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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs, v. TENNESSEE DEPARTMENT OF EDUCATION, et al, Defendants, And NATU BAH, et al, Intervenor-Defendants.	Case No. 20-0143-II Hon. Anne C. Martin Hon. Tammy M. Harrington Hon. Valerie L. Smith CONSOLIDATED
ROXANNE McEWEN, et al., Plaintiffs, v. BILL LEE, in his official capacity as Governor of the State of Tennessee, et al., Defendants, and NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0242-II Hon. Anne C. Martin Hon. Tammy M. Harrington Hon. Valerie L. Smith

CONSOLIDATED BRIEF OF INTERVENOR-DEFENDANTS NATU BAH, BUILGUISSA DIALLO, AND STAR BRUMFIELD IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR A TEMPORARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Intervenor-Defendants Natu Bah, Builguissa Diallo, and Star Brumfield ("Parent Intervenors" or "Parents") file this consolidated brief in opposition to the Metro and McEwen Plaintiffs' separate motions seeking a temporary injunction. In their motions, Plaintiffs seek to halt Tennessee's Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 *et seq.* ("ESA Program" or "Program"), invoking an Equal Protection Clause claim (Metro Plaintiffs) and an Education Clause claim (McEwen Plaintiffs). The ESA Program expands educational options for elementary and secondary aged children trapped in Tennessee public schools that have failed them. *See* Tenn. Code Ann. §§ 49-6-2601 *et seq.*; *see also Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 145 (Tenn. 2022) (describing program). Plaintiffs' motions for temporary injunctive relief fail because the Metro and McEwen Plaintiffs are unlikely to succeed on the merits of their claims, and fail to satisfy the other factors for a temporary injunction.

Metro Plaintiffs' request for a temporary injunction ignores the Tennessee Supreme Court's recent holding in this case.[1] McEwen Plaintiffs premise their request for a temporary injunction on an atextual theory of the Education Clause. But ignoring that the Supreme Court held the challenged law does not regulate the challenger proves fatal to an equal-protection claim. And departing from the text of the Education Clause is not how Tennessee courts interpret the state charter. Parent Intervenors make those points in greater detail below.

[1] No amount of hyperbole by Metro justifies ignoring the Supreme Court's recent decision. *See, e.g.*, Metro Pls.' Mem. at 2 (claiming that the ESA Program's fallout "will be disastrous"); *id.* at 35 (calling implementation of the ESA Program "helter-skelter"); *id.* at 37 (describing awarding ESAs to students as transforming them into "political ping-pong balls"); *id.* at 42 (claiming the Program will "impose significant havoc" and "destruction").

More fundamentally, however, both Metro Plaintiffs and McEwen Plaintiffs ignore the import of the Tennessee Supreme Court's recent decision in this case. As the Court made clear when construing the text of the Tennessee Constitution's Home Rule Amendment—and rejecting Metro Plaintiffs' invitation to depart from it—"the ESA Act regulates and governs only the conduct of [Local Education Agencies], not of the Plaintiffs." *Metro. Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d at 151–52. Because the ESA Program neither regulates nor governs Metro Plaintiffs, they cannot sustain an equal protection claim against it. McEwen Plaintiffs fare no better—they cannot prevail on their Education Clause claim by advancing yet another atextual legal theory of the sort that the Tennessee Supreme Court just rejected *in this case*. Both motions must therefore be denied.

In considering the injunction requests, it should not escape the Court's notice that Metro Plaintiffs, with the support of McEwen Plaintiffs, enjoined the ESA Program for over two years based on an incorrect interpretation of the Home Rule Amendment. The Tennessee Supreme Court rejected it and agreed with the Parent Intervenors, vacating the basis for enjoining the ESA Program in 2020. *See Metro. Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d 141. That decision allows the Parent Intervenors to once again use the Program to afford educational options that meet their needs. The two years that the injunction lasted were not without harm for families eligible for the ESA Program—they were precious years in which Parent Intervenors' children could have attended schools with good academics, where they weren't taunted on account of their origins, and where they could learn in a safe environment. But with that injunction lifted, Plaintiffs seek another one that, if granted, will inflict more pain on Parent Intervenors and thousands more parents of modest means. The damage to Parent Intervenors' children from the original injunction cannot be undone, but this Court should ensure that no more damage is inflicted and deny Plaintiffs' motions for a temporary injunction.

STANDARD OF REVIEW

A temporary injunction is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citation omitted). Courts applying Tenn. R. Civ. P. 65.04(2) weigh the same four factors applied in federal cases involving preliminary injunctive relief: (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendants; (3) the probability that the plaintiff will succeed on the merits; and (4) the public interest. *Moody v. Hutchison*, 247 S.W.3d 187, 199–200 (Tenn. Ct. App. 2007); *see also S. Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (describing this test as "[t]he most common description of the standard for preliminary injunction in federal and state courts"). Courts balance the four factors against one another in determining whether to grant relief. *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

ARGUMENT

The Metro and McEwen Plaintiffs fail to show that they are entitled to a temporary injunction. In Part I, the Parent Intervenors explain why Plaintiffs are unlikely to succeed on the merits of the claims they press in seeking temporary injunctive relief. Part II shows why Plaintiffs cannot satisfy the remaining elements for obtaining a temporary injunction.

I. Plaintiffs' Claims are Unlikely to Succeed on the Merits.

In Part I.A., the Parent Intervenors explain why the Metro Plaintiffs are unlikely to prevail on their Equal Protection claim. The Tennessee Constitution's guarantee of equal protection under the law was not designed as a weapon that county governments can use to extinguish the educational options of Tennessee children. *See* Tenn. Const. art. I, § 8; art.

XI, § 8. Parents next show in Part I.B. why the McEwen Plaintiffs are unlikely to prevail on their Education Clause claim. The Education Clause encourages the General Assembly to innovate with education—it does not impose a straitjacket. *See* Tenn. Const. art. XI, § 12.

A. Metro Plaintiffs' Equal Protection Claim is Unlikely to Succeed on the Merits.

In an attempt to make out a viable equal protection claim, Metro Plaintiffs treat Tennessee children as mere conduits for funding public school districts. In their view, because the ESA Program empowers qualifying families living within their borders to use public funds on private educational options of their choosing, the Program impermissibly treats Metro Plaintiffs differently than the 93 other counties in the state. Even assuming that Tennessee's equal protection guarantees apply to governmental entities like Metro Plaintiffs,[2] the theory Metro Plaintiffs advance ignores decades of established caselaw concerning education funding as well as the Tennessee Supreme Court's decision *in this very case*.

As Parents explain below in Part 1, the Tennessee Supreme Court unequivocally stated that the ESA Program neither regulates nor governs Metro Plaintiffs. That holding is fatal to Metro Plaintiffs' equal-protection claim. In Part 2, Parents show that the Program treats children—the intended beneficiaries of both the Program and Tennessee's public education system writ large—equally. In the absence of unequal treatment (or in the case of Metro Plaintiffs, treatment *at all*), Metro Plaintiffs' equal protection claim stands no chance of success.

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[2] Although the Tennessee Supreme Court suggests they do, *see Town of McMinnville v. Curtis*, 192 S.W.2d 998 (Tenn. 1946), the plain text of Tennessee's equal protection clauses protects individuals and not the governmental entities that exist to serve them. *See* Tenn. Const. art. I, § 8 ("That no *man* shall be taken or imprisoned, or disseized of his freehold, liberties or privileges . . . ." (emphasis added)); Tenn. Const. art. XI, § 8 ("The Legislature shall have no power to suspend any general law for the benefit of any particular *individual* . . . ." (emphasis added)).

1. The ESA Program Does Not Regulate Metro Plaintiffs.

A predicate for a viable equal protection claim is that a challenged law treats some persons differently than others. *See Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993) ("*Small Schools I*") ("The concept of equal protection espoused by the federal and our state constitutions guarantees that all persons similarly circumstanced shall be *treated* alike." (emphasis added) (cleaned up)). If a challenged law does not regulate a party or another similarly situated party at all, therefore, they have no viable equal protection claim. That constitutional reality proves fatal here.

Metro Plaintiffs, resurrecting arguments they advanced in support of their now-dead Home Rule Amendment claim, contend that the ESA Program treats them differently because they are compelled to fully fund their respective school districts for each student enrolled. Metro Pls.' Mem. at 17–19. In their view, because the Program requires each school district to continue counting as enrolled those students that elect to use ESAs, it impermissibly treats Metro Plaintiffs differently than other similarly situated counties. *Id.* But the Tennessee Supreme Court soundly rejected that sleight of hand when it denied their Home Rule Amendment claim. As the Court explained then, "the ESA Act regulates and governs *only the conduct of the LEAs*, not of the Plaintiffs." *Metro. Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d at 152 (emphasis added). True, Metro Plaintiffs are required to help fund their respective school districts like any other county, but that obligation is "derived from other statutory provisions related to school funding outside of the ESA Act." *Id.* Those provisions treat Metro Plaintiffs the same as all other counties in the state. *See, e.g.*, Tenn. Code Ann. § 49-3-356(a) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."). Stated plainly, the ESA Program does not regulate the counties one way or another. It does not treat them differently. Rather the

ESA Program regulates certain LEAs based on their poor performance on the state's accountability metrics. That holding is fatal here.

It makes no difference that Metro Plaintiffs and their respective LEAs have financial connections. Treating them as interchangeable, as Metro Plaintiffs do, "is contrary to . . . long-standing precedent with respect to the structure and operation of the educational system under Tennessee law." *Metro Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d at 153. As the Tennessee Supreme Court approvingly observed just months ago, "[c]ounties and school systems perform separate functions. The fact that there are financial connections between a local school system and local government does not detract from the essentially separate functions of these two entities." *Id.* at 154 (alteration in original) (citation omitted). Metro Plaintiffs' equal-protection arguments do not square with the Supreme Court's recent decision.

Even assuming that the ESA Program regulates Metro Plaintiffs—and it does not—an equal protection claim requires disparate treatment with respect to some right. *Small Schools I*, 851 S.W.2d at 152 (explaining that Tennessee's equal protection clauses "guarantee equal *privileges and immunities* for all those similarly situated" (emphasis added)). Metro Plaintiffs argue that because education is a fundamental right, the ESA Program is subject to strict scrutiny. Metro Pls.' Mem. at 22–30. But regardless of whether education is a fundamental right, that right belongs to *students*—not LEAs or the counties that partially fund them. This has been the case in every major challenge to Tennessee's education funding formula. *See Small Schools I*, 851 S.W.2d at 141 (describing the case as alleging that the state was "depriving the students, *on whose behalf the suit was filed*, of th[e] fundamental right [to an adequate free education]" (emphasis added)); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) ("*Small Schools II*")

(conditionally upholding Tennessee's education funding formula because it "provide[s] substantially equal educational opportunities for . . . *students*" (emphasis added)); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 234 (Tenn. 2002) ("*Small Schools III*") (invalidating Tennessee's teacher salary equity plan because it failed to "maintain a system of public education that affords a substantially equal educational opportunity to all *students*" (emphasis added)). This Court should reject Metro Plaintiffs' attempt to transform the *Small Schools* trilogy into cases about counties[3] instead of the students they serve.

2. The ESA Program Treats Children Equally.

The ESA Program plainly satisfies the mandate of the *Small Schools* cases because it provides Tennessee children—the intended beneficiaries of the Program and the state's educational system writ large—with "substantially equal educational opportunities." *Small Schools I*, 851 S.W.2d at 140–41. The ESA Program is an educational option designed to benefit *individuals* using state funds derived from the Basic Education Program ("BEP").[4] These funds follow the student. If a child uses the ESA Program, their full state-funded BEP allocation will fund their ESA, *see* Tenn. Code Ann. § 49-6-2605(a), and if a child remains in their assigned public school, their full state-funded BEP allocation will remain with their assigned public school, *see id.* § 49-3-307(a)(11) ("The formula shall be student-based such that each student entering or exiting an LEA shall impact generated funding."). Metro Plaintiffs have no authority to control the educational options an LEA can offer its students. There is no unequal treatment between individuals who participate in the ESA

[3] It should also be noted that the *Small Schools* cases were brought by a collection of school districts. Counties were not even parties to the cases.

[4] On July 1, 2023, the BEP funding formula will be replaced by the Tennessee Investment in Student Achievement Formula ("TISA"). 2022 Tenn. Pub. Acts, ch. 966. This transition has no effect on the interaction between the state funding formula and the ESA Program.

Program and those who do not, nor do LEAs in which the Program operates receive less per-pupil funding.

Metro Plaintiffs attempt to sidestep this reality by, yet again, shifting the focus away from Tennessee children and onto themselves and treating counties and LEAs as interchangeable. Metro Plaintiffs' discussion of financing in their brief illustrates this mistake. They argue that when a student that does not use the ESA Program leaves Metro Nashville Public Schools ("MNPS") to attend a private school, MNPS has a $3,618 reduction in State BEP funding. Metro Pls.' Mem. at 14. But in the very next sentence, they compare that figure to the amount of BEP reduction Metro—*not* MNPS—allegedly endures when an ESA participant leaves MNPS to attend a private school. *Id.* They make the same mistake when they discuss Shelby County Schools ("SCS"). *See id.* ("Similarly, SCS would lose only $5,562 in State BEP funding per pupil for a student leaving to attend private school in 2020. But when a participating student leaves an SCS school for a private school, *Shelby County* loses $7,572 in BEP funding[5] . . . ." (emphasis added) (cleaned up)). In other words, Metro Plaintiffs are comparing apples and oranges (and again ignoring the Tennessee Supreme Court's recent decision in this case). The reality is that LEAs like MNPS and SCS receive BEP funding on a per-pupil basis—and the reduction to the LEA is the same amount regardless of whether it is an ESA Program participant or a non-participating student that leaves to attend a private school—*because the public school is educating one less student*.[6]

Lastly, Metro Plaintiffs complain that the ESA Program unfairly singles out MNPS and SCS to the exclusion of other poorly performing school districts. *Id.* at 28–30. As

[5] This statement is also wrong as a matter of law. The BEP funds LEAs, not counties. *See* Tenn. Code Ann. § 49-3-307.

[6] As discussed in greater detail below in Section II, this is the same reason why Metro Plaintiffs cannot demonstrate irreparable harm.

explained above, Metro Plaintiffs and their respective LEAs are not legally interchangeable. But even if they were, Metro Plaintiffs do not contest that their respective LEAs include some of the worst-performing schools in the state under all three performance metrics that the ESA Program uses to determine eligibility.[7] Rather, they complain that *some other* LEAs score just as poorly in *one or two* of the performance metrics that the ESA Program uses, but *only if* their schools are counted as a percentage of the school district as a whole. The Court need not twist itself into knots over which LEAs are worst.

The ESA Program treats children equally. And it tries to give students of modest means opportunities that are equal to those whose families are better off. So, it would be a perverse result if Metro Plaintiffs' equal-protection claim denied those opportunities based on statistical hair-splitting over which LEAs are the worst performing—which "surely is not the meaning or purpose of either the equal protection or education provisions of the constitution." *Small Schools I*, 851 S.W.2d at 156.

* * *

Because the ESA Program neither regulates Metro Plaintiffs nor treats Tennessee children unequally, Metro Plaintiffs' equal protection claim is unlikely to succeed. Their request for a temporary injunction must therefore be denied.

B. McEwen Plaintiffs' Education Clause Claim is Unlikely to Succeed on the Merits Because the Clause Supports Innovation in Education.

The McEwen Plaintiffs' argument is that the legislature's duty to create a public-school system as required by the Education Clause's second sentence nullifies the constitutional command in the first sentence: that the General Assembly value education in

[7] To be eligible to participate in the ESA Program, an applicant must be zoned to attend a school in an LEA with ten or more schools (1) that the state identified as a priority school in 2015, (2) that the state identified as among the bottom 10% of schools in 2017, and (3) that the state identified as a priority school in 2018. Tenn. Code Ann. § 49-6-2602(3)(C).

Tennessee and "encourage[] its support." Tenn. Const. art. XI, § 12. Plaintiffs' radical interpretation of the Tennessee Constitution's Education Clause is not only unmoored from its text, but it also parts ways with virtually every other state high court to consider the constitutionality of educational choice programs under their state's education clauses.

First, the plain language of the Education Clause imposes no bar to the ESA Program (Part I.B.1). Second, the Clause does not prohibit the General Assembly from supporting education with programs *in addition to* Tennessee's system of free public schools (Part I.B.2). Third, the Clause encourages the support of education including advancing innovative educational options such as the ESA Program (Part I.B.3).

1. The Education Clause's Text Does Not Bar the ESA Program.

Plaintiffs begin their argument by stating that the Tennessee Constitution requires the State to "[f]ulfill the Education Clause's [m]andates *solely* [t]hrough a [s]ystem of [f]ree [p]ublic [s]chools[.]" McEwen Pls.' Mem. at 18 (emphasis added). But the Constitution's plain text provides no such exclusivity requirement. Instead, it states three things: (1) Tennessee "recognizes the inherent value of education and encourages its support"; (2) the legislature "shall provide for the maintenance, support and eligibility standards of a system of free public schools"; and (3) the legislature "may establish and support . . . post-secondary educational institutions." Tenn. Const. art. XI, § 12. The exclusivity argument that McEwen Plaintiffs advance proceeds not from the text of the Education Clause. It requires departing from it.

Parents agree that the General Assembly is required to establish and support a public-school system. But Parents disagree that the plain language of the Constitution, and the caselaw interpreting it, prohibit the state from creating other educational options in addition to that system. Plaintiffs' implausible interpretation would mean that the state's

mandate to create a public-school system nullifies the state's coequal obligation to value education and "encourage[] its support." *Id.* McEwen Plaintiffs' exclusivity theory leads to absurd results—it is no different than insisting that courts should interpret the U.S. Constitution's mandate to "raise and support Armies" as prohibiting an air force. U.S. Const. art. I, § 8. The Court should reject McEwen Plaintiffs' atextual legal theory.

Perhaps recognizing that the Education Clause itself imposes no bar on creating educational options, Plaintiffs attempt using the *Small Schools* line of cases to erect one. But these cases are silent on a bar. For instance, in *Small Schools I*, the Tennessee Supreme Court not only failed to prohibit educational alternatives, but it expressly declined to set out "the precise level of education mandated by" the Clause. 851 S.W.2d at 152. Likewise, in *Small Schools II*, the Court simply cited the Clause for the proposition that the state must "maintain and support a system of free public schools"—language nearly identical to the Clause itself. 894 S.W.2d at 738. And in *Small Schools III*, the Court held that the lack of teacher salary equalization violated the Equal Protection Clause—not the Education Clause—of the state charter. 91 S.W.3d at 234.

In none of these cases did the Supreme Court advance the idea that McEwen Plaintiffs attempt to advance—that the General Assembly cannot go *beyond* its mandate of creating a system of free public schools and support the education of Tennessee children by doing more. McEwen Pls.' Mem. at 18. At most, those cases stand for the unremarkable proposition that the Education Clause imposes a duty on the state to maintain and support a public-school system in its second sentence. Thus, resolving McEwen Plaintiffs' Education Clause claim requires only one real question: whether the existence of the ESA Program violates the state's duty to maintain a public-school system.

The answer is no: Both before and after the ESA Program's creation, the public school system in Tennessee remains firmly in place and fully available to parents who wish

to send their children to government-operated schools.[8] Because Tennessee students remain free to attend a public school if they so desire, the General Assembly is not violating its duty to maintain a system of free public schools. And nothing in the ESA Program does away with the system of free public schools—or threatens to do away with (or even injure) that system.

It is therefore no surprise that other state high courts across the United States interpret similar education clauses[9] in their respective constitutions the same way—as providing a floor for state education policy, not a ceiling. *See, e.g.*, *Schwartz v. Lopez*, 382 P.3d 886, 897 (Nev. 2016) (rejecting the view that "the public school system is the *only* means by which the Legislature could encourage education in Nevada" (emphasis in original)); *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015) ("Article IX, Section 6 does not, however, prohibit the General Assembly from appropriating general revenue to support other educational initiatives."); *Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) ("The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) ("[A]rt. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin . . . ."); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 & n.2 (Ohio 1999) (rejecting claim that the "thorough and efficient system of common schools" provision

[8] The General Assembly, through its statutes and budgets, continues to authorize, maintain, and support Tennessee's public schools. See Tenn. *Code* Ann. tit. 49, ch. 2 (creating local school districts) and ch. 6 (governing elementary and secondary education generally).

[9] *See, e.g.*, Clint Bolick, *Constitutional Parameters of School Choice*, 2008 B.Y.U. L. Rev. 335, 346 ("Many state constitutions contain provisions decreeing that the state provide public education, often employing terms like 'uniform,' 'thorough and efficient,' or 'high quality' to describe the type of education to be provided.").

of Ohio's constitution prohibited private school voucher program absent a showing that the program actually "undermine[d]" or "damage[d]" public education); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) ("[T]he uniformity clause requires the legislature to provide . . . a free uniform basic education. . . . [E]xperimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system."). This Court should join the supreme courts of Nevada, North Carolina, Indiana, Ohio, and Wisconsin and refuse to transform the duty to provide for a public school system into a prohibition on funding educational options in addition to that system.

Plaintiffs wish it were otherwise, but there is nothing in the text of Article XI, § 12 to suggest that the framers of the Tennessee Constitution meant to set forth an exclusive means of delivering publicly funded educational options to Tennessee's school children. Because there is no support in the text, tradition, or caselaw to support McEwen Plaintiffs' radical exclusivity argument, it must be rejected.

2. The Education Clause Is Not Limited to Public Schools Only.

Plaintiffs are correct that expressio unius is a well-known principle of law. But the Tennessee Supreme Court has never applied that principle to the Education Clause—whether to bar alternatives to the system of free public schools or otherwise. In fact, there has only been one case in one high court to apply that exclusivity principle in a school choice case—a case that does not apply in Tennessee and that every other state high court to consider the argument has rejected.

McEwen Plaintiffs rely heavily on that outlier case, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), in support of their argument that the broad language in the Education Clause's first sentence ("recogniz[ing] the inherent value of education and encourag[ing] its

support"), should be "limited" by the second sentence because it mandates a system of free public schools. McEwen Pls.' Mem. at 25. But in *Holmes*, the Florida Supreme Court interpreted a unique constitutional provision that imposes a "paramount duty" on the State, *see* Fla. Const. art. IX, § 1(a), that is absent from the Tennessee Constitution (as well as many other state constitutions).

Consequently, every state supreme court considering an exclusivity argument based on *Holmes* has rejected it. *See, e.g.*, *Meredith*, 984 N.E.2d at 1223–24 (refusing to follow *Holmes*); *Schwartz*, 382 P.3d at 898 ("The plaintiffs' reliance on *Bush v. Holmes* . . . is inapposite" because "Florida's constitutional uniformity provision is different"). And every state supreme court that considered such an exclusivity argument before *Holmes* likewise rejected the argument. *See Benson*, 578 N.W.2d at 628; *Simmons-Harris*, 711 N.E.2d at 212 & n.2; *Grover*, 480 N.W.2d at 474. But even if Florida had analogous language to Tennessee's Education Clause, and it does not, *Holmes* is a singularly unpersuasive decision. One has only to compare the majority and dissenting opinions to appreciate how flawed the majority's reasoning was in that case and how glaring its many errors, which are too numerous to catalogue here.[10]

[10] *See, e.g.*, Jamie S. Dycus, *Lost Opportunity:* Bush v. Holmes *and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & Educ. 415 (2006) (documenting critical flaws in court's reasoning, including failure to reconcile new interpretation of uniformity provision with past practice and precedent); Lila Haughey, Case Comment, *Florida Constitutional Law: Closing the Door to Opportunity: The Florida Supreme Court's Analysis of Uniformity in the Context of Article IX, Section 1*, 58 Fla. L. Rev. 945, 953 (2006) ("[W]hen the [*Holmes v. Bush*] court additionally required all state-funded education programs to adhere to strict uniformity standards, it abandoned sixty-eight years of state education jurisprudence"); Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol. 401, 412 (2006) ("The majority's opinion in [*Holmes v. Bush*] is among the most incoherent, self-contradictory, and ends-oriented court decisions in recent memory"); *Recent Developments*, 33 Fla. St. U. L. Rev. 1227, 1234–39 (2006) (discussing decision and pointing out that the dissent provides a more logical and persuasive framework than the majority); Editorial, *Why judges matter; School choice*, The Economist, Jan. 14, 2006 (N. Am. edition); George F. Will, Opinion,

McEwen Plaintiffs then turn to the Ohio Supreme Court case *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). Readers would be forgiven if they concluded from Plaintiffs' account of the case that the court held that Ohio's Education Clause is "incompatible" with a school choice program (and struck down the program). McEwen Pls.' Mem. at 24. In fact, the court there held the *opposite* and explicitly refused to adopt the view that "implicit within [the Education Clause] is a prohibition against the establishment of a system of uncommon (or nonpublic) schools" by families using scholarships. *Simmons-Harris*, 711 N.E.2d at 212.[11]

But McEwen Plaintiffs are not finished distorting the caselaw. In a footnote, they cite *Cain v. Horne*, 202 P.3d 1178, 1183 (Ariz. 2009), where they again suggest that a state Education Clause bars school choice programs. McEwen Pls.' Mem. at 24, n.15. That is flat wrong. The program in *Cain* was struck down under the state's Blaine amendment, Ariz. Const. art. IX, § 10, not the education clause, and four years later an ESA program like the one in Tennessee was upheld by the Arizona Court of Appeals in *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013), *petition for review denied*, 2014 Ariz. LEXIS 59 (Mar. 21, 2014). That ruling and Arizona's ESA program still stand.

In sum, the Education Clause allows educational options in addition to a system of free public schools. The text of the Clause fails to support McEwen Plaintiffs' exclusivity theory. The General Assembly's adoption of policies designed to give Tennessee children additional educational options is well within its discretion. While not popular with the

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Students disrupted by political struggles, Miami Herald, Mar. 28, 2006, at A19; John Tierney, Opinion, *Black Students Lose Again*, N.Y. Times, Jan. 7, 2006, at A11; Andrew Coulson, Opinion, *War Against Vouchers*, Wall St. J., Jan. 9, 2006, at A13.

[11] Years later, the high court bolstered *Simmons-Harris*, holding that the legislature could "add[] to the traditional school system" by providing for other public-funded education alternatives like community schools. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 (Ohio 2006).

Metro and McEwen Plaintiffs, the passage of the ESA Program simply recognizes that there is no one-size-fits-all approach to educating children. The framers of the Education Clause recognized the same when they drafted its opening sentence. The first part of the Clause states, in broad terms: "The state of Tennessee recognizes the inherent value of *education* and encourages its support." Tenn. Const. art. XI, § 12 (emphasis added). The Framers could have easily replaced the word "education" in the first part of the Clause with "free public schools" if they wanted to exclusively support only "free public schools"—but they chose not to. *See Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014) ("[T]he words and terms in the Constitution should be given their plain, ordinary and inherent meaning."). McEwen Plaintiffs assume that Tennessee's founders intended to curtail innovation in an area as challenging and important as education—but there is no textual support for it. That assumption is not in harmony with the plain text of the Education Clause. The Court should reject McEwen Plaintiffs' invitation to rewrite the Clause's text.

3. The Education Clause "Encourages" Innovations Like ESAs.

McEwen Plaintiffs' final argument is that the Education Clause mandates that public funds be used *only* at a "constitutionally authorized system of public education." McEwen Pls.' Mem. at 27. But as explained above, the Clause does not limit public funds in this way. To the contrary, it "recognizes the inherent value of education and encourages its support"—in other words, it urges innovation, not paralysis. Tenn. Const. art. XI, § 12.

Like other states,[12] one way Tennessee has chosen to "encourage[] its support" is through alternatives to the traditional public school system, including charter schools, the

[12] Other state high courts have reached the same conclusion when reviewing the constitutionality of educational choice programs. *See, e.g.*, *Kotterman v. Killian*, 972 P.2d 606, 623–24 (Ariz. 1999) ("Some might argue that the statute in question runs counter to these goals by encouraging more students to attend private schools, thereby weakening the state's public school system. But that is a matter for the legislature, as policy maker, to

ESA Program, and the Tennessee Individualized Education Account Program for special-needs children. These alternatives help parents exercise their constitutional right to direct the upbringing of their children, including by opting out of the traditional public-school system. *See In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917) (the interest of a parent "to its [child's] tutorage" is "sacred); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down law requiring every child to attend a public school as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

Under the ESA Program, parents and their children may choose to stay at their assigned public school or not—because the General Assembly maintains a system of "free public schools" while also recognizing the "value of education and encourag[ing] its support." Tenn. Const. art. XI, § 12. The ESA Program is just one way that the General Assembly is supporting the education of Tennessee children. Plaintiffs view this choice as a threat because they believe that the Education Clause is ultimately about the interests of the free public-school system rather than Tennessee children. But that flips the Tennessee Constitution on its head. Public school districts exist to serve Tennesseans, not the other way around. For that reason, the Education Clause must be interpreted in light of who it is framed to benefit—individual students—rather than a system that some students use. Because the ESA Program serves students, it complies with the Education Clause.

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debate and decide."); *Meredith*, 984 N.E.2d at 1216 ("In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process.").

II. Plaintiffs Fail to Satisfy the Remaining Elements for Obtaining a Temporary Injunction.

Just as they have failed to show a likelihood of success on their legal claims, the Metro and McEwen Plaintiffs have also failed to show the other required elements for a temporary injunction. In Part II.A, Parent Intervenors lay bare Plaintiffs' attempt to establish irreparable harm by relying on speculation and conjecture. In Part II.B, Parents explain why the equities and the public interest tip sharply against a temporary injunction.

A. There is No Risk of Irreparable Harm Supporting Plaintiffs' Motions.

There is no risk of irreparable harm supporting Plaintiffs' motions for temporary injunction. Parent Intervenors explain in Part 1 why the Metro Plaintiffs' claims of irreparable harm fall flat. In Part 2, Parents turn to explaining why the result is no different when evaluating the McEwen Plaintiffs' claimed risk of irreparable harm.

1. Metro Plaintiffs' Claims of Irreparable Harm are Baseless.

Metro Plaintiffs claim two species of irreparable harm, neither of which stands up to scrutiny. Their first claimed harm—a constitutional violation—simply does not exist. *See* Metro Pls' Mem. at 34–35. And their second claimed harm—vague and speculative financial damage to the operating budgets of MNPS and SCS—falls on LEAs, not Metro Plaintiffs. *Id.* at 35–40. As explained throughout this brief (and recently by the Tennessee Supreme Court), Metro Plaintiffs and LEAs are not interchangeable. But even if they were, Metro Plaintiffs' alleged harm happens every time a student leaves a public school system. While the choices of parents who use the ESA Program may cause some fluctuation in public school enrollment figures, particularly in its early implementation phase, these sorts of enrollment adjustments have been part of the public school process long before the ESA Program ever came into existence. Students may leave their public school for many reasons. A parent might decide to home-school her children. Or a family may move to another

district—or even out of state. No matter why a student leaves, the reality is that these other educational options do not cause irreparable harm to public school districts: after all, the district is only losing funding for students it is no longer obligated to educate. The same is true here.

Moreover, to the extent Metro Plaintiffs' alleged harm is based on a sudden impact to the operating budget of the LEAs located within their borders for this coming school year, it is a harm of their own creation. The Tennessee Supreme Court rejected Metro Plaintiffs' Home Rule Amendment claim—the sole basis for enjoining the ESA Program—on May 18, 2022. Indeed, Metro Plaintiffs did not even contest the State Defendants' subsequent motion to lift the injunction.[13] But Metro Plaintiffs continued to appropriate funds to their respective LEAs—and the LEAs crafted annual budgets—as if the ESA Program would not go into effect. *See* Metro Pls.' Ex. 17 ¶ 9 ("In its final budget, effective July 1, 2022,[14] the Metropolitan Government appropriated $847,759,500 to MNPS for FY23."); *id.* ¶ 10 ("On June 28, 2022, the MNPS Board of Education passed the operating budget for FY23."); *see also* Metro Pls.' Ex. 18 ¶ 7 ("On June 14, 2022, the Memphis-Shelby County Schools' Board of Education passed the operating budget for FY23."); *id.* ¶ 8 ("In its final budget for this fiscal year, effective July 1, 2022, the Shelby County Government appropriated $427,259,000 of Property and Wheel Taxes to Education."). All of these decisions were made *after* the Tennessee Supreme Court rejected Metro Plaintiffs' Home Rule Amendment claim. Because "injunctions will not issue to relieve a party from a situation brought about by that party's own act or omission," Metro Plaintiffs' budgetary

[13] Metro Pls.' Resp. to Defs.' Mot. to Vacate Inj. (June 23, 2022).
[14] Metro Plaintiffs' exhibit uses a 2020 date, but this appears to be a typo.

hubris cannot form the basis for irreparable harm. *Van Hooser v. Warren Cnty. Bd. of Educ.*, 807 S.W.2d 230, 238 (Tenn. 1991).

2. McEwen Plaintiffs' Claims of Irreparable Harm Lack Merit.

McEwen Plaintiffs claims that they will suffer irreparable harm if no temporary injunction issues fare no better. They merely assert, but do not even attempt to show (nor could they), that they will suffer a violation of a constitutional right.

McEwen Plaintiffs urge the court that without an injunction, they "will suffer irreparable harm, *per se*, due to the violation of a constitutional right." McEwen Pls.' Mem. at 29. And what is this constitutional right and how has it been violated? Plaintiffs do not say. Instead, Plaintiffs switch gears and complain that the creation of the ESA Program violates the "constitutional requirement" that the legislature "maintain a single system of public education." *Id.* In other words, Plaintiffs are trying to create the impression that the state's duty to establish a public-school system invests that system with constitutional rights that McEwen Plaintiffs can then vindicate. But constitutional rights belong to individuals, not institutions. Plaintiffs seem to believe they have a derivative right to sue on behalf of the public-school system, but they provide no evidence for that proposition.

Perhaps recognizing that their constitutional rights have not been violated, McEwen Plaintiffs turn to asserting that they suffered an injury when ClassWallet was "unlawfully" funded. *Id.* But even assuming that Plaintiffs are correct on this point (which is seriously contested by the State Defendants), a dispute over funding *districts* is woefully insufficient to merit an injunction when the harm from the injunction will be borne most acutely by the *children* of parents that qualify for the ESA Program.

McEwen Plaintiffs then throw a Hail Mary about the "disarray" caused by the number of students eligible to use the Program. *Id.* at 30. As a reminder, this is all of 5,000

students, or about 0.5 percent of the state's total student enrollment.[15] This number is hardly different from the number of students who left last year—indeed, Shelby County and Metro Nashville each lost roughly 3,800 students during the 2020–21 school year, or about 4 and 5 percent of their total respective enrollments.[16] What's more, no matter *why* a student leaves, these other educational options do not cause irreparable harm to LEAs: after all, the school district is only losing funding for students it is no longer obligated to educate. The same is true here. As the Parents' individual circumstances reveal, *see infra* Part II.B, it is the parents and children who desire to participate in the ESA Program who would be harmed by the injunction Plaintiffs seek.

Taken as a whole, Plaintiffs' "irreparable" injury amounts to very little—a nonexistent right, an unspecified harm to that right, a dispute over a government contract, and a program in which the number of eligible participants is thousands less than the number of students that Shelby County and Metro Nashville collectively "lost" in one year. That falls far short of the irreparable harm needed to justify a temporary injunction.

B. The Equities and Public Interest Tip Sharply Against the Plaintiffs.

The balance of harms and the public interest weigh heavily against a temporary injunction. *See*, *e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("Even if we assume . . . that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction."). Here, a temporary injunction only compounds the substantial harm Parent Intervenors and

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[15] The ESA Pilot Program may enroll 5,000 students in 2020–21. Tenn. Code Ann. § 49-6-2604(c)(1). That is 0.5% of Tennessee's total student enrollment in 2019 (973,659 students). *State of Tennessee Report Card*, Tenn. Dep't of Educ., *available at* https://www.tn.gov/content/dam/tn/education/data/districtprofile201819%20(1).xlsx.

[16] *See, e.g.*, Laura Faith Kebede & Marta. W. Aldrich, *School Enrollment Has Dropped by 33,000 Students Across Tennessee Amid Pandemic*, Chalkbeat Tennessee (Nov. 10, 2020), *available at* https://tn.chalkbeat.org/2020/11/10/21558837/school-enrollment-has-dropped-by-33000-students-across-tennessee-amid-pandemic.

their children endured from the first injunction, while adding zero benefit to the public interest.

Over two years ago, the chancery court enjoined the ESA Program based off a reading of the Home Rule Amendment flatly rejected by the Tennessee Supreme Court. *Metro. Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d at 146. At the time of the injunction, Parents and their children were *already* suffering irreparable harm. A new injunction would not only continue that harm but exacerbate the harm already suffered.

As stated in their affidavits, Parent Intervenors' children faced real problems in their assigned public schools and a new injunction will only continue depriving Parents of the educational lifeline that they qualify for. For example, Natu Bah's sons faced difficult circumstances at A. Maceo Walker Middle School, where their academics deteriorated to "a very basic level." Affidavit of Natu Bah ("Bah Aff.") ¶¶4–6. And for most of the 2019-20 academic year, Natu's son Mohammed endured verbal and emotional abuse because other students repeatedly bullied him about his native African background. Bah Aff. ¶¶ 7–8, 14–15. Star Brumfield's son regularly encountered violence at school during the academic year, and it impacted his desire to learn because he felt unsafe and distracted. Affidavit of Star Brumfield ¶¶ 7–9. And after Builguissa Diallo enrolled her daughter Bintah in a public school for kindergarten, her daughter's reading ability regressed substantially over the course of the academic year—putting Bintah's ability to read behind where she was at the end of her pre-K year. Affidavit of Builguissa Diallo ¶¶ 4–6.

Despite all this, the McEwen Plaintiffs claim it is they—not the Parent Intervenors and their children—that will suffer "irreparable harm . . . in the absence of an injunction," offering bare assertions that the Parent Intervenors "will suffer *no harm* from the injunction's issuance." *See, e.g.*, McEwen Pls.' Mem. at 30 (emphasis added). It is hard to imagine a less accurate description of what is at stake here than what Plaintiffs assert. But

it gets worse. McEwen Plaintiffs also claim that "an injunction is likely to benefit, not harm" parents like Natu Bah, Builguissa Diallo, and Star Brumfield. *Id.* at 33. This surreal claim—that taking away an educational option from families of modest means *helps* them—is one of the most patronizing, otherworldly arguments imaginable. One wonders what other kinds of "help" Plaintiffs would like to provide. Fundamentally, both Metro and McEwen Plaintiffs' motions treat Tennessee children as mere conduits for directing education dollars to their desired coffers and nothing more.

Parent Intervenors are only three families who could benefit from the ESA Program. There are many more. But Plaintiffs are dismissive of the hardships that a temporary injunction would impose on low- and middle-income families like Parent Intervenors, who find their children trapped in Tennessee's worst-performing school districts. *See* McEwen Pls.' Mem. at 30. They assert that Parent Intervenors do not have a "right" to the ESA Program. *Id.* That is a non-sequitur. Parents have the "right to direct the education of their children," *Pierce*, 268 U.S. at 534–35, and as the *intended beneficiaries* of the ESA Program, Parents are exercising their rights when choosing the ESA benefit available to them so that their children's educational needs are met. As detailed above, Parent Intervenors' hardships are real. Indeed, the hardships Parents would endure under a temporary injunction are far more injurious, consequential, immediate, and concrete than the harms Plaintiffs invoke. *See, e.g.*, McEwen Pls.' Mem. at 33 (invoking the "significant disruption" caused by the program being implemented). Simply, the balance of harms tips sharply in Parent Intervenors' favor.

Nor is the public interest served by a temporary injunction. To the contrary, it would deny Tennessee families and children the educational lifeline that their representatives in the General Assembly provided them—*and which has been denied them for over two years*. Plaintiffs' motion arrives two months after the Tennessee Supreme Court rejected the basis

for the 2020 injunction. And in the two years that have passed, Parents lost the fleeting time they have when their children are still of school-age to ensure they get an education that meets their needs—with all the benefits that a good education provides. If a new injunction issues and more time passes, Plaintiffs will extinguish the best hope Parent Intervenors have for their children. It cannot be in the public interest to create such a state of affairs for thousands of Tennessee children. Indeed, it is hard to conceive of something *less* in the public interest than ripping away an educational lifeline from low- and middle-income families. This Court should reject Plaintiffs' invitation to do so.

CONCLUSION

The ESA Program fully complies with the Tennessee Constitution and neither the Metro Plaintiffs or McEwen Plaintiffs are likely to prevail on their claims. It is Parent Intervenors that will endure substantial harm if a temporary injunction bars them from using the Program—not the Plaintiffs. For these reasons, and because the equities and public interest also tip strongly in Parents' favor, the Court should deny both motions.

Dated: August 1, 2022.

Respectfully submitted,

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*Admitted *pro hac vice*

Attorneys for Intervenor-Defendants
Natu Bah, Builguissa Diallo, and Star Brumfield

CERTIFICATE OF SERVICE

This is to certify that on this 1st day of August, 2022, a copy of the foregoing has been forwarded via electronic mail (in lieu of U.S. mail by agreement of the parties) and the electronic filing system to the following:

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AFFIDAVIT OF NATU BAH

STATE OF TENNESSEE:

COUNTY OF SHELBY:

Comes now the affiant, Natu Bah, after being duly sworn upon her oath swears as follows:

1. I am Natu Bah, a citizen of the United States, a resident of Memphis, Tennessee in Shelby County, and over the age of 18 years. I have personal knowledge as to all matters contained herein and am fully competent to make this Affidavit.

2. I am an Intervenor-Defendant in the Case Nos. 20-0143-I, 20-0242-II, in Davidson County Chancery Court, represented by the Institute for Justice.

3. I work as an African hair braider in Memphis, Tennessee.

4. I am the mother of two children: Mohammed, who is 13 years old, and Mouctar, who is 12 years old. Both of my sons attend A. Maceo Walker, a public school in Shelby County, where Mohammed is in eighth grade and Mouctar is in sixth grade. A. Maceo Walker is their assigned public school in Shelby County.

5. I have been unhappy with the academics at A. Maceo Walker and I don't think it is the right school for my sons, nor does the school meet their educational needs.

6. Over the course of the 2019-20 academic year at A. Maceo Walker, the level of academics has deteriorated to a very basic level. As a result, my sons are not progressing academically, and their school is not meeting their academic needs.

7. The learning environment at A. Maceo Walker is incredibly poor. In addition, my son Mohammed has been bullied during most of the 2019-20 academic year. During school hours, he is repeatedly verbally and emotionally abused about his African background by other

students at A. Maceo Walker and told to go back to Africa where he came from. I tell my son to be proud that he is from Africa, but I know that the bullying at A. Maceo Walker is negatively affecting his learning environment, hurting his emotional well-being, and his ability to progress academically.

8. My other son, Mouctar, is aware of the bullying that his older brother is enduring. It is affecting Mouctar's learning environment and making it difficult for him to progress academically as well.

9. When I learned about the Tennessee Education Savings Account Pilot Program ("ESA"), I decided that I wanted my sons to apply for it. After doing research, I determined that our family meets all the requirements for the program, including having the proper qualifying income level and attending the assigned public school in Shelby County.

10. Since the State of Tennessee began accepting applications for its ESA program, I have collected all the supporting documents required for the ESA application ahead of the upcoming 2020-21 school year and am submitting my application on or before April 17, 2020. I will re-apply for an ESA each academic year that follows, if necessary.

11. If my sons receive the ESA, I want them to attend the Christian Brothers High School ("Christian Brothers") in Memphis, which is a Catholic college-preparatory high school. I like the Christian Brothers' approach to educating students and its soccer programs. Although our family is not Catholic, I am comfortable with the religious atmosphere at Christian Brothers and would like my sons to attend there.

12. Christian Brothers is a Category III nonpublic school that meets the legal requirements for the ESA program. If my sons cannot attend Christian Brothers, I would want them to attend a qualifying school with similar qualities. I am continuing to research other

educational options for my sons and am considering additional schools that are participating in the ESA Program.

13. The ESA would help my family offset the full cost of tuition at Christian Brothers by as much as 50 percent, or at another private school that charges tuition. Being able to afford the tuition means my sons will get a better education, and a better life.

14. Without the ESA, I will not be able to afford to send my sons to a school that meets their educational needs. Instead, they would need to attend a public school that is not working for them. Not only would the learning environment hold them back from progressing academically, but the bullying my son Mohammed is enduring, and that his brother Mouctar is exposed to, is extremely damaging. The ESA makes educational options affordable and will empower my sons by making it possible for them to leave the public school that is not meeting their needs and where they are forced to endure an abusive environment.

15. With another year at their assigned public schools, I fear that Mohammed will continue to be bullied, verbally abused, and emotionally abused, and I also fear that my son Mouctar will suffer through similar bullying if he is forced to continue attending A. Maceo Walker.

16. If I am unable to obtain an ESA because of the Plaintiffs' lawsuit, I would have to keep my sons in the failing Shelby County public schools or endure great financial hardship to enable them to attend a private school.

17. If the ESA program is not available for the 2020-21 school year, then I will be forced to keep my sons in Shelby County public schools that are failing to meet their academic needs, and where they are enduring, and being exposed to, bullying, verbal abuse, and emotional abuse.

18. As things currently stand, I would not be able to afford to send my sons to a private school if not for the ESA. If it were ruled unconstitutional, an important program that I expect to rely on for my sons' educations will be eliminated.

19. If an injunction prevents me from applying for and obtaining an ESA for the 2020-21 academic year, when Mohammed will be starting ninth grade and Mouctar will be starting seventh grade, I will be forced to keep Mouctar at A. Maceo Walker for another year, and Mohammed will be forced to attend another failing Shelby County school for high school.

20. I declare under penalty of perjury under the laws of the United States and the State of Tennessee that these factual statements are true and if called upon to testify I would competently testify as to them.

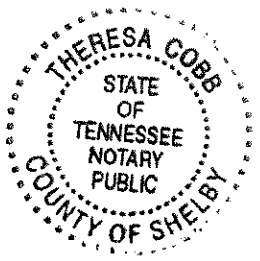
Dated: 04-10-2020

Natu Bah
NATU BAH

Sworn and subscribed to me on this the 10 day of April, 2020.

Theresa Cobb
Notary Public

My Commission Expires: 01/18/2022



AFFIDAVIT OF STAR-MANDOLYN BRUMFIELD

1. I am Star-Mandolyn Brumfield, a citizen of the United States, a resident of Nashville, Tennessee, and over 18 years old.

2. I am fully competent to make this Affidavit.

3. I have personal knowledge of the facts contained in this Affidavit.

4. I, Star-Mandolyn Brumfield, am an Intervenor in Case Nos. 20-0143-I, 20-0242-II, in Davidson County Chancery, represented by the Beacon Center.

5. I presently intend on using the ESA program to enroll child, MB, at Lighthouse, a private school, in the 2020-21 school year.

6. The ESA program makes it possible for me to transfer MB from the public school in which he is currently enrolled and place him at Lighthouse. I cannot otherwise afford to send him there or any other private school.

7. If the ESA program is not available for the 2020-21 school year, then I will be forced to keep my son at his current public school, where the learning environment is not conducive for him. As a mother, I know that even one more year will have permanent and lasting negative effects.

8. At his current public school, my son feels unsafe and distracted. It is an unstable and overcrowded environment that is impacting his desire to learn. The longer he is in this school, the more it will inhibit his ability to learn and it will delay his potential for success.

9. For well over a year, it has been a struggle for my child to attend public school because of the learning environment. The school is crowded and he regularly encounters violence. He is a brilliant, and motivated child but I see the continuing and mounting effects of the school on his social and emotional health. The environment is having a harmful effect. He told me it

would be very hard for him to return to public school. Overtime it will hinder his drive and desire and reach his full potential.

10. I discussed the prospect of losing the ESA program with my son and being forced to remain in his current public school. He expressed extreme disappointment by being left in school.

11. In good conscious I dread the prospect of sending him back to public school. Because I cannot afford private school without the ESA program, I would be left with no option unless I homeschool him which would result in his ineligibility for the ESA program.

12. I have personally witnessed the mentoring program at Lighthouse. I have personally witnessed the class sizes. My son needs to go to Lighthouse immediately or I fear the long-term of effects of leaving him in the stressful environment of his current public school.

13. I declare under penalty of perjury under the laws of the United States and the State of Tennessee that these factual statements are true and if called upon to testify I would competently testify as to them.

Dated: 4/10/2020

STAR BRUMFIELD

Sworn and subscribed to me on this the 10TH day of April, 2020, and executed in compliance with Executive Order No. 26 by Tennessee Governor Bill Lee dated April 9, 2020.

Notary Public

My Commission Expires: My Commission Expires April 6, 2021

BRIAN D. COBB STATE OF TENNESSEE NOTARY PUBLIC WILLIAMSON COUNTY

AFFIDAVIT OF BUILGUISSA DIALLO

STATE OF TENNESSEE:

COUNTY OF SHELBY:

Comes now affiant, Builguissa Diallo, after being duly sworn upon her oath swears as follows:

1. I am Builguissa Diallo, a citizen of the United States, a resident of Cordova, Tennessee in Shelby County, and over the age of 18 years. I have personal knowledge as to all matters contained herein and am fully competent to make this Affidavit.

2. I am an Intervenor-Defendant in the Case Nos. 20-0143-I, 20-0242-II, in Davidson County Chancery Court, represented by the Institute for Justice.

3. I work as an African hair braider in Memphis, Tennessee.

4. I am the mother of four children including one minor child, my daughter Bintah, who is five years old. My daughter currently attends kindergarten at Macon-Hall Elementary, a public school in Shelby County, Tennessee. Macon-Hall Elementary is her assigned public school in Shelby County.

5. I have been unhappy with the academics at Macon-Hall Elementary and I don't think it is the right school for my daughter Bintah, nor does the school meet her educational needs.

6. Over the course of the 2019-20 academic year at Macon-Hall Elementary, Bintah's reading ability has regressed since enrolling at the school, and she is now behind from where her reading skill level was last year when completing pre-K. She is no longer progressing.

7. When I learned about the Tennessee Education Savings Account Pilot Program ("ESA"), I decided that I wanted it for my daughter. After doing research, I determined that our

family meets all the requirements for the ESA program, including having the proper qualifying income level and attending the assigned public school in Shelby County.

8. Since the State of Tennessee began accepting applications for its ESA program, I have collected all the supporting documents required for the ESA application ahead of the upcoming 2020-21 school year, and am submitting my application on or before April 17, 2020. I will re-apply for an ESA each academic year that follows, if necessary.

9. If my daughter receives the ESA, I want her to attend Pleasant View School ("Pleasant View") in Memphis. I am still researching educational options for my daughter, but I like Pleasant View because of its curriculum and its approach to educating students. Good schooling is very important to me and my family, and I want my daughter to receive the best education possible.

10. Pleasant View School is a Category III nonpublic school that meets the legal requirements for the ESA program. If my daughter cannot attend Pleasant View, I would want her to attend a qualifying school with similar qualities. I always research educational options for my daughter and am considering additional schools that are participating in the ESA Program.

11. The ESA would help my family offset the full cost of tuition at Pleasant View, or another private school that charges tuition.

12. Without the ESA, I don't think that we would be able to afford a school that meets my daughter's educational needs. Instead, she would have to continue attending Macon-Hall Elementary, the public school where her needs are not being met.

13. With another year at her current public school, my daughter will be further behind in her academic development.

14. If the ESA program is not available for the 2020-21 school year, then I will be forced to keep my daughter in Macon-Hall Elementary, the failing Shelby County public school where she is currently enrolled and regressing academically, or endure great financial hardship to enable her to attend a private school, including Pleasant View.

15. As things currently stand, I would not be able to afford to send my daughter to a private school if not for the ESA. If it were ruled unconstitutional, an important program that I expect to rely on for my daughter's education will be eliminated.

16. If an injunction prevents me from applying for and obtaining an ESA for the 2020-21 academic year, when Bintah will be starting first grade, I will be forced to keep her in Macon-Hall Elementary for another year, a Shelby County public school where she has made no progress academically, and has regressed in important areas where she should instead be progressing, including her reading ability.

17. I declare under penalty of perjury under the laws of the United States and the State of Tennessee that these factual statements are true and if called upon to testify I would competently testify as to them.

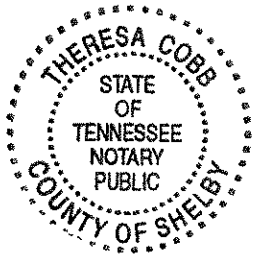
Dated: 04-10-2020

Builguissa diallo
BUILGUISSA DIALLO

Sworn and subscribed to me on this the 10 day of April, 2020.

Theresa Cobb
Notary Public

My Commission Expires: 01/18/2022



CASE APPENDIX

1. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018)
2. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006)
3. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009)
4. *Davis v. Grover*, 480 N.W.2d 460 (Wis.1992)
5. *Hart v. State*, 774 S.E.2d 281 (N.C.2015)
6. *Jackson v. Benson*, 578 N.W.2d 602 (Wis.1998)
7. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999)
8. *Leary v. Daeschner*, 228 F.3d 729 (6th Cir. 2000)
9. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind.2013)
10. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013)
11. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566 (6th Cir. 2002)
12. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)
13. *Schwartz v. Lopez*, 382 P.3d 886 (Nev.2016)
14. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)
15. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 11 Ohio St.3d 568 (2006)

138 S.Ct. 1942
Supreme Court of the United States

O. John BENISEK, et al., Appellants
v.
Linda H. LAMONE, Administrator, Maryland State Board of Elections, et al.

No. 17–333
|
June 18, 2018.

Synopsis

Background: Voters brought redistricting action against Maryland State Board of Elections officials, challenging Maryland's congressional redistricting law as unconstitutional political gerrymander. Voters moved for preliminary injunction barring state from enforcing existing redistricting plan and requiring state to implement new map in advance of upcoming midterm elections. A three-judge panel of the United States District Court for the District of Maryland, Bredar, J., 266 F.Supp.3d 799, denied the motion and stayed further proceedings. Voters appealed.

The Supreme Court noted its jurisdiction and held that the balance of equities and the public interest tilted against the request for a preliminary injunction.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction; Motion to Stay Proceedings.

Attorneys and Law Firms

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Opinion

PER CURIAM.

This appeal arises from the denial of a motion for a preliminary injunction in the District Court. Appellants are several Republican voters, plaintiffs below, who allege that Maryland's Sixth Congressional District was gerrymandered in 2011 for the purpose of retaliating against them for their political views.

In May 2017, six years after the Maryland General Assembly redrew the Sixth District, plaintiffs moved the District Court to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They asserted that "extend[ing] this constitutional offense"—*i.e.,* the alleged gerrymander—"into the 2018 election would be a manifest and irreparable injury." Record in No. 1:13–cv–3233, Doc. 177–1, p. 3. In order to allow time for the creation of a new districting map, plaintiffs urged the District Court to enter a preliminary injunction by August 18, 2017. *Id.,* at 32.

On August 24, 2017, the District Court denied plaintiffs' motion and stayed further proceedings pending this Court's disposition of partisan gerrymandering claims in *Gill v. Whitford,* No. 16–1161. 266 F.Supp.3d 799. The District Court found that plaintiffs had failed to show a likelihood of success on the merits sufficient to warrant a preliminary injunction. *Id.,* at 808–814. The District Court also held that it was "in no position to award [p]laintiffs the remedy they ... requested on the timetable they ... demanded." *Id.,* at 815. The court explained that, notwithstanding its "diligence in ruling on the pending preliminary injunction motion (which has been a priority for each member of this panel)," plaintiffs' proposed August deadline for injunctive relief had "already come and gone." *Ibid.*

In addition, the District Court emphasized that it was concerned about "measuring the legality and constitutionality of any redistricting plan in Maryland ... according to the proper legal standard." *Id.,* at 816. In the District Court's view, it would be "better equipped to make that legal determination and to chart a wise course for further proceedings" after this Court issued a decision in *Gill*. *Ibid.* Plaintiffs ask this Court to vacate the District Court's order and remand for further consideration of whether a preliminary injunction is appropriate.

We now note our jurisdiction and review the District Court's decision for an abuse of discretion, keeping in mind that a preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from ***1944** a plaintiff's showing of a likelihood of success on the merits. *See id.,* at 32, 129 S.Ct. 365. Rather, a court must also consider whether the movant has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Id.,* at 20, 129 S.Ct. 365.

Plaintiffs made no such showing below. Even if we assume—contrary to the findings of the District Court—that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction.

First, a party requesting a preliminary injunction must generally show reasonable diligence. Cf. *Holmberg v. Armbrecht,* 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946). That is as true in election law cases as elsewhere. See *Lucas v. Townsend,* 486 U.S. 1301, 1305, 108 S.Ct. 1763, 100 L.Ed.2d 589 (1988) (KENNEDY, J., in chambers); *Fishman v. Schaffer,* 429 U.S. 1325, 1330, 97 S.Ct. 14, 50 L.Ed.2d 56 (1976) (Marshall, J., in chambers). In this case, appellants did not move for a preliminary injunction in the District Court until six years, and three general elections, after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed.

Plaintiffs argue that they have nevertheless pursued their claims diligently, and they attribute their delay in seeking a preliminary injunction to the "convoluted procedural history of the case" and the "dogged refusal to cooperate in discovery" by state officials. Reply Brief 22. Yet the record suggests that the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016. Although one of the seven plaintiffs before us filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here. See Amended Complaint, Doc. 11, p. 3 (Dec. 2, 2013) (explaining that the gerrymandering claim did not turn upon "the reason or intent of the legislature" in adopting the map).

It was not until 2016 that the remaining plaintiffs joined the case and filed an amended complaint alleging that Maryland officials intentionally retaliated against them because of their political views. See 3 App. 640–643. Plaintiffs' newly presented claims—unlike the gerrymandering claim presented in the 2013 complaint—required discovery into the motives of the officials who produced the 2011 congressional map. See, *e.g.,* Memorandum of Law in Support of Plaintiffs' Motion to Compel, Doc. 111–1, p. 3 (Jan. 4, 2017) (describing plaintiffs' demand that various state officials "testify ... and answer questions concerning legislative intent"). It is true that the assertion of legislative privilege by those officials delayed the completion of that discovery. See Joint Motion To Extend Deadlines for Completion of Fact Discovery and Expert Witness Disclosures, Doc. 161, pp. 1–2 (Mar. 3, 2017); Joint Motion To Extend Deadlines for Completion of Fact Discovery and Expert Witness Disclosures, Doc. 170, pp. 1–2 (Mar. 27, 2017). But that does not change the fact that plaintiffs could have sought a preliminary injunction much earlier. See *Fishman, supra,* at 1330, 97 S.Ct. 14. In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.

Second, a due regard for the public interest in orderly elections supported the ***1945** District Court's discretionary decision to deny a preliminary injunction and to stay the proceedings. See *Purcell v. Gonzalez,* 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*). Plaintiffs themselves represented to the District Court that any injunctive relief would have to be granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season. Despite the District Court's undisputedly diligent efforts, however, that date had "already come and gone" by the time the court ruled on plaintiffs' motion. 266 F.Supp.3d, at 815. (Such deadline has also, of course, long since passed for purposes of entering a preliminary injunction on remand from this Court.)

On top of this time constraint was the legal uncertainty surrounding any potential remedy for the plaintiffs' asserted injury. At the time the District Court made its decision, the appeal in *Gill* was pending before this Court. The District Court recognized that our decision in *Gill* had the potential to "shed light on critical questions in this case" and to set forth a "framework" by which plaintiffs' claims could be decided and, potentially, remedied. 266 F.Supp.3d, at 815–816. In the District Court's view, "charging ahead" and adjudicating the plaintiffs' claims in that fluctuating legal environment, when firmer guidance from this Court might have been forthcoming, would have been a mistake. *Id.,* at 816. Such a determination was within the sound discretion of the District Court. Given the District Court's decision to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs' claims, the court reasonably could have concluded that a preliminary injunction would have been against the public interest, as an injunction might have worked a needlessly "chaotic and disruptive effect upon the electoral process," *Fishman, supra,* at 1330, 97 S.Ct. 14 and because the "purpose of a preliminary injunction is merely to preserve the

relative positions of the parties until a trial on the merits can be held," *University of Tex. v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). In these particular circumstances, we conclude that the District Court's decision denying a preliminary injunction cannot be regarded as an abuse of discretion.

The order of the District Court is

Affirmed.

All Citations

138 S.Ct. 1942, 201 L.Ed.2d 398, 86 USLW 3626, 86 USLW 4426, 18 Cal. Daily Op. Serv. 5870, 2018 Daily Journal D.A.R. 5781, 27 Fla. L. Weekly Fed. S 382

919 So.2d 392

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Florida.

John Ellis "Jeb" BUSH, etc., et al., Appellants,
v.
Ruth D. HOLMES, et al., Appellees.
Charles J. Crist, Jr., etc., Appellant,
v.
Ruth D. Holmes, et al., Appellees.
Brenda McShane, etc., et al., Appellants,
v.
Ruth D. Holmes, et al., Appellees.

Nos. SC04–2323 to SC–4–2325.
|
Jan. 5, 2006.

Synopsis

Background: Individuals filed separate complaints for declaratory judgment with respect to constitutionality of statute establishing opportunity scholarship program (OSP). The Circuit Court, Leon County, L. Ralph Smith, J., granted motion to consolidate and entered judgment holding challenged statute unconstitutional on its face under provision of state constitution obligating state to provide public education. State defendants and parents of students receiving opportunity scholarships appealed. The First District Court of Appeal, 767 So.2d 668, reversed and remanded. On remand, the trial court entered final summary judgment for plaintiffs under "no aid" provision of state constitution. The District Court of Appeal, 886 So.2d 340,affirmed and certified question.

Holdings: The Supreme Court, Pariente, C.J. held that:

OSP statute violated requirement of state constitution's education clause that free education be provided through system of free public schools;

OSP statute violated requirement of state constitution's education clause that education be provided through "uniform" system of public schools; and

OSP did not fall within exception to constitutional mandates for "other public education programs."

Affirmed.

Bell, J., dissented with opinion in which Cantero, J., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Codenotes

Held Unconstitutional
West's F.S.A. § 1002.38.

Recognized as Unconstitutional
F.S.1999, § 229.0537.

Attorneys and Law Firms

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Opinion

PARIENTE, C.J.

Because a state statute was declared unconstitutional by the First District Court of Appeal, this Court is required by the Florida Constitution to hear this appeal. *See* art. V, § 3(b)(1), Fla. Const. The issue we decide is whether the State of Florida is prohibited by the Florida Constitution from expending public funds to allow students to obtain a private school education in kindergarten through grade twelve, as an alternative to a public school education. The law in question, now codified at section 1002.38, Florida Statutes (2005),

authorizes a system of school vouchers and is known as the Opportunity Scholarship Program (OSP).

Under the OSP, a student from a public school that fails to meet certain minimum state standards has two options. The first is to move to another public school with a satisfactory record under the state standards. The second option is to receive funds from the public treasury, which would otherwise have gone to the student's school district, to pay the student's tuition at a private school. The narrow question we address is whether the second option violates a part of the Florida Constitution requiring the state to both provide for "the education of all children residing within its ***398** borders" and provide "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." Art. IX, § 1(a), Fla. Const.

As a general rule, courts may not reweigh the competing policy concerns underlying a legislative enactment. The arguments of public policy supporting both sides in this dispute have obvious merit, and the Legislature with the Governor's assent has resolved the ensuing debate in favor of the proponents of the program. In most cases, that would be the end of the matter. However, as is equally self-evident, the usual deference given to the Legislature's resolution of public policy issues is at all times circumscribed by the Constitution. Acting within its constitutional limits, the Legislature's power to resolve issues of civic debate receives great deference. Beyond those limits, the Constitution must prevail over any enactment contrary to it.

Thus, in reviewing the issue before us, the justices emphatically are not examining whether the public policy decision made by the other branches is wise or unwise, desirable or undesirable. Nor are we examining whether the Legislature intended to supplant or replace the public school system to any greater or lesser extent. Indeed, we acknowledge, as does the dissent, that the statute at issue here is limited in the number of students it affects. However, the question we face today does not turn on the soundness of the legislation or the relatively small numbers of students affected. Rather, the issue is what limits the Constitution imposes on the Legislature. We make no distinction between a small violation of the Constitution and a large one. Both are equally invalid. Indeed, in the system of government envisioned by the Founding Fathers, we abhor the small violation precisely because it is precedent for the larger one.

Our inquiry begins with the plain language of the second and third sentences of article IX, section 1(a) of the Constitution. The relevant words are these: "It is ... a paramount duty of the state to make adequate provision for the education of all children residing within its borders." Using the same term, "adequate provision," article IX, section 1(a) further states: "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." For reasons expressed more fully below, we find that the OSP violates this language. It diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. This diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies. In sum, through the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools. Because we determine that the OSP is unconstitutional as a violation of article IX, section 1(a), we find it unnecessary to address whether the OSP is a violation of the "no aid" provision in article I, section 3 of the Constitution, as held by the First District.

PROCEDURAL HISTORY

Various parents of children in Florida elementary and secondary schools and several organizations (hereinafter collectively referred to as the plaintiffs) filed complaints ***399** in the circuit court challenging the constitutionality of the OSP under article I, section 3, article IX, section 1, and article IX, section 6 of the Florida Constitution, as well as under the Establishment Clause of the First Amendment to the United States Constitution. The trial court found that the OSP was facially unconstitutional under article IX, section 1 of the Florida Constitution. On appeal, a panel of the First District reversed, concluding that "nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." *Bush v. Holmes,* 767 So.2d 668, 675 (Fla. 1st DCA 2000) (*Holmes I*) (footnote omitted). The First District declined to address the other constitutional issues raised and remanded for further proceedings. *See id.* at 677.

This Court denied discretionary review. *See Holmes v. Bush,* 790 So.2d 1104 (Fla.2001).

While the case was pending on remand, the United States Supreme Court held that the Ohio Pilot Project Scholarship Program, a voucher program similar to the OSP, was constitutional under the Establishment Clause. *See Zelman v. Simmons–Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). The plaintiffs in this case then voluntarily dismissed their challenges under the Establishment Clause, [1] leaving undecided only the issue of whether the OSP was facially constitutional under article I, section 3 of the Florida Constitution. [2]

The circuit court entered final summary judgment in favor of the plaintiffs, declaring the OSP unconstitutional. The trial court found that the OSP violated the last sentence of article I, section 3, referred to as the "no aid" provision. A divided panel of the First District affirmed the trial court's order. *See Bush v. Holmes,* 29 Fla. L. Weekly D1877 (Fla. 1st DCA Aug.16, 2004). The district court subsequently withdrew the panel opinion and issued an en banc decision in which a majority of the First District again affirmed the trial court's order. *See Bush v. Holmes,* 886 So.2d 340, 366 (Fla. 1st DCA 2004) (*Holmes II*). In a separate concurring opinion in which four other judges concurred, Judge Benton suggested that he would also have found the OSP unconstitutional under article IX, section 1. *See Bush,* 886 So.2d at 377 (Benton, J., concurring).

ANALYSIS

Because both issues are questions of law, we review both the First District's interpretation of article IX, section 1(a) and its determination that the OSP violates the constitutional provision de novo, without deference to the decision below. *See Zingale v. Powell,* 885 So.2d 277, 280 (Fla.2004) ("[C]onstitutional interpretation ... is performed *de novo.*"); ***400** *D'Angelo v. Fitzmaurice,* 863 So.2d 311, 314 (Fla.2003) (stating that in a de novo review, "no deference is given to the judgment of the lower courts"). In interpreting article IX, section 1(a), we follow principles parallel to those guiding statutory construction. *See Zingale,* 885 So.2d at 282; *Coastal Fla. Police Benevolent Ass'n v. Williams,* 838 So.2d 543, 548 (Fla.2003).

In the analysis that follows, we first examine the operation of section 1002.38, Florida Statutes, which authorizes the OSP, then explore both the language and history of article IX, section 1(a). We then explain our conclusion that the OSP violates article IX, section 1(a).

I. The Opportunity Scholarship Program

The OSP provides that a student who attends or is assigned to attend a failing public school may attend a higher performing public school or use a scholarship provided by the state to attend a participating private school. *See* § 1002.38(2)(a), (3), Fla. Stat. (2005). In re-authorizing this program in 2002, the Legislature stated:

> (1) FINDINGS AND INTENT.—The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a career education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing for 2 years in a 4–year period. The Legislature shall make available 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 as provided

> in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).

§ 1002.38(1), Fla. Stat. (2005). [3]

Section 1002.38(4), Florida Statutes (2005), which sets forth the eligibility requirements for private schools accepting OSP students, provides that these schools "may be sectarian or nonsectarian," and must:

> (a) Demonstrate fiscal soundness....
>
> (b) Notify the Department of Education and the school district in whose service area the school is located of its intent to participate in the program under this section....
>
> (c) Comply with the antidiscrimination provisions of 42 U.S.C. s. 2000d.
>
> (d) Meet state and local health and safety laws and codes.
>
> (e) Accept scholarship students on an entirely random and religious-neutral ***401** basis without regard to the student's past academic history; however, the private school may give preference in accepting applications to siblings of students who have already been accepted on a random and religious-neutral basis.
>
> (f) Be subject to the instruction, curriculum, and attendance criteria adopted by an appropriate nonpublic school accrediting body and be academically accountable to the parent for meeting the educational needs of the student. The private school must furnish a school profile which includes student performance.
>
> (g) Employ or contract with teachers who hold a baccalaureate or higher degree, or have at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.
>
> (h) Comply with all state statutes relating to private schools.
>
> (i) Accept as full tuition and fees the amount provided by the state for each student.
>
> (j) Agree not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.
>
> (k) Adhere to the tenets of its published disciplinary procedures prior to the expulsion of any opportunity scholarship student.

§ 1002.38(4)(a)-(k), Fla. Stat (2005).

The OSP also places obligations on students participating in the program and their parents. *See* § 1002.38(5), Fla. Stat. (2005). In addition to requiring the student to remain in attendance at the private school throughout the school year and the parent to comply with the private school's parental involvement requirements, section 1002.38(5) also requires the parent to ensure that the participating student "takes all statewide assessments required pursuant to s. 1008.22." § 1002.38(5)(c), Fla. Stat. (2005). [4] A failure to comply with any of these requirements results in a forfeiture of the scholarship. *See* § 1002.38(5)(d), Fla. Stat. (2005). However, unless forfeited, the scholarship "remain[s] in force until the student returns to a public school or, if the students chooses to attend a private school the highest grade of which is grade 8, until the student matriculates to high school and the public high school to which the student is assigned is an accredited school with a performance grade category designation of 'C' or better." § 1002.38(2)(b), Fla. Stat. (2005). In other words, the OSP allows the student to remain in the private school of his or her choice, and even switch private schools, regardless of whether the student's assigned public school improves its grade in the interim. The only circumstance in which a student who has elected to attend a private school must return to a public school is if the private school ends at grade eight and the public high school to which the student is assigned has received a grade of C or better.

Section 1002.38(6), Florida Statutes (2005), provides the method for funding and payment of opportunity scholarships. The maximum amount of an opportunity scholarship is "equivalent to the base student allocation in the Florida Education Finance Program multiplied by the appropriate cost factor for the educational program that would have been provided for ***402** the student in the district school to which he or she was assigned, multiplied by the district cost differential." § 1002.38(6)(a), Fla. Stat. (2005). This amount

includes "the per-student share of instructional materials funds, technology funds, and other categorical funds as provided for this purpose in the General Appropriations Act." *Id.* The funds for the opportunity scholarship are transferred "from each school district's appropriated funds ... to a separate account for the Opportunity Scholarship Program." § 1002.38(6)(f), Fla. Stat. (2005). Accordingly, the payment of the scholarships results in a reduction in the amount of funds available to the affected school district. The scholarship is made payable to the parent of the student who is then required to "restrictively endorse the warrant to the private school." § 1002.38(6)(g), Fla. Stat. (2005).

II. Language and History of Florida's Education Articles

The Florida Constitution has contained an education article since its inception in 1838. *See* art. X, Fla. Const. (1838). [5] The original education article contained only two brief sections that dealt almost exclusively with the preservation of public lands granted by the United States for the use of schools. [6] In 1849, the Legislature provided for a system of schools by authorizing the establishment of "common schools." *See* ch. 229, Laws of Fla. (1848). [7] The education article remained substantially the same in the 1861 and 1865 Constitutions. *See* art. X, Fla. Const. (1861); art. X, Fla. Const. (1865).

In 1868, the education article was significantly expanded, *see* art. VIII, §§ 1–9, Fla. Const. (1868), and included the first requirement that the state provide a system of free public schools for all Florida children:

> Section 1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.
>
> Section 2. The Legislature shall provide a uniform system of Common Schools, and a University, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.

As this Court explained in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles,* 680 So.2d 400, 405 (Fla.1996), "[b]y this change, education became the 'paramount duty of the State' and required the State to make 'ample provision for the education of all the children.' "

In 1885, the education provisions were moved to article XII and the provision imposing a "paramount duty" on "the State to make ample provision for the education of all the children" was deleted. *See* art. XII, § 1, Fla. Const. (1885). ***403** Section 1 of article XII simply provided that "[t]he Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same." [8]

The adoption of the 1968 Constitution saw another substantial revision of the education article, with section 1 of article IX providing that

> [a]dequate provision shall be made by law for a uniform system of free public schools 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.

Art. IX, § 1, Fla. Const. (1968). The new reference to "other public education programs" referred "to the existing systems of junior colleges, adult education, etc., which are not strictly within the general conception of free public schools or institutions of higher learning." *Bd. of Pub. Instruction v. State Treasurer,* 231 So.2d 1, 2 (Fla.1970). The effect of the addition of the phrase "adequate provision" was analyzed in *Coalition for Adequacy & Fairness,* in which we ultimately concluded that it is the Legislature, not the Court, that is vested with the power to decide what funding is "adequate." *See* 680 So.2d at 406–07.

In 1998, in response in part to *Coalition for Adequacy & Fairness,* the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1 to make clear that education is a "fundamental value" and "a paramount duty of the state," and to provide standards by which to measure the adequacy of the public school education provided by the state:

> *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.

Art. IX, § 1(a), Fla. Const. (emphasis supplied).

A commentary on the 1998 amendment by the Executive Director and the General Counsel of the Constitution Revision Commission explained that the amendment revised section 1 by

> (1) making education a "fundamental value," (2) making it a paramount duty of the state to make adequate provision for the education of children, and (3) defining "adequate provisions" by requiring that the public school system be "efficient, safe, secure, and high quality."
>
> The "fundamental value" language, new to the constitution, was codified from the language taken from the Florida ***404** Supreme Court decision in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,* 680 So.2d 400 (Fla.1996). Early proposals presented before the Constitution Revision Commission framed education in terms of being a "fundamental right." In response to concerns of commissioners that the state might become liable for every individual's dissatisfaction with the education system, the term "fundamental value" was substituted.
>
> The "paramount duty" language represents a return to the 1868 Constitution, which provided that "[i]t is the paramount duty of the State to make ample provisions for the education of all children residing within its borders, without distinction or preference."....
>
> The addition of "efficient, safe, secure, and high quality" represents an attempt by the 1997–98 Constitution Revision Commission to provide constitutional standards to measure the "adequacy" provision found in the second sentence of section 1. The action of the commission was in direct response to recent court actions seeking a declaration that Article IX, section 1 created a fundamental right to an adequate education, which the state had arguably violated by failing to provide sufficient resources to public education.

William A. Buzzett and Deborah K. Kearney, *Commentary,* art. IX, § 1, 26A Fla. Stat. Annot. (West Supp.2006) (first alteration in original).

In reviewing article IX, section 1 in *Coalition for Adequacy & Fairness,* the Court recognized a four-category system for analyzing state education clauses to ascertain the level of duty imposed on the state legislature by language in the Constitution:

> [A] Category I clause merely requires that a system of "free public schools" be provided. A Category II clause imposes some minimum standard of quality that the State must provide. A Category III clause requires "stronger and more specific education mandate[s] and purpose preambles." And, a Category IV clause imposes a maximum duty on the State to provide for education. Barbara J. Staros, *School Finance Litigation in Florida: A Historical Analysis,* 23 Stetson L.Rev. 497, 498–99 (1994). Using this rating system, Florida's education clause in 1868 imposed a Category IV duty on the legislature—a maximum duty on the State to provide for education. In addition, it also imposed a duty on the legislature to provide for a uniform system of education.

680 So.2d at 405 n. 7. After the 1998 revision restoring the "paramount duty" language, Florida's education article is again classified as a Category IV clause, imposing a maximum duty on the state to provide for public education that is uniform and of high quality.

Continuing concern over the quality of the education provided by the public schools led the citizens of this state to adopt a constitutional amendment in 2002 mandating maximum class sizes. *See* art. IX, § 1(a), Fla. Const.; *Advisory Opinion to Attorney Gen. re Florida's Amendment to Reduce Class Size,* 816 So.2d 580, 586 (Fla.2002) (approving the proposed amendment for placement on the ballot).[9] In this same election, the citizens of this state also approved a constitutional amendment requiring the state to provide "a high quality pre-kindergarten learning opportunity." ***405** Art. IX, § 1(b)-(c), Fla. Const.; *see also Advisory Opinion to Attorney Gen. re Voluntary Universal Pre–Kindergarten Education,* 824 So.2d 161, 167 (Fla.2002) (approving the proposed amendment for placement on the ballot).

III. Constitutionality of the Opportunity Scholarship Program

In our review of the constitutionality of the OSP, "[t]he political motivations of the legislature, if any, in enacting [this legislation] are not a proper matter of inquiry for this Court. We are limited to measuring the Act against the dictates of the Constitution." *School Bd. of Escambia County v. State,* 353 So.2d 834, 839 (Fla.1977). We are also mindful that statutes come to the Court "clothed with a presumption of constitutionality," *City of Miami v. McGrath,* 824 So.2d 143, 146 (Fla.2002) (quoting *Dep't of Legal Affairs v. Sanford–Orlando Kennel Club, Inc.,* 434 So.2d 879, 881 (Fla.1983)), and that the Court should give a statute a constitutional construction where such a construction is reasonably possible. *See Tyne v. Time Warner Entertainment Co.,* 901 So.2d 802, 810 (Fla.2005). However, in this case we conclude that the OSP is in direct conflict with the mandate in article IX, section 1(a) that it is the state's "paramount duty" to make adequate provision for education and that the manner in which this mandate must be carried out is "by law for a uniform, efficient, safe, secure, and high quality system of free public schools."

A. The State's Obligation Under Article IX, Section 1(a)

This Court has long recognized the constitutional obligation that Florida's education article places upon the Legislature:

> Article XII, section 1, constitution [the predecessor to article IX, section 1] commands that the Legislature shall provide for a uniform system of public free schools and for the liberal maintenance of such system of free schools. This means that a system of public free schools ... shall be established upon principles that are of uniform operation throughout the State and that such system shall be liberally maintained.

State ex rel. Clark v. Henderson, 137 Fla. 666, 188 So. 351, 352 (1939). Currently, article IX, section 1(a), which is stronger than the provision discussed in *Henderson,* contains three critical components with regard to public education. The provision (1) declares that the "education of children is a fundamental value of the people of the State of Florida," (2) sets forth an education mandate that provides that it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders," and (3) sets forth *how* the state is to carry out this education mandate, specifically, that "*[a]dequate* provision shall be made by law for a *uniform,* efficient, safe, secure, and *high quality system of free public schools.*" (Emphasis supplied.)

Justice Overton explained in his concurring opinion in *Coalition for Adequacy & Fairness* that "[t]his education provision was placed in our constitution in recognition of the fact that education is absolutely essential to a free society under our governmental structure." 680 So.2d at 409. Justice Overton also noted that

> [t]he authors of our United States Constitution and our general governmental structure have acknowledged the importance of education as well. As James Madison said:
>
> > Knowledge will forever govern ignorance; and a people who mean to be their own governours must arm themselves with the power that knowledge gives.... Learned institutions ought to be favorite objects with every free ***406** people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.
>
> Robert S. Peck, The Constitution and American Values, in *The Blessings of Liberty: Bicentennial Lectures At The National Archives* 133 (Robert S. Peck & Ralph S. Pollock eds., 1989). Thomas Jefferson said it even more succinctly: "If a nation expects to be ignorant and free ... it expects what never was and never will be." Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816). Further, in one of the most important cases ever decided by the United States Supreme Court, *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880 (1954), the Court stated that education is important "to our democratic society. It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship."

Id. (alterations in original).

B. Article IX, Section 1(a): A Mandate With a Restriction

In the 1999 legislation creating the OSP, the Legislature recognized its heightened obligation regarding public education imposed by the 1998 amendment to article IX, section 1:

> (1) FINDINGS AND INTENT.—... The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education.

§ 229.0537(1), Fla. Stat. (1999). In 2002 legislation that renumbered the statutory provisions dealing with education, the Legislature made essentially the same finding in language that more closely tracked the language of article IX, section 1(a):

> The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the opportunity to obtain a high-quality education.

§ 1002.38(1), Fla. Stat. (2005). Although these statements purport to fulfill the constitutional mandate, the legislative findings omit critical language in the constitutional provision. In neither the 1999 nor the 2002 version of the OSP legislation is there an acknowledgment by the Legislature that the state's constitutional obligation under article IX, section 1(a) is to provide a "uniform, efficient, safe, secure, and high quality *system of free public schools*." (Emphasis supplied.)

The constitutional language omitted from the legislative findings is crucial. This language acts as a limitation on legislative power. *See generally Savage v. Bd. of Pub. Instruction,* 101 Fla. 1362, 133 So. 341, 344 (1931) ("The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power...."). Absent a constitutional limitation, the Legislature's "discretion reasonably exercised is the sole brake on the enactment of legislation." *State v. Bd. of Pub. Instruction,* 126 Fla. 142, 170 So. 602, 606 (1936).

Article IX, section 1(a) is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate. The second and third sentences must be read *in pari materia,* rather than as distinct and unrelated obligations. This principle of ***407** statutory construction is equally applicable to constitutional provisions. As we stated in construing a different constitutional amendment, the provision should "be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole." *Dep't of Envtl. Prot. v. Millender,* 666 So.2d 882, 886 (Fla.1996); *see also Physicians Healthcare Plans, Inc. v. Pfeifler,* 846 So.2d 1129, 1134 (Fla.2003).

The second sentence of article IX, section 1(a) provides that it is the "paramount duty of the state to make adequate provision for the education of all children residing within its borders." The third sentence of article IX, section 1(a) provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence "shall be made by law for a uniform, efficient, safe, secure and high quality system of *free public schools*." (Emphasis supplied.) The OSP violates this provision by devoting the state's resources to the education of children within our state through means other than a system of free public schools. [10]

The principle of construction, "expressio unius est exclusio alterius," or "the expression of one thing implies the exclusion of another," leads us to the same conclusion. This Court has stated:

> [W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does

> not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Weinberger v. Bd. of Pub. Instruction, 93 Fla. 470, 112 So. 253, 256 (1927) (citations omitted); *see also S & J Transp., Inc. v. Gordon,* 176 So.2d 69, 71 (Fla.1965) (providing that "where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways"). We agree with the trial court that article IX, section 1(a) "mandates that a system of free public schools is the manner in which the State is to provide a free education to the children of Florida" and that "providing a free education ... by paying tuition ... to attend private schools is a 'a substantially different manner' of providing a publicly funded education than ... the one prescribed by the Constitution." *Holmes v. Bush,* No. CV99–3370 at 10, 2000 WL 526364 (2nd Cir. Ct. order filed March 14, 2000) (citation omitted).

In reaching this conclusion, we distinguish *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 882 (1944), in which the Court declined to apply the "expressio unius est exclusio alterius" maxim based on its determination that the statute at issue did ***408** not conflict with the primary purpose of the relevant constitutional provision. In *Taylor,* the Court considered whether a law that allowed married women to manage and control their separate property by, *inter alia,* suing or being sued over the property conflicted with a constitutional provision allowing a married woman's separate property to be charged in equity to satisfy claims related to that property. *See id.* at 880. The Court concluded that "it was not the primary purpose of [the constitutional provision] to effect the adjudication in equity of all claims against married women, but to require positive action on the part of the legislature to insure enforcement in equity against their separate property of claims having equitable qualities because they represented money traceable into the property." *Id.* at 882. Unlike the constitutional provision at issue in *Taylor,* which had a narrow primary purpose, article IX, section 1(a) provides a comprehensive statement of the state's responsibilities regarding the education of its children.

The dissent considers our use of rules of construction such as "in pari materia" and "expressio unius" unnecessary to discern the meaning of a provision that the dissent considers clear and unambiguous. "Ambiguity suggests that reasonable persons can find different meanings in the same language." *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla.1992). It is precisely because the amendment is not clear and unambiguous regarding public funding of private schools that we look to accepted standards of construction applicable to constitutional provisions. *See Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla.2000) (stating that "if the language of the statute is unclear, then rules of statutory construction control"); *Zingale,* 885 So.2d at 282, 285 (applying rules of statutory construction, including "in pari materia," to constitutional provisions); *Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 501 (Fla.2003) (same). "In pari materia" and "expressio unius" are objective principles to apply in our analysis.

Although parents certainly have the right to choose how to educate their children,[11] article IX, section (1)(a) does not, as the Attorney General asserts, establish a "floor" of what the state can do to provide for the education of Florida's children. The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.

C. Diversion of Funds from the Public Schools

The Constitution prohibits the state from using public monies to fund a private alternative to the public school system, which is what the OSP does. Specifically, the OSP transfers tax money earmarked for public education to private schools that provide the same service—basic primary education. Thus, contrary to the defendants' arguments, the OSP does not supplement the public education system. Instead, the OSP diverts funds ***409** that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.

Section 1002.38(6)(f), Florida Statutes (2005), specifically requires the Department of Education to "transfer from each school district's appropriated funds the calculated amount from the Florida Education Finance Program and authorized categorical accounts to a separate account for the Opportunity Scholarship Program." Even if the tuition paid to the private school is less than the amount transferred from the school district's funds and therefore does not result in a dollar-for-dollar reduction, as the dissent asserts, it is of no significance to the constitutionality of public funding of private schools as a means to making adequate provision for the education of children.

Although opportunity scholarships are not now widely in use, if the dissent is correct as to their constitutionality, the potential scale of programs of this nature is unlimited. Under the dissent's view of the Legislature's authority in this area, the state could fund a private school system of indefinite size and scope as long as the state also continued to fund the public schools at a level that kept them "uniform, efficient, safe, secure, and high quality." However, because voucher payments reduce funding for the public education system, the OSP by its very nature undermines the system of "high quality" free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida. [12] The systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a).

D. Exemption from Public School Uniformity

In addition to specifying that a system of free public schools is the means for complying with the mandate to provide for the education of Florida's children, article IX, section 1(a) also requires that this system be "uniform." The OSP makes no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity. In fact, in a provision directing the Department of Education to establish and maintain a database of private schools, the Legislature expressly states that it does not intend "to regulate, control, approve, or accredit private educational institutions." § 1002.42(2)(h), Fla. Stat. (2005). This lack of oversight is also evident in section 1001.21, which creates the Office of Private Schools and Home Education Programs within the Department of Education but provides that this office "ha[s] no authority over the institutions or students served." § 1001.21(1), Fla. Stat. (2005).

Further, although the parent of a student participating in the OSP must ensure that the student "takes all statewide assessments" required of a public school student, § 1002.38(5)(c), the private school's curriculum and teachers are not subject to the same standards as those in force in public schools. For example, only teachers possessing bachelor's degrees are eligible to teach at public schools, but private ***410** schools may hire teachers without bachelor's degrees if they have "at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught." § 1002.38(4)(g), Fla. Stat. (2005).

In addition, public school teachers must be certified by the state. *See* § 1012.55(1), Fla. Stat. (2005). To obtain this certification, teachers must meet certain requirements that include having "attained at least a 2.5 overall grade point average on a 4.0 scale in the applicant's major field of study" and having demonstrated a mastery of general knowledge, subject area knowledge, and professional preparation and education competence. *See* § 1012.56(2)(c), (g)-(i), Fla. Stat. (2005).

Public teacher certification also requires the applicant to submit to a background screening. *See* § 1012.56(2)(d), Fla. Stat. (2005). Indeed, all school district personnel hired to fill positions that require direct contact with students must undergo a background check. *See* § 1012.32(2)(a), Fla. Stat. (2005). This screening is not required of private school employees. *See* § 1002.42(2)(c)(3), Fla. Stat. (2005) (providing that owners of private schools *may* require employees to file fingerprints with the Department of Law Enforcement).

Regarding curriculum, public education instruction is based on the "Sunshine State Standards" that have been "adopted by the State Board of Education and delineate the academic achievement of students, for which the state will hold schools accountable." § 1003.41, Fla. Stat. (2005). Public schools are required to teach all basic subjects as well as a number of other diverse subjects, among them the contents of the Declaration of Independence, the essentials of the United States Constitution, the elements of civil government, Florida state history, African–American history, the history of the Holocaust, and the study of Hispanic and women's contributions to the United States. *See* § 1003.42(2)(a), Fla. Stat. (2005). Eligible private schools are not required to teach any of these subjects.

In addition to being "academically accountable to the parent," a private school participating in the OSP is subject only "to the ... curriculum ... criteria adopted by an appropriate nonpublic school accrediting body." § 1002.38(4)(f), Fla. Stat. (2005). There are numerous nonpublic school accrediting bodies that have "widely variant quality standards and program requirements." Florida Department of Education, *Private School Accreditation,* http://www.floridaschoolchoice.org/Information/Private_Schools/ accreditation.asp (last visited Jan. 3, 2005). Thus, curriculum standards of eligible private schools may vary greatly depending on the accrediting body, and these standards may not be equivalent to those required for Florida public schools.

In all these respects, the alternative system of private schools funded by the OSP cannot be deemed uniform in accordance with the mandate in article IX, section 1(a).

E. Other Provisions of Article IX

Reinforcing our determination that the state's use of public funds to support an alternative system of education is in violation of article IX, section 1(a) is the limitation of the use of monies from the State School Fund set forth in article IX, section 6. That provision states that income and interest from the State School Fund may be appropriated "only to the support and maintenance of free public schools." Art. IX, § 6, Fla. Const. It is well established that "[e]very provision of ***411** [the constitution] was inserted with a definite purpose and all sections and provisions of it must be construed together, that is, in pari materia, in order to determine its meaning, effect, restraints, and prohibitions." *Thomas v. State ex rel. Cobb,* 58 So.2d 173, 174 (Fla.1952); *see also Caribbean Conservation Corp.,* 838 So.2d at 501 ("[I]n construing multiple constitutional provisions addressing a similar subject, the provisions 'must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision.' ") (quoting *Advisory Opinion to the Governor–1996 Amendment 5 (Everglades),* 706 So.2d 278, 281 (Fla.1997)). Reading sections 1(a) and 6 of article IX in *pari materia* evinces the clear intent that public funds be used to support the public school system, not to support a duplicative, competitive private system.

Further, in reading article IX as a whole, we note the clear difference between the language of section 1(a) and that of section 1(b), which was adopted in 2002 and provides in full:

> Every four-year old child in Florida *shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards.* An early childhood development and education program means an organized program designed to address and enhance each child's ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.

(Emphasis supplied.) Although this provision requires that the pre-kindergarten learning opportunity must be free and delivered according to professionally accepted standards, noticeably absent is a requirement that the state provide this opportunity by a particular means. Thus, in contrast to the Legislature's obligation under section 1(a) to make adequate provision for kindergarten through grade twelve education through a system of free public schools, the Legislature is free under section 1(b) to provide for pre-kindergarten education in any manner it desires, consistent with other applicable constitutional provisions.

We reject the argument that the OSP falls within the state's responsibility under article IX, section 1(a) to make "[a]dequate provision ... for ... other public education programs that the needs of the people may require." As this Court explained in *Board of Public Instruction,* the reference to "other public education programs" added in 1968 "obviously applies to the existing systems of junior colleges, adult education, etc., which are not strictly within the general conception of free public schools or institutions of higher

learning." 231 So.2d at 2. The OSP is limited to kindergarten through grade twelve education.

F. Other Programs Unaffected

The OSP is distinguishable from the program at issue in *Scavella v. School Board of Dade County,* 363 So.2d 1095 (Fla.1978), under which exceptional students could attend "private schools because of the lack of *special* services" in their school district. *Id.* at 1097 (emphasis supplied). The program allowed a school board to use state funds to pay for a private school education if the public school did "not have the *special* facilities or instructional personnel to provide an ***412** adequate educational opportunity" for certain exceptional students, specifically physically disabled students. *See id.* at 1098 (emphasis supplied). Further, it was not the program itself that was challenged in *Scavella* but a subsequent amendment to the program that placed a cap on the amount of money a school district could pay to a private institution. *See id.* at 1097. The issue was whether the cap violated the students' right to equal protection under article I, section 2, Florida Constitution, which expressly provided that "[n]o person shall be deprived of any right because of ... physical handicap." *See id.* at 1097. [13] The Court held that "the statute requires the school districts to establish a maximum amount that would not deprive any student of a right to a free education," and that so interpreted the statute did "not deny anyone of equal protection before the law." *Id.* at 1099. We conclude that the First District erred in relying on *Scavella* to support its determination that the OSP does not violate article IX, section 1(a). [14]

We reject the suggestion by the State and amici that other publicly funded educational and welfare programs would necessarily be affected by our decision. Other educational programs, such as the program for exceptional students at issue in *Scavella,* are structurally different from the OSP, which provides a systematic private school alternative to the public school system mandated by our constitution. Nor are public welfare programs implicated by our decision, which rests solely on our interpretation of the provisions of article IX, the education article of the Florida Constitution. Other legislatively authorized programs may also be distinguishable in ways not fully explored or readily apparent at this stage. The effect of our decision on those programs would be mere speculation.

CONCLUSION

In sum, article IX, section 1(a) provides for the manner in which the state is to fulfill its mandate to make adequate provision for the education of Florida's children—through a system of public education. The OSP contravenes this constitutional provision because it allows some children to receive a publicly funded education through an alternative system of private schools that are not subject to the uniformity requirements of the public school system. The diversion of money not only reduces public funds for a public education but also uses public funds to provide an alternative education in private schools that are not subject to the "uniformity" requirements for public schools. Thus, in two significant respects, the OSP violates the mandate set forth in article IX, section 1(a).

We do not question the basic right of parents to educate their children as they see fit. We recognize that the proponents of vouchers have a strongly held view that students should have choices. Our decision does not deny parents recourse to either public or private school alternatives to a failing school. Only when the private school option depends upon public funding is choice limited. This limit is necessitated by the constitutional mandate in ***413** article IX, section 1(a), which sets out the state's responsibilities in a manner that does not allow the use of state monies to fund a private school education. As we recently explained, "[w]hat is in the Constitution always must prevail over emotion. Our oaths as judges require that this principle is our polestar, and it alone." *Bush v. Schiavo,* 885 So.2d 321, 336 (Fla.2004).

Because we conclude that section 1002.38 violates article IX, section 1(a) of the Florida Constitution, we disapprove the First District's decision in *Holmes I.* We affirm the First District's decision finding section 1002.38 unconstitutional in *Holmes II,* but neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach. In order not to disrupt the education of students who are receiving vouchers for the current school year, our decision shall have prospective application to commence at the conclusion of the current school year.

It is so ordered.

WELLS, ANSTEAD, LEWIS, and QUINCE, concur.

BELL, J., dissents with an opinion, in which CANTERO, J., concurs.

BELL, J., dissenting.

"[N]othing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." *Bush v. Holmes,* 767 So.2d 668, 675 (Fla. 1st DCA 2000) (footnote omitted). This conclusion, written by Judge Charles Kahn for a unanimous panel of the First District Court of Appeal, is the only answer this Court is empowered to give to the constitutional question the majority has decided to answer. Therefore, I dissent.

In its construction of this constitutional provision, the majority asserts that it "follow[s] principles parallel to those guiding statutory construction," yet its reasoning fails to adhere to the most fundamental of these principles. Majority op. at 400. It fails to evince any presumption that the OSP is constitutional or any effort to resolve every doubt in favor of its constitutionality. Therefore, I begin this dissent by stating the fundamental principles that should direct any determination of whether the OSP violates article IX, section 1. Next, I address the text of article IX, section 1. I will show that this text is plain and unambiguous. Because article IX is unambiguous, it needs no interpretation, and it is inappropriate to use maxims of statutory construction to justify an exclusivity not in the text. Finally, I find no record support for the majority's presumption that the OSP prevents the State from fulfilling its mandate to make adequate provision for a uniform system of free public schools.

I. Fundamental Principles of State Constitutional Jurisprudence

This Court has long proclaimed that courts "have the power to declare laws unconstitutional only as a matter of imperative and unavoidable necessity," *State ex rel. Crim v. Juvenal,* 118 Fla. 487, 159 So. 663, 664 (1935), and are "bound 'to resolve all doubts as to the validity of [a] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.' " *Caple v. Tuttle's Design–Build, Inc.,* 753 So.2d 49, 51 (Fla.2000) (quoting *State v. Stalder,* 630 So.2d 1072, 1076 (Fla.1994)). Indeed, "[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every ***414** doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt." *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 882 (1944).

This judicial deference to duly enacted legislation is derived from three "first principles" of state constitutional jurisprudence. First, the people are the ultimate sovereign. *Rivera–Cruz v. Gray,* 104 So.2d 501, 506 (Fla.1958) (Terrell, C.J., concurring) (recognizing that "[t]he Constitution is the people's document.... As said by George Mason in the Virginia Declaration of Rights, adopted June 12, 1776: ... 'all power is vested in, and consequently derived from, the people; [therefore,] [m]agistrates are their trustees and servants, and at all times amenable to them' "). Second, unlike the federal constitution, our state constitution is a limitation upon the power of government rather than a grant of that power. *Chiles v. Phelps,* 714 So.2d 453, 458 (Fla.1998) (citing *Savage v. Board of Public Instruction,* 101 Fla. 1362, 133 So. 341, 344 (1931), for the proposition that "[t]he Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative [a]cts invalid"). This means that the Legislature has general legislative or policy-making power over such issues as the education of Florida's children except as those powers are specifically limited by the constitution. *Id.* (recognizing that "[t]he legislature's power is inherent, though it may be limited by the constitution"); *see also State ex rel. Green v. Pearson,* 153 Fla. 314, 14 So.2d 565, 567 (1943) ("It is a familiarly accepted doctrine of constitutional law that the power of the Legislature is inherent.... The legislative branch looks to the Constitution not for sources of power but for limitations upon power."). Third, because general legislative or policy-making power is vested in the legislature, the power of judicial review over legislative enactments is strictly limited. Specifically, when a legislative enactment is challenged under the state constitution, courts are without authority to invalidate the enactment unless it is clearly contrary to an express or necessarily implied prohibition within the constitution. *Chapman v. Reddick,* 41 Fla. 120, 25 So. 673, 677 (1899) ("[U]nless legislation duly passed be clearly contrary to some express or implied prohibition

contained [in the constitution], the courts have no authority to pronounce it invalid.").

Because of these three "first principles," statutes like the OSP come to courts with a strong presumption of constitutionality. *State v. Jefferson,* 758 So.2d 661, 664 (Fla.2000) ("[w]henever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result"); *see also State ex rel. Shevin v. Metz Const. Co., Inc.,* 285 So.2d 598, 600 (Fla.1973) ("It is elementary that a statute is clothed with a presumption of constitutional validity"). And, as we will see from the text of article IX, section 1, when read in light of these fundamental principles, the OSP does not violate any express or necessarily implied provision of article IX, section 1(a) of the Florida Constitution.

II. Article IX, Section 1 and the OSP

The text of article IX, section 1 is plain and unambiguous. In its third sentence, it clearly mandates that the State make adequate provision for a system of free public schools. But, contrary to the majority's conclusion, it does not preclude the Legislature from using its general legislative powers to provide a private school scholarship to a finite number of parents who ***415** have a child in one of Florida's relatively few "failing" public schools.[15] Even if the text of article IX, section 1 could be considered ambiguous on this issue, there is absolutely no evidence that the voters or drafters ever intended any such proscription. Given these irrefutable facts, it is wholly inappropriate for a court to use a statutory maxim such as *expressio unius est exclusio alterius* to imply such a proscription.

A. The Plain Meaning of Article IX, Section 1

The relevant portion of article IX, section 1 of the Florida Constitution provides in part:

> **Section 1. Public education.—**
>
> (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.

The majority finds an exclusivity requirement in this provision that is neither expressed in the text nor necessarily implied. Specifically, the majority states that the public school system is "the exclusive means set out in the constitution for the Legislature to make adequate provision for the education of children." Majority op. at 409. It reads article IX, section 1(a) as "a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate." Majority op. at 406. Therefore, the majority concludes that "[t]he OSP violates [article IX, section 1] by devoting the state's resources to the education of children within our state through means other than a system of free public schools." Majority op. at 407.

The majority's reading of article IX, section 1 is flawed. There is no language of exclusion in the text. Nothing in either the second or third sentence of article IX, section 1 requires that public schools be the sole means by which the State fulfills its duty to provide for the education of children. And there is no basis to imply such a proscription.

The meaning of this clause, especially if read in light of the presumptions and "first principles" discussed above, is plain. The people of Florida declare in the first sentence that they consider the education of children a core value. In the second sentence, they establish that it is a primary duty of their government to see that this value is fulfilled. These two sentences state:

> ***416** 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.

Having laid this foundation, the people specify exactly what they demand of their government in regards to this duty to make adequate provision for the education of Florida's children. They specify three things; however, only the first mandate is at issue in this case.[16] This first mandate requires

the Legislature to make adequate provision by law *for* a system of free public schools, institutions of higher learning and other educational programs. Specifically, the mandate states:

> 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.
>
> (Emphasis added.) This mandate is to make adequate provision *for* a public school system. 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.

As the ultimate sovereign, if the people of Florida had wanted to mandate this exclusivity, they could have very easily written article IX to include such a proscription. Ten other states have constitutional provisions that expressly prohibit the allocation of public education funds to private schools. [17] *Compare* art. IX, Fla. Const., *with, e.g.,* Miss. Const. art. 8, § 208 ("[N]or shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."), *and* 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."). However, the people of Florida have not included such a proscription in article IX, section 1 of the Florida Constitution. Therefore, without any express or necessarily implied proscription in article IX, section 1 of Florida's Constitution, this Court has no authority to declare the OSP unconstitutional as violative of article IX, section 1. [18]

*417 B. The History of Article IX: Discerning the Voters' and Drafters' Intent

Because the plain language of article IX, section 1 is wholly sufficient to conclude that this provision does not prohibit a program such as the OSP, it is unnecessary and improper to go beyond the text by citing to the intent of the voters and drafters. [19] However, I include it here because the majority asserts that article IX, section 1 is "not clear and unambiguous regarding public funding of private schools," majority op. at 408, and a majority of this Court has found legislative history persuasive in the past—at least in regard to statutory interpretation. *See Am. Home Assur. Co. v. Plaza Materials Corp.,* 908 So.2d 360 (Fla.2005). Moreover, the history of article IX helps to highlight why the majority's use of the *expressio unius* maxim, in particular, is improper because this history provides no support for the majority's implied exclusivity.

1. The 1998 Amendments to Article IX, Section 1

My criticism of the majority's interpretation of article IX, section 1 is confirmed by looking at how the amendments to article IX were presented to the voters in 1998. Consistent with the plain meaning of the text, the ballot summary reveals that: (1) the first sentence was added as a declaration of the value of education; (2) the second sentence was added to "establish adequate provision for education as a paramount duty of the state"; and (3) the third sentence was modified to expand the terms of the existing mandate relative to public schools. Nowhere in this ballot summary were the voters informed that by adopting the amendments, they would be mandating that the public school system would become the exclusive means by which the State could fulfill its duty to provide for education.

The full text of the 1998 ballot proposal read as follows (deleted words are stricken and added language is underlined):

> ARTICLE IX
>
> EDUCATION
>
> SECTION 1. ~~System of~~ Public education.—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.

***418** The ballot summary explained these amendments to the voters in this way:

BALLOT SUMMARY

Declares the education of children to be a fundamental value to the people of Florida; establishes adequate provision for education as a paramount duty of the state; expands constitutional mandate requiring the state to make adequate provision for a uniform system of free public schools by also requiring the state to make adequate provision for an efficient, safe, secure and high quality system.

Significantly, the *only* reference to a mandate in the ballot summary is in regard to the preexisting third sentence, and this reference only speaks of "expand[ing] the constitutional mandate requiring the State to make adequate provision for" the public school system. It does not refer to the second sentence as a mandate. And it certainly does not describe this amendment as mandating that the public school system be the exclusive means for carrying out the State's duty to provide education under article IX, section 1.

2. The Constitution Revision Commission

The majority will also find no support for its interpretation of article IX, section 1 in the history behind the drafting of the 1998 amendments. There is no evidence that this clause was intended to place "a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate." Majority op. at 406. Instead, the evidence from the 1997–98 Constitution Revision Commission supports the textual understanding I described above.

According to a prominent member of this Commission, the sole purpose for amending article IX, section 1 was to emphasize the importance of education and to provide a standard for defining "adequate provision." Jon Mills & Timothy McClendon, *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, 331 (2000) (stating that "The Constitution Revision Commission's clear goal [when revising article IX] was to increase the state's constitutional duty and raise the constitutional standard for adequate education, and in fact to make the standard high quality"). There was no intent to make public schools the exclusive manner by which the Legislature could make provision for educating children.

A review of the minutes of the meetings of the Commission reveals a finding that a proposal to preclude educational vouchers was actually presented to the Commission by the public, but never accepted. When the Constitution Revision Commission convened to draft the language for the 1998 amendments, the issue of whether the state should be allowed to fund education at private schools was clearly before them. The debate over education vouchers had been a matter of nationwide public debate since at least the early 1990s. For example, in 1992 the Wisconsin Supreme Court upheld a program similar to the OSP under an education article that also required the state legislature to provide by law for the establishment of a uniform public school system.[20] ***419** *Davis v. Grover,* 166 Wis.2d 501, 480 N.W.2d 460 (1992). And opportunity scholarships were a central part of Florida's hotly contested 1998 gubernatorial campaign. Peter Wallsten & Tim Nickens, *Governor's Race is Set; Education is the Issue,* St. Petersburg Times, July 7, 1998, at 1A, *available at* http://www.sptimes.com (search Archives for "governor's race is set"). Indeed, the citizens of Florida raised this very issue at the Commission's public hearings. Some citizens requested that the amended article IX expressly authorize vouchers or increase school choice, while others requested that article IX expressly prohibit vouchers. *See, e.g.,* Florida Constitution Revision Commission, Meeting Proceedings July 30, 1997, Gainesville Public Hearing Minutes, Remarks of Cynthia Moore Chestnut, http://www.law.fsu. edu/crc/minutes.html ("Opposes vouchers allowing for the taking of public school dollars to pay for private school"); *id.,* Remarks of Brian Lyons ("Favors educational vouchers; school choice."); Florida Constitution Revision Commission, Meeting Proceedings for August 21, 1997, Minutes, Remarks of Charlotte Greenbarg, http://www.law.fsu. edu/crc/minutes.html ("School Choice is too restrictive"); Florida Constitution Revision Commission, Meeting Proceedings for September 4, 1997, Minutes, Remarks of John Book, http://www.law.fsu. edu/crc/minutes.html ("Don't allow vouchers for private schools"). Despite this intense public debate, the Commission offered no amendments related to educational vouchers.

Again, the Commission's goal, as stated by Commissioner Jon Mills, was "to increase the State's constitutional duty and

raise the constitutional standard for education." As another commissioner explained: [21]

> Now I want to point out clearly and for purposes of intent that as the education of our children in the state move in various directions, whether it be charter schools, private schools, public schools, and whatever preference you have as to how our children are educated, this amendment [to article IX] does not address that.
>
> > What this amendment does is says that as we move off in those directions ... this amendment is going to ensure everyone moves together, that every child is ensured an education: the poor, the black, the whites, the Asians, the Hispanics. Every one will be ensured this fundamental right, no matter what direction this State takes.

Florida Constitution Revision Commission, Meeting Proceedings for January 15, 1998, Transcript at 265–66, http://www.law.fsu. edu/crc/minutes.html [hereinafter CRC Jan. 15 Transcript] (statement of Commissioner Brochin). A number of other commissioners ***420** affirmed this position, voicing their convictions that the amendments to article IX should not limit the Legislature's authority to determine the best method for providing education in Florida. *See, e.g.,* CRC Jan. 15 Transcript at 296–97 (statement of Commissioner Thompson expressing a desire to ensure the Legislature retains the freedom to determine how best to provide education); *see also* Florida Constitution Revision Commission, Meeting Proceedings for February 26, 1998, at 55, http://www.law.fsu .edu/crc/minutes.html (statement of Commissioner Evans conveying fear that the heightened importance of education in article IX would transfer power from the voters to the courts); *see also* CRC Jan. 15 Transcript at 269 (statement of Commissioner Langley expressing concern that the heightened importance of education in article IX would transform the Florida Supreme Court into the State Board of Education).

C. The Maxims of Statutory Construction

As established above, there is no textual or historical support for the majority's reading of article IX, section 1 as a prohibition on the Legislature's authority to provide any public funds to private schools. Given this complete absence of textual or historical support, I strongly disagree with the majority's use of maxims of statutory construction to imply such a prohibition. *See Holly v. Auld,* 450 So.2d 217 (Fla.1984), where this Court held, " '[w]hen the language of the statute is clear and unambiguous and conveys a definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' " *Id.* at 219 (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)). In particular, the use of *expressio unius* in this case significantly expands this Court's case law in a way that illustrates the danger of liberally applying this maxim.

It is generally agreed in courts across this nation that *expressio unius* is a maxim of statutory construction that should rarely be used when interpreting constitutional provisions and, then, only with great caution. *See generally State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County,* 9 Ohio St.2d 159, 224 N.E.2d 906, 910 (1967) (recognizing that the *expressio unius* maxim "should be applied with caution to [constitutional] provisions ... relating to the legislative branch of government, since [the maxim] cannot be made to restrict the plenary power of the legislature") (citing 16 C.J.S. *Constitutional Law* § 21); 16 Am.Jur.2d *Constitutional Law* § 69 (2005) (stating "the maxim 'expressio unius est exclusio alterius' does not apply with the same force to a constitution as to a statute ..., and it should be used sparingly"); *see also, e.g., Reale v. Bd. of Real Estate Appraisers,* 880 P.2d 1205, 1213 (Colo.1994) (finding the *expressio unius* maxim "inapt" when used to imply a limitation in a state constitution because the "powers not specifically limited [in the constitution] are presumptively retained by the people's representatives"); *Penrod v. Crowley,* 82 Idaho 511, 356 P.2d 73, 80 (1960) (declaring that *expressio unius* does not apply when interpreting provisions of the state constitution); *Baker v. Martin,* 330 N.C. 331, 410 S.E.2d 887, 891 (1991) (recognizing that the *expressio unius* maxim has never been applied to interpret the state constitution because the maxim "flies directly in the face" of the principle that "[a]ll power which is not *expressly limited* ... in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution").

***421** This Court has employed *expressio unius* in addressing constitutional questions, but only rarely. As Judge Kahn aptly noted in his 2000 opinion, the question of whether article IX proscribes a program such as the OSP is clearly distinguishable from other cases in which we have applied this maxim:

> In *Weinberger,* and the other cases relied upon by the trial court, ... the expressio unius principle found its way

> into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision.
>
> In contrast, in this case, nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary.

Bush, 767 So.2d at 674 (citations and footnote omitted). I agree with this analysis. Article IX, section 1 does not forbid the Legislature from enacting a well-delineated program such as the OSP.

In accord with courts across this nation, this Court has long recognized that the *expressio unius* maxim should not be used to imply a limitation on the Legislature's power unless this limitation is absolutely necessary to carry out the purpose of the constitutional provision. *Marasso v. Van Pelt,* 77 Fla. 432, 81 So. 529, 530 (1919). We have repeatedly refused to apply this maxim in situations where the statute at issue bore a "real relation to the subject and object" of the constitutional provision, *id.* at 532, or did not violate the primary purpose behind the constitutional provision. *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 882 (1944). The majority's use of this maxim violates both restrictions.

The principles stated in *Marasso* and *Taylor* restricting the application of the *expressio unius* maxim in constitutional interpretation apply in this case. The OSP bears a "real relation to the subject and object" of article IX. The primary objective of article IX is to ensure that the Legislature makes adequate provision for a public school system. It does not require that this system be the exclusive means. And, as I have said earlier and will elaborate in more detail below, there is no evidence that the OSP prevents the Legislature from making adequate provision for a public school system that is available to every child in Florida. Because it is not absolutely necessary to imply such a limitation upon the Legislature's power in order to carry out the purpose of article IX, section 1, it is improper for this court to use *expressio unius* as the basis for doing so. *Marasso v. Van Pelt,* 77 Fla. 432, 81 So. 529, 530 (1919).

Likewise, the majority's reading of article IX, section 1 *in pari materia* with article IX, section 6 certainly supports the importance of the public school system in this State. However, it does not imply an absolute prohibition against the use of public funds to provide parents with children in a public school that is not properly educating their child with the option of placing that child in a private school. In fact, in the more than 150 years that section 6 has been a part of Florida's Constitution, it has never been interpreted as preventing the State from using public funds to provide education through private schools.[22] Historical records indicate that ***422** Florida provided public funds to private schools until, at least, 1917.[23] *See, e.g.,* ***423** Thomas Everette Cochran, *History of Public–School Education in Florida* 25 (1921) (indicating the State provided $3,964 to private academies in 1860); Nita Katharine Pyburn, *Documentary History of Education in Florida: 1822–1860* 27 (1951) (recognizing that it was relatively common for the State to fund private academies, the "accepted form of secondary education" through general revenues); Richard J. Gabel, Public Funds for Church and Private Schools 638, 639 n. 3 (May 1937) (Ph.D. dissertation, Catholic University of America) (relying on historical documents to find that Florida use public funds to provide private education until at least 1917).[24] In addition, a commentary on the proposed 1958 constitutional revision described the education article as "authoriz[ing] a system of uniform free public schools, and also permit[ting] the legislature to provide assistance for 'other non-sectarian schools.' " Manning J. Dauer, *The Proposed New Florida Constitution: An Analysis* 16 (1958). When the Florida House of Representatives considered language for the 1968 constitution, it rejected a proposal to add a section to article IX that would have limited the Legislature's use of education funds by preventing any state money from going to sectarian schools. *See* 3 *Minutes: Committee of the Whole House, Constitutional Revision* 34 (1967) (proposed art. IX, § 7, Fla. Const).[25] Consequently, I can find no justification for the majority's assertion that reading article IX, section 1 in pari materia with article IX, section 6 justifies its conclusion that article IX, section 1 must be interpreted to restrict the Legislature from applying public funds to private schools.

II. No Evidence That the OSP Prevents the Legislature from Fulfilling its Article IX Mandate

Given the fact that neither the text nor the history of article IX supports the majority's reading of this provision as "mandat(ing) that 'adequate provision for the education of all children' shall be by a ... system of free public schools," the only other basis for concluding that the OSP violates article IX is to establish that the program prevents the Legislature

from fulfilling its duty to make adequate provision by law for the public school system. The majority does not cite, nor can I find, any evidence in the record before us to support such a finding. In this facial challenge to the OSP, there is absolutely no evidence that the Legislature has either failed to make adequate provision for a statewide system of free public schools or ***424** that this system is not available to every child in Florida.

To support its position, the majority critiques the Legislature's failure to recognize its duty to provide a system of free public schools in the statute authorizing the OSP. Majority op. at 406–07. While the Legislature may not have recited the language of article IX verbatim in the statute authorizing the OSP, I find no competent, substantial evidence that the OSP was enacted to somehow escape article IX's mandate to make adequate provision for a system of free public schools, or that this program, in fact, results in an inadequate provision by law for the public school system.

Indeed, the statute authorizing the OSP presents the public school system as the first option for parents with children in a public school that has twice failed to meet the Legislature's educational standards. § 1002.38, Fla. Stat. (2004). It requires school districts to notify parents whose children attend a school qualifying for an opportunity scholarship of the right to attend a higher-performing public school either within or outside of their district. §§ 1002.38(3)(a)(2), 1002.38(3)(b), Fla. Stat. (2004). In addition, the legislative history surrounding the OSP indicates that the purpose behind the program was to improve the public school system by increasing accountability in education. *See, e.g.,* ch. 99–398, Laws of Fla. (1999) (implementing the OSP by creating section 229.0537; amending section 229.591, Florida Statutes (1999), to recognize that the purpose of school improvements was to require the state to provide additional assistance to "D" or "F" schools; and amending section 230.23(16)(3), Florida Statutes (1999), to require school boards to provide assistance to schools that either failed or were in danger of failing). In fact, around the time the OSP was enacted, the Senate rejected a bill authorizing a pilot program that would have provided education vouchers without regard to the public school's performance. *See* Fla. SB 100 (1999).

Moreover, there is absolutely no evidence that the OSP prevents the Legislature from making adequate provision for a public school system. Opportunity scholarships are available on a very limited basis—only to students whose public school has repeatedly failed to meet the Legislature's minimum standard for a "high quality education." While the scholarships are taken from public moneys allocated to public education, the amount of money removed from the public schools is not a dollar-for-dollar reduction because the opportunity scholarships are capped at the nonpublic school's tuition. On average, this is apparently less than the per-pupil allocation to public schools. SchoolChoiceInfo.Org, Florida Voucher Program: Cost & Fiscal Implications, http://www.school choiceinfo.org (follow "School Choice Facts" hyperlink, then "Florida", then "Cost and Fiscal Impact") (Aug. 16, 2005). Furthermore, the program is part of a broader education initiative that provides additional assistance to failing schools. Schools that receive an "F" must file school improvement plans, and studies show that these schools actually receive, on average, $800 more in per-pupil funding than "A" schools, even after accounting for the financial rewards given to high performing schools. Governor's Office Initiatives: A+ Plan, Opportunity Scholarships, http://www.myflorida .com/myflorida/gover nment/ go vernorinit iatives/aplusplan/ opportunityScholar ships.html (Aug. 17, 2005). Therefore, the omission of the phrase "uniform public school system" in the legislative findings in the statute authorizing the OSP provides no justification for the majority's conclusion that the OSP violates article IX.

***425** Just as there is no textual or historical support for the majority's finding that article IX, section 1 mandates that the Legislature must make adequate provision for the education of Florida's children exclusively through the public school system, there is absolutely no support for the alternative finding that the OSP somehow prevents the Legislature from fulfilling its article IX mandate.

Conclusion

Our position as justices vests us with the right and the responsibility to declare a legislative enactment invalid—but only when such a declaration is an "imperative and unavoidable necessity." *State ex rel. Crim,* 159 So. at 664. No such necessity is evident in this case. Nothing in the plain language or history of article IX requires a finding that the Opportunity Scholarship Program is unconstitutional. The clear purpose behind article IX is to ensure that every child in Florida has the opportunity to receive a high-quality education and to ensure access to such an education by requiring the Legislature to make adequate provision for a uniform system of free public schools. There is absolutely no evidence before this Court that this mandate is not

being fulfilled. Therefore, I agree with Judge Kahn and his two colleagues in the First District Court of Appeal's first opinion regarding this dispute over the OSP. "Nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." *Bush,* 767 So.2d at 675. The Opportunity Scholarship Program does not violate article IX, section 1 of Florida's Constitution.

CANTERO, J., concurs.

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Footnotes

1 The plaintiffs also dismissed their separate claim under article IX, section 6 of the Florida Constitution, which provides:

> **State school fund.**—The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

2 Article I, section 3 provides:

> **Religious freedom.**—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

3 When the OSP was enacted in 1999, the Legislature's findings and intent contained slightly different language. Specifically, the Legislature stated that it found "that the State Constitution requires the state to provide the opportunity to obtain a high-quality education." *See* § 229.0537(1), Fla. Stat. (1999).

4 Section 1008.22, Florida Statutes (2005), is titled "Student assessment program for public schools," and requires the Commissioner of Education to, among other things, develop and implement the Florida Comprehensive Assessment Test ("FCAT"). *See* § 1008.22(3)(c), Fla. Stat. (2005).

5 This first constitution was drafted during the 1838 Constitutional Convention but was not adopted until 1845, when Florida was admitted to the Union.

6 Article X of the 1838 Constitution provided in full:

> Section 1. The proceeds of all lands that have been or may hereafter be granted by the United States for the use of Schools, and a Seminary or Seminaries of learning, shall be and remain a perpetual fund, the interest of which, together with all moneys derived from any other source applicable to the same object, shall be inviolably appropriated to the use of Schools and Seminaries of learning respectively, and to no other purpose.
>
> Section 2. The General Assembly shall take such measures as may be necessary to preserve from waste or damage all land so granted and appropriated to the purposes of Education.

7 This first public system of schools was open only to white children between the ages of five and eighteen. *See* ch. 229, art. I, § 3, Laws of Fla. (1848–49).

8 Although not confirmed by the written record of the 1885 constitution, some commentators have suggested that the removal of the "paramount duty" provision along with the addition of a section explicitly requiring racial segregation (article XII, section 12, Florida Constitution (1885)) may indicate that the "drafters of the 1885 Constitution wished to prevent both mixed-race schooling and any real 'equality' requirement for the supposedly 'separate but equal' schools established for African–American children." Jon Mills & Timothy Mclendon, *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, 349 n. 98 (2000).

9 Article IX, section 1 was renumbered as section 1(a) and modified to include the class size amendment.

10 In *Davis v. Grover,* 166 Wis.2d 501, 480 N.W.2d 460 (1992), which is cited by the dissent, the Wisconsin Supreme Court in a four-to-three decision upheld a program providing public funds to children from low-income families to attend nonsectarian schools against several constitutional challenges, including one resting on language similar to the third sentence in article IX, section 1(a) of the Florida Constitution. *See id.* at 473–74. However, the education article of the Wisconsin Constitution construed in *Davis, see* Wis. Const., art. X, does not contain language analogous to the statement in article IX, section 1(a) that it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders."

11 *See Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that a law that prohibited parents from choosing private education over public schooling for their children "unreasonably interfere[d] with the liberty of parents ... to direct the upbringing and education of [their] children"); *Beagle v. Beagle,* 678 So.2d 1271, 1276 (Fla.1996) ("[T]he State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.").

12 Further, as the dissent acknowledges, students become eligible for opportunity scholarships only if a public school has repeatedly failed to meet the Legislature's standards for a "high quality education." Dissenting op. at —— n. 11. Similarly, Judge Benton noted below that the only circumstances in which opportunity scholarships are available "are antithetical to and forbidden by" the constitutional requirement that the state provide a "high quality system of free public schools." *Bush,* 886 So.2d at 370–71 (Benton, J., concurring).

13 In 1998, the term "physical handicap" was changed to "physical disability."

14 The dissent notes that Florida funded private schools until the early Twentieth Century, which is of merely historical interest because the practice ended long before the adoption of the 1998 constitutional amendment we construe and apply today. The dissent cites no authority suggesting that the constitutional validity of these allocations was ever challenged as an unconstitutional public funding of private schools under Florida's education article.

15 The majority repeatedly suggests that the scope of this program is irrelevant to the question of constitutionality. *See* majority op. at 398 & 409. If the text of article IX contained the exclusivity that the majority reads into this provision, I would agree. However, the text of article IX does not support exclusivity. Therefore, the only remaining basis for finding the OSP unconstitutional is to assert that the OSP prevents the State from fulfilling its mandate to make adequate provision, "by law for a uniform, efficient, safe, secure, and high quality system of public schools." The scale of the program would be relevant to this analysis because it is possible that a more widespread program would prevent the Legislature from fulfilling its mandate. As I will explain in more detail later, there is no evidence that the OSP prevents the Legislature from fulfilling this mandate; therefore, there is no support for the majority's claim that the OSP violates article IX, section 1.

16 The other two mandates in article IX, section 1 were added in 2002. The first requires the State to make adequate provision for reasonable class size, and the second requires the State to make adequate provision for a high quality pre-kindergarten program. *See* art. IX, § 1(a)-(b).

17 In addition to Mississippi and South Carolina, Alaska, California, Hawaii, Kansas, Michigan, Nebraska, New Mexico, and Wyoming also prohibit public education funds from going to any private school in their state constitutions. *See* Alaska Const. art. VII, § 1; Cal. Const. art. IX, § 8; Haw. Const. art. 10, § 1; Kan. Const. art. 6, § 6(c); Mich. Const. art. VII, § 2; Neb. Const. art VII, § 11; N.M. Const. art. VII, § 2; Wyo. Const. art. VII, § 4.

18 This argument is buttressed by the fact that the people of Florida explicitly revised the language of article IX, section 1 twice after the OSP program was enacted in order to add two additional mandates. Yet, none of these amendments inserted a prohibition against allocating public funds to private schools. *See* art. IX, § 1(a), Fla. Const.; *Advisory Op. to the Att'y Gen. re Florida's Amendment to Reduce Class Size,* 816 So.2d 580, 586 (Fla.2002) (approving a proposed amendment to mandate maximum class sizes for placement on the ballot); *see also* art. IX, § 1(b)-(c) Fla. Const.; *Advisory Op. to the Att'y Gen. re Voluntary Universal Pre-kindergarten Educ.,* 824 So.2d 161, 167 (Fla.2002) (approving a proposed amendment to require the Legislature to provide a "high quality pre-kindergarten learning opportunity" for placement on the ballot).

19 Courts should not use legislative history to depart from the text's plain meaning. It is dangerous to attempt to divine the intent behind a statutory or constitutional provision from the statements of individuals involved in the process. *See Am. Home Assur. Co. v. Plaza Materials Corp.,* 908 So.2d 360, 371 (Fla.2005) (Cantero, J., concurring in part and dissenting in part). Nonetheless, a majority of this Court apparently finds legislative history persuasive, at least when interpreting statutory text. *Id.* at 368–69. Therefore, I include the history of article IX here not because I would rely on it in upholding the OSP program, but because it demonstrates that there is no refuge for the majority's finding the OSP is unconstitutional.

20 The provision at issue in *Davis* was article X, section 3 of the Wisconsin Constitution. The provision stated:

> 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.

21 This statement was made as an introduction to Proposal 181, which suggested this language for article IX:

> SECTION 1: ~~System of~~ Public education.—Each resident of this state has a fundamental right to a public education during the primary and secondary years of study, and it is the paramount duty of the state to ensure that such education is complete and adequate. Ample ~~Adequate~~ provision shall be made by law for a uniform system of free public schools 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.

This proposal was to be read in conjunction with a proposal defining "adequate provision," which had already been passed. Fla. Constitutional Revision Commission, Meeting Proceedings for January 15, 1998, transcript at 263, http://www.law.fsu.edu/crc/minutes.html (statement of Commissioner Brochin).

22 Article IX, section 6, became a part of Florida's Constitution in 1838. It was incorporated in response to a federal initiative in which Congress set aside one section of every township in the Northwest Territories for "the maintenance of the 'common schools.' " Wade R. Budge, Comment, *Changing the Focus: Managing State Trust Lands in the Twenty–First Century,* 19 J. Land Resources & Envtl. L. 223, 225 (1999). Documents surrounding this initiative suggest that Congress' primary concern was to further education. In legislation enacted two years after the 1785 allocation, Congress stated that the 1785 land grants were given in recognition of the fact that "religion, morality and knowledge [were] necessary for good government and the happiness of mankind.... [Therefore,] schools, and the means of education shall forever be encouraged." *Id.*

It was not until 1837 that the requirement that this land be dedicated to education alone was incorporated into a state constitution. In 1837, Michigan became the first state to incorporate this requirement in its constitution, and almost every state that joined the union afterwards followed suit. *Id.* at 227. Florida received its land grant on March 3, 1845. An act supplemental to that admitting Florida into the union provided the sixteenth section "in every township or other land equivalent thereto" for the support of public schools. James B. Whitfield, *Legal Background to the Government of Florida in* The Florida Bar, *Florida Real Property Title Examination and Insurance* apx. 20 (4th ed.1996). This act also set aside two townships for the creation of seminaries and required that five percent of the net proceeds of a future sale of federal land be applied "for the purposes of education." *Id.*

23 The majority disputes this assertion by claiming that the constitutionality of these provisions has never been challenged. I disagree. In *Scavella v. Sch. Bd. of Dade County,* this Court upheld a statute that allowed public funds to be used for private education. 363 So.2d 1095 (Fla.1978). I recognize that the majority distinguishes the OSP from the statute at issue in *Scavella;* however, I find its reasons for doing so unpersuasive. First, the majority argues that *Scavella* is not applicable here because this Court addressed a different issue. I disagree. In *Scavella,* this Court defined its duty as deciding whether the statute at issue denied the appellant *any* right. 363 So.2d at 1097–98, *citing* art. I, § 2, Fla. Const. (stating that "[N]o person shall be deprived of any right because of race, religion or Physical handicap."). Then, it held that article IX, section 1's mandate that the Legislature "provide for a 'uniform system of free public schools' " guaranteed that "all Florida residents have the right to attend this public school system for free." *Id.* at 1098. This Court found that the Legislature's determination that the public school system was not meeting the student's educational needs authorized the Legislature to require school districts to pay private schools an amount that would not deprive any student of a free education. *Id.* at 1099.

Second, the majority's distinction between "special" and "routine" education services is unconvincing. That is more of a policy distinction than a legal one. Indeed, article IX does not draw any such distinction. It declares that the State has a "paramount duty ... to make adequate provision for the education of all children residing within [Florida's] borders." Art. IX, § 1, Fla. Const. (2004). Presumably, "all children" includes exceptional students. While article IX was revised after *Scavella* was decided, the 1998 revisions simply emphasized the importance of the Legislature's obligation to make adequate provision for education. In addition, such a distinction would place this Court in the difficult position of determining whether or not an educational service is the type regularly provided in the public school. For example, can the Legislature provide a scholarship to a dyslexic student whose public school does not offer help with reading? Can the Legislature provide an opportunity scholarship to a student whose public school offers no advanced placement courses? If these services are routinely provided in another public school, perhaps one located in a wealthier district, but not in the student's public school, does that make the service "routine" and prohibit the Legislature from providing it through a nonpublic school? The majority's distinction will quickly place the judicial system in an untenable role.

This distinction also ignores the fact that students only become eligible for opportunity scholarships if their public school has repeatedly failed to meet the Legislature's standards for a "high quality education." It is nonsensical to hold that article IX allows the Legislature to fund education outside the public school system when the public school system fails to uphold its constitutional duty in regard to disabled students but prohibits it when that school system fails to uphold the duty in regard to disadvantaged students. The majority's distinction between "special" and "routine" in determining when the Legislature can provide education through a nonpublic school is untenable. As I said before, this is more of a policy distinction than a legal one, and absent an express or necessarily implied mandate to the contrary, our constitutional form of government leaves such policy distinctions to the legislative branch.

24 Records indicate that the State allocated $7500 to private schools in 1887, $1000 in 1892–98, $600 in 1900, and $800 in 1904. Gabel, *supra,* at 639 n. 63. While this funding rarely went to academies providing education to white students, Florida relied heavily on private sources, such as the Freedman's Bureau and a number of church academies, to educate African–American children. *Id.*

25 Amendment 686 proposed that a new section be added to article IX with this language:

> Section .... No law shall be enacted authorizing the diversion or lending of any public school funds or the use of any part of them for support of any sectarian school.

It was adopted as an amendment to Amendment 682, but was not included in the proposed constitution that the Committees on Style and Drafting presented to the House of Representatives on December 13, 1967. *See* 3 *Minutes: Committee of the Whole House, Constitutional Revision* 55 (1967).

220 Ariz. 77
Supreme Court of Arizona,
En Banc.

Virgel CAIN, Sandy Bahr, Scott Holcomb, Arizona Association of School Business Officials, Arizona Education Association, Arizona Federation of Teacher Unions, Arizona Parent Teacher Association, Arizona Rural Schools Association, Arizona School Administrators, Inc., Arizona School Boards Association, American Civil Liberties Union of Arizona, and People for the American Way, Plaintiffs/Appellants,
v.
Tom HORNE, in his capacity as Superintendent of Public Instruction, Defendant/Appellee,
and
Jessica Geroux, Andrea Weck, Kristina Peterson, Kimberly Wuestenberg, Edwin Rivera, and Mike and Shirley Okamura, Intervenors/Appellees.

No. CV–08–0189–PR.
|
March 25, 2009.

Synopsis
Background: Interested individuals and organizations filed action challenging the constitutionality of school voucher programs and seeking to enjoin State Superintendent of Public Instruction from implementing them. The Superior Court, Maricopa County, Cause No. CV2007-002986, Bethany G. Hicks, J., granted Superintendent's motion to dismiss. The Court of Appeals reversed, 218 Ariz. 301, 183 P.3d 1269, holding that school voucher programs did not violate religion clause, but that programs violated aid clause of State Constitution. Interested individuals and organizations petitioned for review, and Superintendent cross-petitioned for review.

Holdings: The Supreme Court, Ryan, J., held that:

Aid Clause was afforded a construction independent from that of the Religion Clause for purpose of determining constitutionality of school voucher program;

school voucher program allowed state aid to private schools in violation of the Aid Clause under State Constitution; and

interested individuals and organizations were prevailing parties entitled to attorney fees.

Judgment of the superior court reversed and Court of Appeals' opinion vacated; remanded to the superior court for further proceedings.

Procedural Posture(s): Motion to Dismiss.

West Codenotes

Held Unconstitutional
A.R.S. §§ 15-891, 15-891.01, 15-891.02, 15-891.03, 15-891.04, 15-891.05, 15-891.06

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****1180 *79 OPINION**

RYAN, Justice.

¶ 1 Article 2, Section 12, of the Arizona Constitution provides that "[n]o public money ... shall be appropriated to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article 9, Section 10, of the Arizona Constitution states that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." The issue before us is whether two state-funded programs violate these provisions of our constitution.

I

A

¶ 2 In 2006, the Legislature enacted two programs that, in part, appropriated state monies to allow students to attend a private school of their choice instead of the public school in the district in which they live. *See* 2006 Ariz. Sess. Laws, ch. 340, §§ 1–2 (2d Reg.Sess.) ("Arizona Scholarship for Pupils with Disabilities"); *id.,* ch. 358, §§ 1–4 (2d Reg.Sess.) ("The Displaced Pupils Grant Program"). The Legislature appropriated $2.5 million for each program. 2006 Ariz. Sess. Laws, ch. 340, § 2 (2d Reg.Sess.); *id.,* ch. 358, § 3 (2d Reg.Sess.).

¶ 3 The Arizona Scholarships for Pupils with Disabilities Program, codified at Arizona Revised Statutes ("A.R.S.") §§ 15–891 to 15–891.06 (Supp.2008), offers "pupils with disabilities ... the option of attending any public school of the pupil's choice or receiving a scholarship to any qualified school of the pupil's choice." A.R.S. § 15–891(A).[1] Under this program, a public-school student with a disability may transfer to a private primary or secondary school, with the State paying a scholarship up to the amount of basic state aid the student would generate for a public school district. *Id.* §§ 15–891, 15–891.04. A parent of a disabled student may apply for a scholarship if the pupil attended a public school during the prior school year, the parent "is dissatisfied with the pupil's progress," and "[t]he parent has obtained acceptance for admission of the pupil to a qualified school." *Id.* § 15–891(B)(1) & (2). A " '[q]ualified school' means a nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state and that does not discriminate on the basis of race, color, handicap, familial status or national origin." *Id.* § 15–891(F)(2). The program also requires school districts to notify parents of their options, including enrolling in another school in the district. *Id.* § 15–891.01(A).

¶ 4 The Arizona Displaced Pupils Choice Grant Program, codified at A.R.S. §§ 15–817 to 15–817.07 (Supp.2008) and 43–1032 (Supp.2008), allows the State to pay $5,000 or the cost of tuition and fees, whichever is less, for children in foster care to attend the private primary or secondary school of their choice.[2] *Id.* §§ 15–817.02, 15–817.04. The program is limited to 500 pupils. *Id.* § 15–817.02(C). A grant school is "a nongovernmental primary school or secondary school or a preschool ... that does not discriminate on the basis of race, color, handicap, familial status or national origin, that

maintains one or more grade levels from kindergarten through grade twelve....” *Id.* § 15–817(3).

¶ 5 Sectarian and nonsectarian schools may participate in both programs; schools are not required to alter their “creed, practices or curriculum” in order to receive funding. *Id.* §§ 15–817.07(B), 15–891.02, 15–891.05(B). Under both programs, (collectively “the voucher programs”) parents or legal guardians select the private or sectarian school their child will attend. *Id.* §§ 15–817.01(D), 15–891(B). The State then disburses a check or warrant to the parent or guardian, who must “restrictively endorse” the instrument ***80 **1181** for payment to the selected school. *Id.* §§ 15–817.05, 15–891.03(F).

B

¶ 6 Virgel Cain and others (“Cain”) filed a complaint in Maricopa County Superior Court seeking to enjoin implementation of the voucher programs. Cain named Tom Horne, the superintendent of schools, as the defendant. Cain alleged that the voucher programs were facially unconstitutional under Article 2, Section 12, and Article 9, Section 10 of the Arizona Constitution. Horne and various intervenors moved for judgment on the pleadings, which the superior court granted, dismissing the complaint with prejudice.

¶ 7 On appeal, the court of appeals held that the voucher programs did not violate Article 2, Section 12. *Cain v. Horne,* 218 Ariz. 301, 306, ¶ 11, 183 P.3d 1269, 1274 (App.2008). The court concluded, however, that the voucher programs violated Article 9, Section 10. *Id.* at 310, ¶ 23, 183 P.3d at 1278.

¶ 8 Horne and the intervenors petitioned for review, contending that the court of appeals erred in concluding that the voucher programs violated Article 9, Section 10. Cain cross-petitioned for review, arguing that the court erred in holding that the voucher programs did not violate Article 2, Section 12.

¶ 9 We granted review of both petitions because this is a matter of first impression and of statewide importance. We exercise jurisdiction under Article 6, Section 5.3 of the Arizona Constitution and A.R.S. § 12–120.24 (2003).

II

A

¶ 10 In interpreting a constitutional provision, “[o]ur primary purpose is to effectuate the intent of those who framed the provision.” *Jett v. City of Tucson,* 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). In doing so, “we first examine the plain language of the provision.” *Id.* (citation omitted). We do not depart from the language unless the framers' intent is unclear. *Fairfield v. Foster,* 25 Ariz. 146, 151, 214 P. 319, 321 (1923). “Each word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial.” *City of Phoenix v. Yates,* 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949). When a provision is not clear, we can consider “the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied.” *McElhaney Cattle Co. v. Smith,* 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982) (citation omitted). “The provisions of [our] constitution are mandatory, unless by express words they are declared to be otherwise.” Ariz. Const. art. 2, § 32.

B

¶ 11 The court of appeals referred to Article 2, Section 12 as the “Religion Clause.” *Cain,* 218 Ariz. at 305, ¶ 6, 183 P.3d at 1273. The court reasoned that our decisions in *Kotterman v. Killian,* 193 Ariz. 273, 287, ¶ 46, 972 P.2d 606, 620 (1999), and *Community Council v. Jordan,* 102 Ariz. 448, 451–52, 432 P.2d 460, 463–64 (1967), suggest that Arizona's Religion Clause is “virtually indistinguishable from the United States Supreme Court's interpretation of the federal Establishment Clause.” *Cain,* 218 Ariz. at 306, ¶ 8, 183 P.3d at 1274.

¶ 12 The Supreme Court's Establishment Clause jurisprudence has upheld programs that permit state funds to flow to religious institutions as a result of the genuinely independent and private choice of aid recipients. *See, e.g., Zelman v. Simmons–Harris,* 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (distinguishing between aid to religious schools and “programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals”); *Witters v. Wash. Dep't of Servs. for Blind,* 474 U.S. 481, 487, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986).

Given its conclusion that the Religion Clause is coextensive with the federal Establishment Clause, the court of appeals rejected Cain's Religion Clause arguments, noting that the voucher programs neither favor "one religion over another nor religion over nonreligion [,]" because "[the] parents ... make an independent ... choice ***81** ****1182** to direct the funds to a particular school." *Cain,* 218 Ariz. at 306–07, ¶ 11, 183 P.3d at 1274–75.

¶ 13 The court of appeals described Article 9, Section 10, as the "Aid Clause." *Id.* at 305, ¶ 6, 183 P.3d at 1273. It noted that

> although there may be some overlap between these clauses, the Religion Clause—Arizona's analog to the federal Establishment Clause—was intended to ensure the separation of church and state, whereas the Aid Clause—which has no equivalent in the United States Constitution—was aimed at placing restrictions on the disbursement of public funds to specified institutions, both religious and secular.

Id. The court thus concluded that the "plain text" of the Aid Clause required it to find the school voucher programs violated that clause. *Id.* at 310, ¶ 23, 183 P.3d at 1278. It reached this conclusion in part because schools, whether sectarian or nonsectarian, are "aided by tuition payments." *Id.* at 308, ¶ 18, 183 P.3d at 1276.

C

¶ 14 Horne and the intervenors argue that the Aid Clause should be interpreted just as the United States Supreme Court has interpreted the Establishment Clause of the United States Constitution, and that the parental choice involved in signing the state checks over to a private or sectarian school saves the voucher programs from unconstitutionality.

¶ 15 Horne first argues that the Aid and Religion Clauses must be interpreted similarly because our previous case law has considered them together. *See Kotterman,* 193 Ariz. at 287–88, ¶¶ 46–50, 972 P.2d at 620–21; *Jordan,* 102 Ariz. at 451, 432 P.2d at 463. *But see Pratt v. Ariz. Bd. of Regents,* 110 Ariz. 466, 468–69, 520 P.2d 514, 516–17 (1974) (considering Article 2, Section 12 in isolation).

¶ 16 Our only two cases addressing these clauses, however, did not correlate the two clauses as explicitly as Horne contends. For example, *Kotterman* held only that tax credits for contributions to school tuition organizations were not appropriations of public money and therefore did not violate either clause. 193 Ariz. at 287–88, ¶¶ 44–50, 972 P.2d at 620–21. Thus, the Court did not address any difference between the Religion Clause and the Aid Clause. Similarly, although *Jordan* referred to both clauses, it focused on whether the state could contract with religious organizations to provide entirely non-denominational services to Arizona residents. 102 Ariz. at 451, 432 P.2d at 463 (stating that the issue before the Court was "whether the state ... can choose to do business with and discharge part of its duties through denominational or sectarian institutions without contravening constitutional prohibitions"). We held there that "[t]he 'aid' prohibited in the constitution of this state is ... assistance in any form whatsoever which would encourage ... the preference of one religion over another, or religion per se over no religion." *Id.* at 454, 432 P.2d at 466; *see also id.* at 456, 432 P.2d at 468 (stating that if the beneficiaries could not obtain aid without attending "chapel services," it "would render unconstitutional the payments ... to the Salvation Army").

¶ 17 Contrary to Horne's assertion, *Kotterman* and *Jordan* do not compel us to interpret the Aid Clause as a mirror image of the Religion Clause or to interpret the Aid Clause as no broader than the federal Establishment Clause. More importantly, both the text and purpose of the Aid Clause support the conclusion that the clause requires a construction independent from that of the Religion Clause.

¶ 18 First, the text of the Aid Clause encompasses more than does the Religion Clause. The Aid Clause prohibits the use of public funds not only to aid *private* or sectarian schools, but to aid public corporations as well. Ariz. Const. art. 9, § 10. Thus, under the Aid Clause, a statute granting funds to aid a public service corporation engaged exclusively in secular activities might be prohibited; such a statute would pose no difficulties under the Religion Clause, nor could it be readily analyzed under the Supreme Court's Establishment Clause jurisprudence. Likewise, the Religion Clause would prohibit an appropriation to pay for religious instruction in a public school, but the Aid Clause ***82** ****1183** says nothing about such an appropriation, as public schools are not among the forbidden recipients of appropriations under the Aid Clause.

¶ 19 Second, although the two clauses overlap to some extent, they serve different purposes. The Religion Clause appears in Article 2, entitled "Declaration of Rights," and reinforces other provisions in the constitution "dealing with the separation of church and state." John D. Leshy, *The Arizona State Constitution: A Reference Guide* 52 (1993). The Aid Clause is found in Article 9, entitled "Public Debt, Revenue, and Taxation," and "[u]nlike [Article 2, Section 12] ... prohibits public aid to private nonsectarian schools and to public service corporations." *Id.* at 216. The Aid Clause is thus primarily designed to protect the public fisc and to protect public schools.

¶ 20 The floor debates at the 1910 constitutional convention involved little discussion about these clauses. *The Records of the Arizona Constitutional Convention of 1910* 660, 894, 940 (John S. Goff ed., 1991) (hereafter "*Records* "). Nevertheless, those debates make clear that our framers considered public education of prime importance. *Records, supra,* at 523–38, 945, 960 (discussing requirements for public education in Arizona); John D. Leshy, *The Making of the Arizona Constitution,* 20 Ariz. St. L.J. 1, 96 (1988). Indeed, the framers created a separate constitutional article on the subject. *See* Ariz. Const. art. 11, §§ 1–10.

¶ 21 The framers plainly intended that Arizona have a strong public school system to provide mandatory education. The Aid Clause furthers this goal by prohibiting appropriation of funds from the public treasury to private schools.

> [B]y prohibiting state financial support for any private school, whether or not it is religious in nature, article IX, section 10, seems designed ... to help insure that the Arizona state legislature adequately meets its affirmative constitutional obligation under article XI, section 1—an obligation found nowhere in the United States Constitution —to "provide for the establishment and maintenance of a general and uniform public school system."

Paul Bender et al., *The Supreme Court of Arizona: Its 1998–99 Decisions,* 32 Ariz. St. L.J. 1, 18 (2000).

D

¶ 22 Both the Aid and Religion Clauses prohibit certain appropriations of public money. In *Kotterman,* this Court addressed whether tax credits for contributions to organizations providing scholarships to students attending non-governmental schools violated the two clauses. 193 Ariz. at 276–77, ¶ 1, 972 P.2d at 609–10. We held that neither provision precluded the Legislature from granting a tuition tax credit, because the tax credit was not an appropriation. "An appropriation earmarks funds from the general revenue of the state for an identified purpose or destination." *Id.* at 287, ¶ 45, 972 P.2d at 620 (internal quotations omitted); *see also League of Ariz. Cities & Towns v. Martin,* 219 Ariz. 556, 560, ¶ 15, 201 P.3d 517, 521 (2009) (defining appropriation). Because the funds in *Kotterman* were credits against tax liability, not withdrawals from the state treasury, the funds were never in the state's treasury; therefore, the credits did not constitute an appropriation. *Kotterman,* 193 Ariz. at 287, ¶ 45, 972 P.2d at 620.

¶ 23 Unlike the funds in *Kotterman,* the funds at issue here are withdrawn from the public treasury and earmarked for an identified purpose. *See Black & White Taxicab Co. v. Standard Oil Co.,* 25 Ariz. 381, 399, 218 P. 139, 145 (1923). Horne and the intervenors do not dispute that the vouchers therefore constitute appropriations of public funds. But, citing *Jordan,* they argue that the funds do not aid the schools; rather they characterize the funds as aid to students under a "true beneficiary" theory.

E

¶ 24 Under the true beneficiary theory, individuals benefitted by a government program, rather than the institution receiving the public funds, are characterized as the true beneficiaries of the aid. For example, in *Jordan,* we held that using state funds to partially reimburse the Salvation Army's expenses in providing emergency aid to those ***83 **1184** in need did not violate the Aid Clause. 102 Ariz. at 454, 432 P.2d at 466 (" 'Aid' in the form of partially matching reimbursement for only the direct, actual costs of materials given entirely to third parties of any or no faith or denomination and not to the church itself is not the type of aid prohibited by our constitution."). *Jordan* thus stands for the proposition that an entity covered by the Aid Clause may contract with the State to provide non-religious services to members of the public when such an entity "merely [acts as] a conduit and receives no financial aid or support therefrom." *Id.* at 456, 432 P.2d at 468.

¶ 25 The voucher programs, however, vary significantly from the program at issue in *Jordan.* In contrast to the program in *Jordan,* the voucher programs do not provide

reimbursement for contracted services. *See id.* at 450, 432 P.2d at 462 (observing that payments by the State to the Salvation Army represented "relief expenditures made by the Salvation Army"). In fact, they are designed in such a way that the State does not purchase anything; rather it is the parent or the guardian who exercises sole discretion to contract with the qualified school. *See* A.R.S. §§ 15–817.01(A), 15–817.05, 15–891.03(F), 15–891.04(F). Moreover, as *Jordan* noted, when "the state is paying less than the actual cost of food, lodging, clothing, transportation, cash assistance, laundry and cleaning given to the destitute in *emergency situations* and *paying nothing for administration,* there is not an unconstitutional aiding of the conduit through which such things are made available." 102 Ariz. at 456, 432 P.2d at 468 (emphasis added). The voucher programs do not have comparable limitations.

F

¶ 26 The Aid Clause flatly prohibits "appropriation of public money ... in aid of any ... private or sectarian school." Ariz. Const. art. 9, § 10. No one doubts that the clause prohibits a direct appropriation of public funds to such recipients. For all intents and purposes, the voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial; once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school. *See* A.R.S. §§ 15–817.05, 15–891.04(F).

¶ 27 Thus, given the composition of these voucher programs, applying the true beneficiary theory exception would nullify the Aid Clause's clear prohibition against the use of public funds to aid private or sectarian education. *See Cal. Teachers Ass'n v. Riles,* 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953, 960 (1981) (finding that the true beneficiary doctrine would justify any type of aid to sectarian schools because "practically every proper expenditure for school purposes aids the child") (internal citation omitted); *Gaffney v. State Dep't of Educ.,* 192 Neb. 358, 220 N.W.2d 550, 556 (1974) (examining a similarly worded "aid" clause and holding that application of the true beneficiary theory "would lead to total circumvention of the principles of our [state] Constitution"); *cf. Hartness v. Patterson,* 255 S.C. 503, 179 S.E.2d 907, 909 (1971) (rejecting argument that tuition grants "do not constitute aid to the participating schools" and noting that "[although] tuition grant[s] aid[ ] the student, [they are] also of material aid to the institution to which it is paid").

¶ 28 In sum, the language and purpose of the Aid Clause do not permit the appropriations these voucher programs provide; to rule otherwise would allow appropriations that would amount to "aid of ... private or sectarian school[s]," Ariz. Const. art. 9, § 10, and render the clause a nullity. [3]

****1185 *84 G**

¶ 29 The voucher programs appear to be a well-intentioned effort to assist two distinct student populations with special needs. But we are bound by our constitution. There may well be ways of providing aid to these student populations without violating the constitution. But, absent a constitutional amendment, because the Aid Clause does not permit appropriations of public money to private and sectarian schools, the voucher programs violate Article 9, Section 10 of the Arizona Constitution. [4]

III

¶ 30 Cain requests attorneys' fees under A.R.S. § 35–213 (2000). Under this statute, taxpayers are entitled to bring an action on behalf of the state if (1) they request that the Attorney General bring the action on the citizens' behalf and wait sixty days to determine whether the Attorney General will heed the request, (2) they are taxpayers in the State of Arizona, and (3) they execute a bond payable to the defendant in the action and prosecute the action with "diligence and finality." *Id.* If the taxpayer prevails in the action "the court shall allow him costs and reasonable attorney's fees, not to exceed forty per cent of the amount recovered or saved to the state, as the case may be." *Id.* § 35–213(C).

¶ 31 In this case, Cain and the other plaintiffs satisfied all statutory requisites. Once this matter is final, they must be reimbursed for their expenses and reasonable attorneys' fees not to exceed forty per cent of the amount saved by the State by way of this action. *See id.*

IV

¶ 32 For the foregoing reasons, we reverse the judgment of the superior court and vacate the court of appeals' opinion. We remand to the superior court for further proceedings consistent with this opinion. [5]

CONCURRING: REBECCA WHITE BERCH, Vice Chief Justice, ANDREW D. HURWITZ and W. SCOTT BALES, Justices and ANN A. SCOTT TIMMER, Chief Judge. *

All Citations

220 Ariz. 77, 202 P.3d 1178, 242 Ed. Law Rep. 435

Footnotes

1 The portion of this statute permitting disabled students the option of attending a public school of their choice is not at issue in this case.

2 A "grant school is not required to accept the grant as full payment for the educational and related services that [it] provides to that qualifying pupil and may charge the ... pupil an additional amount representing the balance of the tuition and fees that remains payable after crediting the ... pupil with the amount of the grant." A.R.S. § 15–817.03(B).

3 With respect to the Displaced Pupils Choice Grants Program, the Legislature stated that "[a] grant ... constitutes a grant of aid to a qualifying pupil through the pupil's respective custodian and not to the grant school." A.R.S. § 15–817.01(B). We are not bound by such statements; it is our obligation to decide if legislation violates the constitution. *See Chevron Chem. Co. v. Superior Court,* 131 Ariz. 431, 440, 641 P.2d 1275, 1284 (1982) (citing *Ogden v. Blackledge,* 6 U.S. (2 Cranch) 272, 277, 2 L.Ed. 276 (1804)). The Legislature made no such statement as to the Arizona Scholarships for Pupils with Disabilities Program.

4 Because we conclude that these programs violate the Aid Clause, we need not address Cain's cross-petition for review challenging the court of appeals' conclusion that these programs did not violate Article 2, Section 12.

5 On June 27, 2008, we granted the intervenors' "Motion for Order Preserving Status Quo" to permit the Superintendent of Public Instruction to continue to fund the voucher programs as to children who participated in the programs during the 2007–2008 school year and who applied to participate in the programs for 2008–2009. This opinion does not affect that order.

* Chief Justice Ruth V. McGregor has recused herself from this case. Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable Ann A. Scott Timmer, Chief Judge of the Arizona Court of Appeals, Division One, was designated to sit in this matter.

166 Wis.2d 501
Supreme Court of Wisconsin.

Lonzetta DAVIS, in her own behalf and as natural guardian of her daughter, Sabrina Davis; Velma Y. Frier, in her own behalf and as natural guardian of her daughter, Shavonne Frier; Janet Grice, in her own behalf and as natural guardian of her son, Melvin Grice; Doris Pinkney, in her own behalf and as natural guardian of her daughter, Antionette Roberson; and Thais M. Jackson, in her own behalf and as natural guardian of her daughter, Tamika Carr; Bruce–Guadalupe Community School; Harambee Community School; Highland Community School; Juanita Virgil Academy; Urban Day School; and Woodlands School, Plaintiffs–Respondents–Petitioners,

v.

Herbert J. GROVER, Superintendent of Public Instruction of the State of Wisconsin, Defendant–Cross–Claimant–Defendant– Respondent –Petitioner.

Felmers O. CHANEY, Richard Collins, Mary Ann Braithwaite, Lauri Wynn, Linda Oakes, George Williams, Melanie Moore, Donald A. Feilbach, Wisconsin Association of School District Administrators, Inc., Wisconsin Education Association Council, National Association for the Advancement of Colored People, Milwaukee Branch, Association of Wisconsin School Administrators, Milwaukee Teachers Education Association, Wisconsin Congress of Parents & Teachers, Inc., Milwaukee Administrator s & Supervisors Council, Inc., and Wisconsin Federation of Teachers, Intervenors – Petitioners – Appellants –Cross – Petitioners, †

v.

Charles P. SMITH, State Treasurer and Board of School Directors of the City of Milwaukee, Cross–Claimant–Defendant–Respondent.

No. 90–1807.
|
Argued Oct. 4, 1991.
|
Decided March 3, 1992.

Synopsis

Action was brought to compel State Superintendent of Public Instruction to comply with statute creating Milwaukee Parental Choice Program of public funding to permit children from low-income families to attend nonsectarian private schools. School administration organizations and civil rights organization intervened to challenge constitutionality of statute. The Circuit Court, Dane County, Susan R. Steingass, J., upheld statute. Defendants appealed. The Court of Appeals, 159 Wis.2d 150, 464 N.W.2d 220, reversed. Review was granted. The Supreme Court, Callow, J., held that: (1) Program does not violate constitutional prohibition against private or local bill embracing more than one subject expressed in title; (2) Program complies with uniformity clause requiring legislature to provide for establishment of district schools as nearly uniform as practicable; and (3) Program complies with public purpose doctrine.

Decision of Court of Appeals reversed.

Ceci, J., concurred and filed opinion.

Heffernan, C.J., dissented and filed opinion.

Shirley S. Abrahamson, J., dissented and filed opinion.

Bablitch, J., dissented and filed opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****461 *510** For the plaintiffs-respondents-petitioners there were briefs by Clint Bolick, Allyson Tucker, Jerald L. Hill, Mark Bredemeier and Landmark Legal Foundation Center for Civil Rights, Washington, D.C. and oral argument by Mr. Bolick.

****462** For the defendant-cross-claimant-defendant-respondent-petitioner the cause was argued by Warren D. Weinstein, Asst. Atty. Gen., with whom on the briefs was, James E. Doyle, Atty. Gen.

For the intervenors-petitioners-appellants-cross petitioners there were briefs by Robert H. Friebert, Charles D. Clausen, David S. Branch, Caren B. Goldberg, Peter K. Rofes and Friebert, Finerty & St. John, S.C., Milwaukee and Bruce Meredith and Wisconsin Educ. Ass'n Council, of counsel, Madison and oral argument by Robert H. Friebert, Mr. Clausen, Mr. Rofes and Mr. Meredith.

Amicus curiae brief was filed by Michael J. Julka, Jill Weber Dean and Lathrop & Clark, Madison for the Wisconsin Ass'n of School Boards, Inc.

***511** Amicus curiae brief was filed by William H. Lynch, Madison and Gretchen Miller, Milwaukee for The American Civil Liberties Union of Wisconsin Foundation, Inc.

Amicus curiae brief was filed by Julie K. Underwood, Madison for Herbert J. Grover and oral argument by Ms. Underwood.

Amicus curiae brief was filed by Steven P. Schneider, Milwaukee and William P. Dixon and Davis, Miner, Barnhill & Galland, of counsel, Madison and oral argument by Senator Gary R. George.

Amicus curiae brief was filed by Eva M. Soeka, Milwaukee and Robert A. Destro and Columbus School of Law, Washington, D.C. and oral argument by James Klauser.

Interested party brief was filed by Patrick B. McDonnell, Sp. Deputy City Atty., and Grant F. Langley, City Atty., Milwaukee.

Opinion

CALLOW, Justice.

This is a review under sec. (Rule) 809.62, Stats., of a decision of the court of appeals, *Davis v. Grover,* 159 Wis.2d 150, 464 N.W.2d 220 (Ct.App.1990). The court of appeals reversed the decision of the Dane county circuit court, Judge Susan R. Steingass, and found that the Milwaukee Parental Choice Program (MPCP) violated art. IV, sec. 18 of the Wisconsin Constitution. [1] The MPCP is a publicly funded program that permits selected children from low-income families to attend nonsectarian private schools at no cost to the student.

***512** The scope of our inquiry is strictly confined to the specific issues raised on this review. We pass no judgment on the wisdom or desirability of the MPCP. The propriety of the program is most appropriately addressed by the legislature, not the judiciary.

Three issues are raised in this review. The first issue concerns whether the MPCP is a private or local bill which was enacted in violation of the procedural requirements mandated by art. IV, sec. 18 of the Wisconsin Constitution. We hold that the MPCP is not a private or local bill and, thus, is not subject to the procedural requirements of Wis. Const. art. IV, sec. 18.

The program was and remains politically controversial. As such, it was greatly debated in legislative committee public hearings and by the entire legislature. It is evident the program was not smuggled through the legislature. The purpose of this experimental legislation is to determine if it is possible to improve, through parental choice, the quality of education in Wisconsin for children of low-income families. [2] Logically, the best location ***513** to test ****463** the program is in a city such as Milwaukee where the socio-economic disparities and educational problems are particularly great and the potential private educational choices are most abundant.

The second issue concerns whether the MPCP violates art. X, sec. 3 of the Wisconsin Constitution, which requires the establishment of uniform school districts. We hold that the MPCP does not violate art. X, sec. 3 of the Wisconsin Constitution because the participating private schools do not constitute "district schools," even though they receive some public monies to educate students participating in the program.

The third issue concerns whether the MPCP violates the public purpose doctrine which requires that public funds be spent only for public purposes. We hold that the MPCP does not violate the public purpose doctrine. We give great weight to legislative determinations of public policy. Sufficient safeguards are included in the program to ensure that participating private schools are under adequate governmental supervision reasonably necessary under the circumstances to attain the public purpose of improving educational quality. Further, the cost of education and the funds available for education are dependent upon the taxpayers' ability to fund an intensive public educational program. The amount of money allocated under this program to participating private schools for the education of a participating student is less than 40 percent of the full cost of educating that same student in the Milwaukee Public School (MPS) system. The total amount of public funds appropriated to fund this experimental program is inconsequential when compared to the total expenditures for public education ***514** allocated to schools throughout the state of Wisconsin.

The relevant facts follow. The MPCP, as enacted into law, provides that a kindergarten through twelfth grade (K–12) student who resides in a city of the first class may attend, at no charge to the student, any nonsectarian private school located in the city if the following criteria are met:

(1) the family income does not exceed 175% of the poverty level;

(2) the pupil was enrolled in a public school in the city, was attending a private school under this program, or was not enrolled in school the previous year;

(3) the private school notifies the State Superintendent of its intent to participate in the program by June 30 of the previous school year;

(4) the private school complies with 42 U.S.C. sec. 2000d; [3] and

(5) the private school meets all health and safety laws or codes that apply to public schools.

Section 119.23(2)(a), Stats. Additionally, private schools participating in the program must meet defined performance criteria [4] and submit to financial and performance ***515** audits by the state. [5] For each participating student, approximately $2,500 in state educational funding is diverted from the Milwaukee Public Schools (MPS) to the participating private school. The legislature placed significant limitations on the scope of the program. The ****464** program limits the number of students that may participate in the program to no more than 1 percent of the school district's membership. Section 119.23(2)(b) 1, Stats. This limitation makes the program available to approximately 1,000 Milwaukee students. The record reflects that participating students are selected on a random basis with preference afforded to students continuing in the program and their siblings. This narrowly defined and carefully monitored program provides that no private school may enroll more than 49 percent of its total enrollment under this program. Section 119.23(2)(b)2.

Since the goal of the MPCP legislation is to gather information to assist in identifying educational problems and solutions, a number of reporting and supervisory functions on the part of the State Superintendent as well as the Legislative Audit Bureau are statutorily required by the program. The State Superintendent must submit a report to each house of the legislature concerning achievement, attendance, discipline, and parental ***516** involvement under the program as compared to the public school system in general. Section 119.23(5)(d), Stats.

The State Superintendent is required to monitor the performance of students participating in the program and is given specific authority to prohibit participation in the program the following school year by any private school which does not meet the performance criteria. Section 119.23(7)(b), Stats.

The State Superintendent is also authorized to conduct one or more financial or performance evaluation audits of the program. Section 119.23(9)(a), Stats. The Legislative Audit Bureau is further required to perform a financial and performance evaluation audit on the program. Section 119.23(9)(b). Clearly, the legislature included very particular and detailed reporting and supervisory requirements to test a new and innovative method of delivering education services to students of low-income families.

Governor Tommy Thompson first proposed a parental choice program in early 1988. The proposal was analyzed by the Legislative Fiscal Bureau, but was never considered by the legislature. In 1989, the governor again proposed a parental choice program, at which time the Legislature requested the Legislative Council to study the proposal.

In October 1989, the bill that led to the enactment of the Milwaukee Parental Choice Program was introduced by a bipartisan coalition of 47 members of the assembly and nine senate co-sponsors. The bill was referred to the Assembly Committee on Urban Education, which held a public hearing on the proposal. A broad array of persons and organizations, encompassing many of the interests represented in this case, appeared at the public hearing. Based on committee reports and the statements made at the public hearing, the committee ***517** recommended an amended version of the bill to the assembly. After considering a number of amendments to the bill, the assembly passed the bill.

The program, as passed by the assembly, was then considered by the senate and referred to the Committee on Educational Financing, Higher Education and Tourism. Subsequently, it was added to the senate budget adjustment bill, a multi-subject bill addressing numerous unrelated topics. The language of this component of the bill was preceded by the title, “Milwaukee Parental Choice Program.” Following the addition of a fiscal amendment relating to the program, the entire budget bill was adopted by the senate. The assembly passed the budget bill without again considering the parental choice program.

The governor signed the bill, but vetoed a sunset provision included in the program which would have limited the effective period of the program to a five-year time span. Thereafter, the MPCP was enacted into law under ch. 119,

Stats., the chapter applicable to the school system in cities of the first class.

Lonzetta Davis, et al. (Davis), representing families of participating students and private schools participating in the program, initiated this action challenging a number of regulatory actions taken by State Superintendent of Public Instruction ****465** Herbert Grover (Superintendent Grover).[6] Davis believed Superintendent Grover's actions were designed to frustrate the MPCP and exceeded his authority as State Superintendent.

Felmers O. Chaney, et al. (Chaney), representing various school administration organizations and the ***518** National Association for the Advancement of Colored People, intervened, challenging the MPCP on state constitutional grounds; namely, that it violates Wis. Const. art. IV, sec. 18 (private/local legislation clause), Wis. Const. art. X, sec. 3 (uniform district schools clause), and the public purpose doctrine.

The State of Wisconsin, acting on its own behalf, argues that the MPCP is constitutional in all respects.

The circuit court found the MPCP constitutional and that Superintendent Grover's actions exceeded his regulatory authority. Chaney filed an appeal on the constitutional issues with the court of appeals. Superintendent Grover did not appeal the circuit court's decision on the regulatory issues.

The court of appeals reversed the decision of the circuit court and held that the MPCP violated the private/local legislation clause of Wis. Const. art. IV, sec. 18. It did not reach the uniformity clause and public purpose doctrine issues.

No injunction was ever issued against the Milwaukee Parental Choice Program, which continues to operate unaffected by the pending litigation.

The issues presented in this case involve questions of law. On review, this court decides questions of law independently without deference to the decisions of the trial court and court of appeals. *Ball v. District No. 4, Area Bd.,* 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984). We now address each of these issues separately.

I. THE PRIVATE/LOCAL LEGISLATION CLAUSE

Article IV, sec. 18 of the Wisconsin Constitution states:

> ***519** No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

It was adopted as part of the original Wisconsin Constitution of 1848 and has remained unchanged. In previous cases, we have explained that art. IV, sec. 18 has three underlying purposes:

> 1) [T]o encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Milwaukee Brewers v. Department of Health & Social Services, 130 Wis.2d 79, 107–08, 387 N.W.2d 254 (1986). The requirements of art. IV, sec. 18 are prescribed to ensure accountability of the legislature to the public and to "guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature." *Milwaukee County v. Isenring,* 109 Wis. 9, 23, 85 N.W. 131 (1901). In *Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 896, 426 N.W.2d 591 (1988), we further examined legislative accountability. Section 18 also recognizes the need to avoid "internal logrolling"[7] on the part of the legislature. Multi-subject bills by their nature are subject to a greater susceptibility of smuggling and logrolling. They intermingle a variety ***520** of unrelated legislation which singly may not have the support of the majority and, thus, tend to reduce accountability to the public. Nevertheless, ****466** the fact that a multi-subject bill contains a program such as the MPCP does not necessarily condemn the process in which the program was enacted as unconstitutional.

The determination of whether a bill violates Wis. Const. art. IV, sec. 18 involves a two-fold analysis. We must first address whether the process in which the bill was enacted deserves a presumption of constitutionality. Second, we must address whether the bill is private or local. If the bill is found to be private or local, then the requirements of art. IV, sec. 18 apply; namely, that the legislation must be a single subject bill and the title of the bill must clearly reflect the subject.

The general rule in Wisconsin is that a statute is presumed to be constitutional and "the burden of establishing the unconstitutionality of a statute is on the person attacking it, who must overcome the strong presumption in favor of its validity." *ABC Auto Sales v. Marcus,* 255 Wis. 325, 330, 38 N.W.2d 708 (1949). This presumption of constitutionality was recognized in the art. IV, sec. 18 context in *Soo Line R. Co. v. Transportation Dep't,* 101 Wis.2d 64, 76, 303 N.W.2d 626 (1981). However, we explained in *Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 896, 912–13, 426 N.W.2d 591 (1988), that a distinction exists between assessing the constitutionality of the substance of legislation and assessing the constitutionality of the process in which the legislation was enacted. In *Brookfield,* we stated:

> In the sec. 18 context, the point of the rules listed in the text is to determine whether some sham or artifice is being perpetrated by smuggling through a local ***521** bill in the sheep's clothing of a statewide interest or a general bill....
>
> By contrast to sec. 18, under equal protection the legislature is not being accused of violating a constitutionally mandated procedural rule. Therefore, because the legislature is now presumed to have "intelligently participate[d] in considering such bill...." (*Isenring,* 109 Wis. at 23 [85 N.W. 131]) this court is not seeking to determine whether a sham has been perpetrated. Consequently, this court has repeatedly stated that a law attacked on equal protection grounds is entitled to a presumption of constitutionality, *see, e.g., Laufenberg v. Cosmetology Examining Board,* 87 Wis.2d 175, 181, 274 N.W.2d 618 (1979), which presumption attends the use of the rational basis test.
>
> Thus, although both sec. 18 and equal protection seek to determine whether one group is being accorded favored status, the difference between the sec. 18 and the equal protection contexts is this: In sec. 18 cases, because the legislature is alleged to have violated a law of constitutional stature which mandates the form in which bills must pass, the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement....
>
> By contrast, in equal protection, as stated above, the court will presume constitutionality ... given the quite different purposes of sec. 18 and equal protection.

Brookfield, 144 Wis.2d at 918–19 n. 6, 426 N.W.2d 591. In *Brookfield,* there was no indication that the legislature had adequately considered or discussed the legislation in question that was passed as part of the budget bill. The record in the present case is replete with evidence that the MPCP was introduced by a significant number of ***522** legislators and was debated extensively by the legislature and its various committees and agencies. The program was proposed in several consecutive years. The Assembly Committee on Urban Education held a public hearing on the proposed program. The program was passed as a separate, single subject bill by the assembly. Unfortunately, the senate included it as part of the multi-subject budget bill, thereby creating the problem we address here.

We are aware that time constraints sometimes force legislators to pass a variety of worthy legislation in one multi-subject package. However, multi-subject bills reduce accountability to the public and are very susceptible to the charge of violating the procedural requirements of ****467** Wis. Const. art. IV, sec. 18. The legislature could avoid litigatory challenges of this nature by using separate, single subject bills for legislation that is not plainly of statewide concern.

However, we find no evidence in this case that suggests the program was smuggled or logrolled through the legislature without the benefit of deliberate legislative consideration.[8] As mentioned earlier, the MPCP legislation ***523** was passed by the assembly as a single subject bill. Even though the senate included the MPCP as part of the budget bill, the budget bill was debated by the senate and the senate specifically amended the MPCP prior to enactment of the budget bill. Clearly, the legislature "intelligently participate[d] in considering" this program. *Id.* Therefore, under the circumstances of this case, it is proper for us to apply a presumption of constitutionality to the process in which the MPCP was enacted into law.[9] Applying a presumption of constitutionality in this case was expressly authorized by the *Brookfield* court where we stated:

***524** [U]nder sec. 18, full scrutiny of the legislature, rather than the substituted process of smuggling through is the best determinant of need.

> Just as we seek not to err on the one hand by employing an inappropriate standard of deference through presuming constitutionality where such a presumption would render sec. 18 meaningless, *so equally we seek not to err on the other hand by substituting our judgment for that of an attentive legislature....*
>
> *If such legislation is passed after full consideration ... that will be the proper time to engage in the presumption of constitutionality....*

Brookfield, 144 Wis.2d at 918–19 n. 6, 426 N.W.2d 591 (emphasis added). The burden of overcoming this presumption of constitutionality falls upon Chaney, et al., the parties attacking the statute.

Even though we conclude that there is no indication that the MPCP was smuggled or logrolled through the legislature without due consideration and we apply a presumption of constitutionality to such process, our analysis does not end here. Article IV, sec. 18 specifies certain procedural requirements that must be satisfied if legislation is found to be private or local. The previous discussion concerning legislative consideration is only relevant to the presumption of constitutionality portion of the analysis. It has no effect on our determination of whether the MPCP is a private or local bill. We now turn to the determination of whether the MPCP is private or local legislation.

This court has developed three prongs of analysis for cases involving a challenge to ****468** legislation as being private or local. The first prong of analysis involves legislation that is specific on its face as to particular people, places or things that allegedly runs afoul of art. IV, sec. 18. *See* ***525** *Milwaukee County v. Isenring,* 109 Wis. 9, 85 N.W. 131 (1901); *Monka v. State Conservation Comm.,* 202 Wis. 39, 231 N.W. 273 (1930); *Soo Line R. Co. v. Transportation Dep't,* 101 Wis.2d 64, 303 N.W.2d 626 (1981); and *Milwaukee Brewers v. DH & SS,* 130 Wis.2d 79, 387 N.W.2d 254 (1986). These cases explain that "such legislation is private or local within the meaning of sec. 18 and therefore prohibited unless the general subject matter of the provision relates to a state responsibility of statewide dimension and its enactment will have a direct and immediate effect on a specific statewide concern or interest." *Brookfield,* 144 Wis.2d at 911, 426 N.W.2d 591.

The second prong of analysis involves legislation that is not specific on its face, but which involves classifications and allegedly runs afoul of the specific prohibitions of art. IV, sec. 31, which was adopted as an aid in a sec. 18 analysis. Section 31 explains specific areas in which the legislature is prohibited from enacting any special or private laws. The resolution of these cases depends on whether the legislation "falls into the category of matters upon which the legislature is competent to legislate pursuant to sec. 32 notwithstanding the prohibition of sec. 31." *Id.*

The third, and final, prong of analysis involves legislation that is not specific on its face, involves classifications, does not violate the provisions of sec. 31, but allegedly runs afoul of sec. 18. *See Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 896, 426 N.W.2d 591 (1988). A statute creating a closed classification can be the same as legislation that is specific on its face to a certain locality. In *Brookfield,* we determined that such cases must be analyzed consistent with the classification concepts developed in cases under art. IV, secs. 31 and 32. *Id.* at 912, 426 N.W.2d 591.

***526** Five primary elements comprise the *Brookfield* test. These elements are as follows:

> First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.
>
> Second, the classification adopted must be germane to the purpose of the law.
>
> Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.
>
> Fourth, when a law applies to a class, it must apply equally to all members of the class.
>
> ... [F]ifth, the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Brookfield, 144 Wis.2d at 907–09, 426 N.W.2d 591. While these tests are similar to those used in the equal protection context, they are necessarily differently applied because sec. 18 and equal protection address quite different concerns.

The rationale for using the five-factor test was aptly explained in *Brookfield,* 144 Wis.2d at 912–14 n. 5, 426 N.W.2d 591. We shall not endeavor a reexplanation of that rationale here. We shall state only that sec. 18 addresses the form in which the legislation is enacted and not the substance of the legislation. In the classification legislation context, it is necessary to use the five-factor test to determine exactly what the substance of the legislation is in order to determine whether the procedural requirements of Wis. Const. art. IV, sec. 18 apply. Thus, although the ***527** five-factor test "is used in both a sec. 18 context and an equal protection context, the tests are necessarily differently applied, given the quite different purposes of sec. 18 and equal protection." *Id.* at 913 n. 5, 426 N.W.2d 591.

Notwithstanding the fact that the title of sec. 119.23, Stats., expressly mentions Milwaukee, the text of the MPCP as well as its placement in the statutes suggests that it involves a classification and should be analyzed under *Brookfield* rather than *Milwaukee* ****469** *Brewers*. The MPCP applies to any school district in a city of the first class. It is not limited to Milwaukee because Madison presently meets the population requirement and could become a city of the first class by a simple declaration. While the title of legislation expressly refers to Milwaukee, titles of statutes are not part of the statute itself. [10] We find no reason why this rule should not encompass legislative bills as well. Therefore, the MPCP is similar to the statute in *Brookfield* in that it involves a classification and not expressly a specific person, place or thing. Thus, we are required to apply the *Brookfield* five-factor test to determine whether the MPCP is private or local legislation. [11]

The first element of the *Brookfield* test requires that "the classification employed by the legislature must be ***528** based on substantial distinctions which make one class really different from another." The MPCP does not create a new classification, but involves a classification that has consistently been recognized and accepted by this court: namely, cities of the first class. "Cities of the first class" is defined under sec. 62.05, Stats., as cities with a population of 150,000 or more. Presently, Milwaukee is the only city to declare itself a city of the first class in the state of Wisconsin.

In *Brookfield,* we acknowledged that the mere size of a particular city does not necessarily justify treating that city differently than any other city in the state. *Brookfield,* 144 Wis.2d at 916, 426 N.W.2d 591. However, cities of the first class, by virtue of their large population and concentration of poverty, are substantially distinct from other cities. In *Lamasco Realty Co. v. Milwaukee,* 242 Wis. 357, 377, 8 N.W.2d 372 (1943), where the challenged law pertained to cities of the first class, we noted that "the requirements of a metropolitan city like Milwaukee as against the smaller municipal corporations of the state are so obvious that any other result would be opposed to the public welfare." In *State ex rel. Nyberg v. Bd. of School Directors of the City of Milwaukee,* 190 Wis. 570, 577, 209 N.W. 683 (1926), this court upheld a statute regarding first class city school districts and stated that "there is a substantial basis for classifying for school purposes the large communities embraced in cities of the first class as established under our law and the smaller communities of the state."

School districts located in areas with monumentally oppressive poverty problems as found in first class cities have particular educational problems as well. These problems were recognized also in *Kukor v. Grover,* 148 Wis.2d 469, 482–83, 436 N.W.2d 568 (1989). As demonstrated ***529** by dropout rates, welfare statistics, and population data, the Milwaukee Public School District has significantly greater education and poverty problems than any other school district in the state.

Various statistical analyses, while not entirely consistent, dramatically show the need for legislative attention. The dropout rate for the Milwaukee Public Schools is higher than any other area in the state. For example, in the 1988–89 school year, the dropout rate for students in grades 9–12 in the MPS reached 14.4 percent. [12] In contrast, the public school dropout rate for the state at large during the 1988–89 school year was 3.11 percent, with no county, other than Milwaukee County, having a dropout rate of greater than 4.3 percent. [13]

During the 1988–89 fiscal year, Wisconsin spent $2.4 billion, or $499.57 per capita, ****470** on public welfare. Wisconsin ranked sixth among all states for welfare-related expenditures. [14] In 1988, over 50 percent of the general public assistance in Wisconsin was spent in Milwaukee County alone and the city of Milwaukee comprises about two-thirds of the population of Milwaukee County. Furthermore, of the $485 million spent in Wisconsin in 1988 for Aid to Families with Dependent Children, $213 million was allocated to Milwaukee County. [15]

The statistical data clearly illustrates that the socioeconomic disparities and the educational problems are ***530** greater in the large urban area of Milwaukee than any other part of

Wisconsin. By definition, first class cities encompass large urban cities in Wisconsin, such as the city of Milwaukee. Therefore, we find that the classification of first class cities is based on substantial distinctions which make the class really different from all others. The first element of the *Brookfield* test is satisfied.

The second element of the *Brookfield* test requires that "the classification adopted must be germane to the purpose of the law." Both the trial court and the court of appeals concluded that the only reasonable inference to be drawn from the MPCP was that it was an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children. *Davis,* 159 Wis.2d at 164–65, 464 N.W.2d 220. We agree with this conclusion.

Improving the quality of education in Wisconsin is, without a doubt, a matter of statewide importance. It is apparent that on a national scale the educational needs of many students are not being met by the present educational structure and options. Average School Aptitude Test (SAT) scores fell from 978 in 1960 to just 870 in 1980. [16] Nearly 25 percent of public high school students drop out before graduation and the dropout rates for minorities often reach 50 percent. These are some of the highest dropout rates in the western world. [17]

The educational problems that the nation is experiencing are also evident in the Milwaukee Public Schools, where 55–60 percent of MPS students do not graduate from high school or do not graduate in a six-year period of time. A recent report by the Greater Milwaukee ***531** Education Trust states that only 40–45 percent of the students who start high school in the MPS graduate in four, five or six years. This completion rate is down from 57 percent in 1984. Of those who do graduate from high school, 36 percent graduate with a "D" average. [18] Students of MPS, in general, score below the national average on the basic skills tests, and minority students score dramatically below the average. The grade point average (GPA) on a scale of 4.0 for MPS students in general is 1.60, whereas the GPA for African–American students in the MPS is just 1.31. [19]

The consequences of school dropouts and inadequate education are shocking. High school dropouts comprise 75 percent of the prison population and 80 percent of the families receiving Aid for Families with Dependent Children. Only 55 percent of the male dropouts under age thirty have jobs and only 20 percent have full-time jobs. [20]

Recently, researchers have attempted to discover the reasons underlying inadequate public instruction. A Brookings Institution study examined data from more than 60,000 students in 1,000 public and private ****471** schools to test the relationship between 220 different variables. The study concluded that the three most important factors that affected student achievement were student ability, school organization, and family background. Chubb & Moe, *Politics, Markets & America's Schools,* 140 (1990). The factor which is most amenable to legislative efforts appears to be school organization. In this ***532** respect, the researchers found that "by itself, autonomy from bureaucracy is capable of making the difference between effective and ineffective organizations—organizations that would differ by a year in their contributions to student achievement." [21] *Id.* at 181. We find especially interesting the study's conclusion that the educational credentials of teachers, teachers' scores on competency tests, how teachers are paid and other formal qualities do not make a significant difference on student achievement. *Id.* at 186.

In response to the conclusions reached by the Brookings Institution study and others, the MPCP was drafted to include two main features to help fulfill the ***533** statewide purpose of improving education. The first feature empowers selected low-income parents to choose the educational opportunities that they deem best for their children. Concerned parents have the greatest incentive to see that their children receive the best education possible. Parental choice allows parents to send their children to nonsectarian private schools which, except for the statutory responsibilities of the State Superintendent, are autonomously operated free from the bureaucracy of the public school system. In so providing, the program will engender educational success competition between the public and private educational sectors for students of low-income families.

However, the program is not an abandonment of the public school system. Rather, the MPCP would affect at most only 1 percent of the students in the MPS, giving the program a very small window of opportunity to test the effectiveness of an alternative to the MPS.

Furthermore, the MPCP contains a second feature which not only should benefit the MPS but also the state at large. The second main feature of the MPCP creates an extensive data compilation and reporting process which the state can use to measure the effects of choice and competition in education.

The experimental nature of the program is evident from these detailed compilation and reporting requirements.

The experimental nature of the program can also be inferred from the fact that the program, as originally drafted, would have been effective for only a five-year period of time. However, in a partial veto, the governor removed the five-year time limit. It is unclear whether the governor felt that the time limitation was too short or too long. It is apparent, though, that the governor and the legislature directed the gathering of extensive information ***534** for the purpose of reacting to this experimental program.

The success of the program is dependent upon the participation of numerous and diverse nonsectarian private schools such that the fate of the program does not rest on the operations of one or a few schools. ****472** The record indicates that at least nine private schools in Milwaukee filed an intent to participate in the MPCP when it was first implemented. We assume no other city in Wisconsin offers as many private schools as Milwaukee. The significant availability of private schools is so necessary to a reliable sampling of alternative educational methods that it distinguishes a first class city such as Milwaukee from all other communities.[22] This experiment tests a theory of education. The possible failure in one or more private schools may be the fault of the school rather than the program's concept. Therefore, locating the program in a first class city such as Milwaukee where numerous and diverse private schools exist will enable the legislature to determine which, if any, of the private schools ***535** were most effective and why they are particularly successful in their mission of education.

We conclude that the classification of first class cities is germane to the purpose of the law. Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socio-economic and educational disparities are greatest and the private educational choices are most abundant. The experimental nature of the MPCP places this case in direct contrast to *Brookfield* where we found no relationship between Milwaukee county's size and the challenged financing scheme. *See Brookfield,* 144 Wis.2d at 920, 426 N.W.2d 591. Therefore, the second element of the *Brookfield* test is satisfied.

The third element of the *Brookfield* test requires that the classification not be based only on existing circumstances. Rather, "the classification must be subject to being open, such that other cities could join the class." Granted, the title of the statute is "Milwaukee Parental Choice Program." However, the statute is located in ch. 119, Stats., which addresses first class city schools and is applicable, by virtue of sec. 119.01, Stats., to cities of the first class. There are two requirements for a city to be of the first class. The city must have a population of at least 150,000 and the city's mayor must make an official proclamation that the city is of the first class. *See* sec. 62.05, Stats.

Presently, Milwaukee, with a population of 628,088, is the only city in Wisconsin which is officially a first class city. However, it is not the only city in Wisconsin which qualifies for such status, nor is the classification ***536** limited only to Milwaukee. Madison is large enough to qualify as a city of the first class. Madison has a population of 191,262. If the mayor of Madison officially declares Madison to be a first class city, it will be subject to all legislation affecting cities of the first class, including the parental choice program. Therefore, we conclude that the classification is subject to being open and is not based only on existing circumstances. The third element of the *Brookfield* test is satisfied.

The fourth element of the *Brookfield* test requires that the law be applied equally to all members of the class. As mentioned earlier, there is only one member of the class at the present time. Milwaukee is the only official first class city. However, if Madison or any other qualifying city were to become an official first class city, then there appears nothing to indicate that the benefits and obligations of the MPCP would not equally apply to these additional members. Therefore, we find that the law ****473** would apply equally to all cities of the first class. The fourth element of the *Brookfield* test is also satisfied.

The fifth, and final, element of the *Brookfield* test which is applicable to the present case requires that "the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." The satisfaction of this element has already been addressed. *Supra* at 469–470. The immense disparity in the socio-economic conditions and educational problems in the MPS as well as the greatest potential private educational choices in the urban area of Milwaukee create the ideal testing ground for experimental legislation such as the MPCP. ***537**

Therefore, we find that the MPCP also satisfies the fifth element of the *Brookfield* test.

The MPCP satisfies all elements of the *Brookfield* classification test. Therefore, we hold that the MPCP is not a private or local bill within the meaning of Wis. Const. art. IV, sec. 18 and, thus, not subject to its procedural requirements. We emphasize that the MPCP is not a private or local bill because it satisfies the applicable tests, not because of the amount of legislative consideration afforded to it.

II. THE UNIFORMITY CLAUSE

Wisconsin Constitution art. X, sec. 3 states:

> 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.

This court has stated on several occasions that the requirement of uniformity "applies to the districts after they are formed, —to the 'character of instruction' given,—rather than to the means by which they are established and their boundaries fixed." *Kukor v. Grover,* 148 Wis.2d 469, 486, 436 N.W.2d 568 (1989) (citing *State ex rel. Zilisch v. Auer,* 197 Wis. 284, 289–90, 223 N.W. 123 (1928)). Furthermore, the *Kukor* court concluded that "character of instruction" refers to that of "district schools" and is legislatively regulated by sec. 121.02, Stats.

Chaney argues that the MPCP violates the uniformity clause of Wis. Const. art. X, sec. 3. The thrust of Chaney's argument involves two steps: (1) the participating ***538** private schools are "district schools" within the meaning of the uniformity clause; and (2) by offering a "character of instruction" that is different from the one found under the mandate of sec. 121.02, the participating private schools violate the uniformity clause. The key to this argument is whether private schools participating in the MPCP are considered "district schools" for the purposes of the uniformity clause.

In *Comstock v. Jt. School Dist. No. 1,* 65 Wis. 631, 636–37, 27 N.W. 829 (1886), this court held that a statute allowing school districts to determine whether to admit nonresident school children did not violate the uniformity clause. In that case, we declared that "when the legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Id.* at 636–37, 27 N.W. 829. Thereafter, the legislature is free to act as it deems proper.

This sentiment was reiterated in several subsequent cases and most recently in *Kukor,* 148 Wis.2d at 496–97, 436 N.W.2d 568. In *Kukor,* we found that a statutory school finance system did not violate Wis. Const. art. X, sec. 3 because every Wisconsin student has an opportunity to attend a public school with uniform character of instruction.

The MPCP unambiguously refers to nonsectarian private schools. "Private school" is a defined term under sec. 115.001(3r), Stats., and means "an institution with a private educational program that meets all of the criteria under s. 118.165(1) or is determined to be a private school by the state superintendent under s. 118.167." We assume that the legislature was aware of this statutory meaning and intended to use "private school" in the MPCP as a statutory term of art.

****474** Similar to the legislation in *Kukor,* the MPCP in no way deprives any student the opportunity to attend a ***539** public school with a uniform character of education. Even these students participating in the program may withdraw at any time and return to a public school. The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education. The legislature has done so. The MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated.

Therefore, we hold that the private schools participating in the MPCP do not constitute "district schools" for purposes of the uniformity clause. The legislature has fulfilled its constitutional duty to provide for the basic education of our children. Their experimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system.

Nevertheless, the MPS argues that the method which the state has chosen to fund the program indicates that the legislature considered this program part of the basic public education delivery system and, thus, subject to Wis. Const. art. X, sec. 3 requirements of uniformity. As noted earlier, participating private schools receive public monies under the MPCP for the education of participating students. Chaney argues that a school supported by public taxation is a "public school" by definition under sec. 115.01, Stats.

Under this theory, any school that accepted public monies would become a "district school" which is subject ***540** to Wis. Const. art. X, sec. 3. However, this theory flies directly in the face of past decisions by this court. In *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 216, 170 N.W.2d 790 (1969), we held that the appropriation of public funds to a private entity need only be accompanied by such controls as are necessary to fulfill the public purpose required. Depending on the circumstances, these controls do not necessarily have to be the same as those regulating similar public agencies. A more detailed analysis of this area is presented in the following issue.

In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school. We decline the opportunity to adopt such a conclusion here.

III. THE PUBLIC PURPOSE DOCTRINE

Chaney also argues that the public purpose doctrine prohibits the legislature from authorizing the expenditure of public funds for the basic education of students to private schools without adequate supervision and controls. Therefore, Chaney concludes that the MPCP violates the public purpose doctrine because the program lacks adequate supervision and controls.

Although the public purpose doctrine is not an express provision of the Wisconsin Constitution, this court has long held that public expenditures may be made only for public purposes. *Reuter,* 44 Wis.2d at 211, 170 N.W.2d 790. In *Reuter,* we stated, "[w]e need not go into the origin or the validity of the doctrine which commands that public funds can only be used for public purposes. The doctrine is beyond contention." *Id.*

***541** In considering questions of "public purpose," a legislative determination of public purpose should be given great weight because " 'the hierarchy of community values is best determined by the will of the electorate' and that 'legislative decisions are more representative of popular opinion because individuals have greater access to their legislative representatives.' " *State ex rel. Bowman v. Barczak,* 34 Wis.2d 57, 65, 148 N.W.2d 683 (1967) (citations omitted). Without clear evidence of unconstitutionality, "the court cannot further weigh the adequacy of the need or the wisdom of the method" chosen by the legislature to satisfy the public purpose. ****475** *State ex rel. Warren v. Nusbaum,* 59 Wis.2d 391, 414, 208 N.W.2d 780 (1973).

No party disputes that education constitutes a valid public purpose, nor that private schools may be employed to further that purpose. Rather, the parties dispute whether the private schools participating in the MPCP are under proper government control and supervision, as required by *Wisconsin Indus. Sch. for Girls v. Clark Co.,* 103 Wis. 651, 668, 79 N.W. 422 (1899).

Chaney and, particularly, Superintendent Grover contend the controls in the MPCP over participating private schools are woefully inadequate and insist that these schools be subject to the stricter requirements of sec. 121.02, Stats. MPCP advocates, on the other hand, believe the statutory controls applicable to private schools coupled with parental involvement suffice to ensure the public purpose is met. The circuit court agreed with the MPCP advocates' contention, as we do.

The present situation is similar to that faced by this court in *Reuter.* In *Reuter,* we upheld an appropriation of public funds to the Marquette School of Medicine for ***542** the purpose of providing quality medical education. *Reuter,* 44 Wis.2d at 207, 170 N.W.2d 790. To test the propriety of expending public monies to a private institution for public purpose, this court must determine whether the private institution is under reasonable regulations for control and accountability to secure public interests. *Id.* at 215–16, 170 N.W.2d 790. "Only such control and accountability as is reasonably necessary under the circumstances to attach the public purpose is required." *Id.* at 216, 170 N.W.2d 790.

Chaney attempts to distinguish the present situation from *Reuter* in two main ways. First, Chaney argues that private schools participating in the MPCP may do whatever they want with the public money that they receive, whereas the funds

in *Reuter* were earmarked for "medical education, teaching and research." Chaney is facially correct in that no express limitations exist on the use of the funds paid to private schools through the MPCP. However, the private schools must still provide their students with an education. It simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money. Public schools face a similar situation. While the use of certain state aid to school districts is limited under sec. 121.007, Stats., the public schools must continue to provide a basic education to its students regardless of how and to what extent its programs and investments are funded.

Second, Chaney argues that private schools participating in the MPCP have no duty to demonstrate any institutional quality, whereas Marquette University was accredited by an independent national organization as well as federal and state agencies. *See Reuter,* 44 Wis.2d at 217, 170 N.W.2d 790. In effect, Chaney is challenging the quality of ***543** education provided by the private schools participating in the program.

The MPCP specifically allows participating students to attend a "nonsectarian private school." *See* sec. 119.23(2)(a), Stats. "Private school" has an express statutory definition under sec. 115.001(3r), Stats., which requires the institution to meet all of the criteria under secs. 118.165(1) or 118.167, Stats.

Under sec. 118.165, Stats., a private school must:

(1) be organized to primarily provide private or religious-based education;

(2) be privately controlled;

(3) provide at least 875 hours of instruction each school year;

(4) provide a sequentially progressive curriculum of fundamental instructions in reading, language arts, mathematics, social studies, science, and health;

(5) not be operated or instituted for the purpose of avoiding or circumventing compulsory school attendance; and

(6) have pupils return home not less than two months of each year unless the institution is also licensed as a child welfare agency.

Even though private schools are not subject to the same amount of controls which ****476** are applicable to public schools, they are subject to a significant amount of regulation which is geared toward providing a sequentially progressive curriculum. This issue is uniquely complicated, however, by the underlying thesis of the MPCP that less bureaucracy coupled with parental choice improves educational quality.

***544** Keenly aware of this potential problem, the legislature included within the MPCP sufficient supervision and control measures. The State Superintendent is required to annually report to the legislature comparing the students participating in the MPCP with students in the MPS. The report includes data on academic achievement, daily attendance, percentage of dropouts, and percentage of pupils suspended and expelled. The State Superintendent is authorized to conduct financial and performance audits on the program, and the Legislative Audit Bureau is mandated to perform financial and performance evaluation. We believe that these detailed reports and evaluations in conjunction with the private school requirements under secs. 118.165(1) and 118.167, Stats., provide sufficient and reasonable control under the circumstances to attain the public purpose to which this legislation is directed.

Control is also fashioned within the MPCP in the form of parental choice. Parents generally know their children better than anyone. The program allows participating parents to chose a school with an environment that matches their child's personality, with a curriculum that matches their child's interest and needs, and with a location that is convenient. If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere. In this way, parental choice preserves accountability for the best interests of the children.

In *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the United States Supreme Court also recognized the importance and the strong tradition of parental choice in education. Using a balancing of interests test, the *Yoder* Court held that the First and Fourteenth Amendments ***545** prevent the state from compelling Amish parents to cause their children to attend formal high school to age sixteen. *Id.* at 234, 92 S.Ct. at 1542. In so deciding, it stated:

> Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility ... yield[s] to the right of parents to

> provide an equivalent education in a privately operated system.

Id. at 213, 92 S.Ct. at 1532. *Yoder* involved the protection of the Religion Clauses, whereas the present case involves purely secular considerations. However, the *Yoder* Court declared that purely secular considerations "may not be interposed as a barrier to *reasonable state regulation* of education." *Id.* at 215, 92 S.Ct. at 1533 (emphasis added). We have determined in this case that the reporting and private school requirements applicable to the MPCP provide sufficient and reasonable state control under the circumstances.

Further, the cost of education and the funds available for education are dependent upon the taxpayers' ability to fund an intensive public educational program. The amount of money allocated to a private school participating in the MPCP to educate a participating student is less than 40 percent of the full cost of educating that same student in the MPS. Each of the participating private schools is willing to accept the responsibility of educating a child for the $2,500 granted by the state.[23] In ***546** contrast, it costs the MPS an average of ****477** $6,451 to educate each student.[24] At most, $2.5 million of public funds will be appropriated to fund this experimental legislation. This amount is inconsequential compared to the more than $6.4 billion that is annually expended for public education in Wisconsin.[25] The amount of money to fund the MPCP represents only about four one-hundredths of one percent (.04 percent) of the public money allocated for public education throughout the state. Therefore, we hold that the MPCP does not violate the public purpose doctrine because the MPCP contains sufficient and reasonable controls to attain its public purpose.

We conclude that the Milwaukee Parental Choice Program passes constitutional scrutiny in all issues presented before this court. Accordingly, we reverse the decision of the court of appeals.

The decision of the court of appeals is reversed.

CECI, Justice (concurring).
Let's give choice a chance!

Literally thousands of school children in the Milwaukee public school system have been doomed because of those in government who insist upon maintaining the ***547** status quo. The sacred cow of status quo has led to the terrible problems that manifest themselves as described in the majority opinion.

The Wisconsin legislature, attuned and attentive to the appalling and seemingly insurmountable problems confronting socioeconomically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.

The dissent by Justice Bablitch attempts to paint a difference in that the schools that these deprived children would attend under this experimental program would be the recipients of "the state's largesse." Dissenting opinion at 487. IMAGINE THAT! If the expenditure of a mere $2,500.00 per child to teach the deprived children of the poor of the city of Milwaukee is—largesse—what foolishness are we engaged in when the taxpayers are spending approximately $5,000.00 for each of these same children in a failing public school system? The reason why the legislature adopted the classification of private schools specifically located in the city of Milwaukee is that the Milwaukee public school system evidently is viewed by the legislature as a failure despite the dedicated labors of its hundreds of teachers and administrators. Perhaps this experimental program will point the way for improvements that can be utilized throughout the public schools of this state.

As recently as December 11, 1991, Dr. Howard Fuller, Superintendent of the Milwaukee Public Schools, addressing some of the awesome problems of the school system, stated in a television interview that he was unwilling to let things be as they were. In other words, the status quo must go. While not addressing the school choice program, he was attempting to address the ***548** problems that exist. More recently, the mayor of the city of Milwaukee has given his public voice of approval to the school choice program.

The dissent opts for maintaining the status quo. Justice Bablitch obviously does not now trust the legislative process he claims to know so well. His dissent is replete with anecdotal statements not a part of this record, and it is improper that such purported information, known to him alone, be used. Unfortunately, the dissent does not want to attempt to give choice a chance.

On February 22, 1989, less than two years ago, the dissent in *Kukor v. Grover,* 148 Wis.2d 469, 531, 436 N.W.2d 568 (1989), stated:

> **The fashioning of a constitutional system of public education is not only the legislature's constitutional prerogative, **478 it is far better equipped than any court to do it. I am not unaware of the terrible political complexities involved in fashioning such legislation, but I have full confidence in the legislature's ability to resolve it.**

(Emphasis added.) The author of the above-quoted dissenting opinion? Justice Bablitch.

Apparently the legislature has decided in this constitutionally proper experimental program to give choice a chance. I believe that the legislature has fashioned a constitutionally correct experimental program to deal with the terrible problems it is attempting to resolve. I join the majority opinion, with which I am in full accord.

Let's give choice a chance!

HEFFERNAN, Chief Justice (dissenting).

The Milwaukee Parental Choice Program, sec. 119.23, Stats., was enacted in violation of the procedures mandated ***549** by Wis. Const. art. IV, sec. 18, and as enacted substantively violates Wis. Const. art. X, sec. 3. It is clear from reading the majority opinion and the concurring opinion that the majority opinion reflects a tacit approval of the policy behind "choice." This is apparent from both the contrived expansion of the presumption of constitutionality and from the exhaustive attempt to portray the Milwaukee Public School system as a complete failure. Because the purported policy of choice is irrelevant to a constitutional challenge, and because the statute is constitutionally infirm both in form and in substance, I dissent.

The respondents challenge the statute on both procedural and substantive grounds. The method of constitutional review under procedural provisions such as art. IV, sec. 18 is distinct from constitutional review of the substance of a statute. As we explained in *Brookfield:* "In sec. 18 cases, because the legislature is alleged to have violated a law of constitutional stature which mandates the form in which bills must pass, the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement." *Brookfield,* 144 Wis.2d at 912–13 n. 5, 426 N.W.2d 591. The concept of a "presumption of constitutionality" is inappropriate when discussing legislative procedure. [1] One of the rationales that justifies the use of the presumption of constitutionality is that when the legislature follows the constitutionally mandated procedures, the democratic safeguards ensure that the law is the will of the legislature. Not so when a question of constitutional procedure arises.

***550** The majority recognizes this principle, majority op. at 466, but ignores it because it concludes that choice was "debated extensively by the legislature and its various committees and agencies." Majority op. at 466. This conclusion is doubly troubling, because choice was never debated by the Senate, and because it also reveals a fundamental misunderstanding of review under art. IV, sec. 18.

The majority's novel and disturbing approach to determining whether a presumption of constitutionality exists derives from the discussion in footnotes 5 and 6 of *Brookfield* regarding whether a sham or fraud has occurred in the legislature. I disagree with the majority's distillation of *Brookfield.* Article IV, sec. 18 does more than protect against legislative fraud —it ensures accountability. Quite simply, a legislator must vote separately on private or local matters, and must answer to his or her constituency for those votes. *See Brewers,* 130 Wis.2d at 145, 387 N.W.2d 254 (Steinmetz, J., concurring in part and dissenting in part), and 156–58, 387 N.W.2d 254 (Ceci, J., concurring in part and dissenting in part). It begs the question to presume that because the choice program was not "smuggled" that it is not in fact a private or local law.

Review of the level of consideration or deliberation accorded a particular piece of legislation is an improper intrusion into the ****479** legislative process. Moreover, it is impossible. The majority's astonishing conclusion that choice was "debated extensively" by the entire legislature, despite the fact that it was neither separately debated nor voted upon in the Senate—as it should have been as a local bill—offers a clear example of the inappropriateness of review by judges of the deliberative process of the legislature. Review under art. IV, sec. 18 should be limited to the face of the bill, and nothing more. I agree with Justice Abrahamson that a presumption ***551** of regularity attaches to the legislative procedure. As this court stated in *Integration of Bar Case,* 244 Wis. 8, 28, 11 N.W.2d 604 (1943): "The law does not presume that a public officer violates his duty." The challenging party should be

required to prove that the bill, on its face, is private or local. That proof is manifold.

Regardless of the presumption accorded the choice legislation, it is apparent that its passage as a part of a multi-subject budget bill violated art. IV, sec. 18. The title of the bill, its "experimental" nature, and the startling statistics cited by the majority regarding the Milwaukee Public School system leave no doubt that the law is private and local and intended to apply only to the city of Milwaukee. The statute, as was the bill, is entitled "Milwaukee Parental Choice Program." The text of the statute consistently refers to "the city." And while the title is not a part of a statute, it is a constitutional requirement that the legislature must caption a private or local bill under art. IV, sec. 18. In this case the title demonstrates that the choice program was specifically tailored for Milwaukee.

The majority's exposition of why Milwaukee and its public school system is so different from other cities is self-defeating —the classification under whose aegis this legislation purports to come is cities of the first class, not Milwaukee —and underscores the fact that the program is aimed only at Milwaukee. As the court of appeals noted:

> When applying [the *Brookfield*] test, we cannot consider the specific characteristics of Milwaukee and its social and educational problems, even though it is presently the only member of the class. Our analysis must be limited to the characteristics of the chosen classification. The *Brookfield* court examined only the general qualities of a first class sewerage district, ***552** not the characteristics of the Milwaukee area sewerage district.

Davis v. Grover, 159 Wis.2d 150, 162, 464 N.W.2d 220 (Ct.App.1990). The majority states that "cities of the first class, by virtue of their large population and concentration of poverty, are substantially distinct from other cities." Majority op. at 469. While it may be fair to characterize Milwaukee as having a "large concentration" of poverty, it cannot be said that all first class cities will necessarily share this attribute. It also cannot be said that the poverty in Milwaukee is necessarily any different or worse than poverty elsewhere in the state. Anyone who is aware of conditions statewide must know that there are areas outside of Milwaukee and outside of incorporated municipalities where poverty is acute. The fact that Milwaukee, which has over 150,000 residents and has declared itself to be a first class city, arguably has numerically more persons living in poverty than smaller cities, does not make it "substantially distinct" from other cities such that "it is necessary for them, as opposed to all other" cities, to have the choice program. *Brookfield,* 144 Wis.2d at 916, 426 N.W.2d 591. I conclude that the choice program fails under the first test of *Brookfield* that "the classification employed by the legislature must be based on substantial distinctions which make one class really different from another." *Id.* at 907, 426 N.W.2d 591.

The majority goes on to conclude that because choice is "experimental" legislation, the classification is germane to the purpose of the law and therefore is a general, not a private or local law.[2] Two ****480** things strike me ***553** about the conclusion that the choice program is experimental. First, it is not clear at all that the program is an experiment. Second, assuming that it is experimental, it is no less private or local. An unconstitutional experiment is unconstitutional.

The majority opinion and Justice Abrahamson's dissenting opinion agree that the choice program is experimental. I am unconvinced that this is so, and if so that is constitutionally irrelevant. Nothing in the language of the statute indicates that it is "experimental." There is no statement of a legislative purpose to conduct an educational experiment. Nothing in the statute provides for expansion of the program if it proves successful. Governor Thompson's veto of the five-year sunset provision detracts from rather than adds to the argument that the legislation is experimental.[3] It indicates that the governor, who is a part of the legislative process, vetoed the "experimental" time limitation of the statute. The majority seemingly bases its conclusion that the program is experimental on the fact that public education ***554** in Milwaukee and across the nation faces severe problems, and from the auditing and reporting provisions contained in sec. 119.23, Stats. If the majority's assertion is that public education across the nation is in the same crisis as Milwaukee, this in itself demonstrates the impropriety of the classification. The remedy, which treats Milwaukee differently, is a non-germane separate classification. In the sense that choice can be inferred to be one legislative attempt to address a serious societal problem, all legislation addressing problems where the solution is not evident is

experimental and subject to change in the will of the legislature. The financial audits and reports authorized or mandated by the statute are common ways of reviewing publicly funded programs. Indeed, the majority notes these same provisions in its conclusion that the program satisfies the public purpose doctrine.

While the majority's conclusion that choice is experimental, in the sense that all legislation is, is logically defensible, calling the law "experimental" in the absence of a clearly expressed legislative intent is the type of post-hoc justification this court rejected in *Brookfield,* 144 Wis.2d at 918 n. 6, 426 N.W.2d 591. And as stated above, from a constitutional point of view it is irrelevant that it may be experimental. On its face, the legislation is not an experiment, and for art. IV, sec. 18 purposes this court should look no further. From the face of the legislative document it is apparent that the legislation specifically was drafted to address the tremendous problems facing the Milwaukee Public School system, and, as Justice Bablitch concludes, and I join in his conclusion, that the legislation is an attempt to provide funding to private schools which are located only within the city of Milwaukee.

***555** Experimental legislation is not exempt from the strictures of the constitution. It is not germane to limit the experiment to the largest city in the state, or to any distinct class of cities in the state. I agree with the reasoning of the court of appeals:

> Why the experiment should be made only in a first class city is not apparent. That a city has a population of 150,000 and its mayor has proclaimed that it is a city of the first class, as provided in sec. 62.05(1)(a) and (2), Stats., has no relation to whether the experiment should be conducted in such a city. Cities of smaller size may be equally satisfactory sites for ****481** this experiment. Nor does a mayoral proclamation show greater suitability for this educational experiment. The city of Madison, for example, meets the population criterion to become a first class city, but has not yet declared itself to be one. Madison would not become a more appropriate site for the experiment merely by making such a proclamation.

Davis, 159 Wis.2d at 165, 464 N.W.2d 220 (footnote excluded). Thus, the choice legislation fails the second test of *Brookfield* that "the classification adopted must be germane to the purpose of the law." *Brookfield,* 144 Wis.2d at 907, 426 N.W.2d 591.

I conclude that sec. 119.23, Stats., is a private and local law enacted in violation of art. IV, sec. 18. Finally, I am fully in accord with Justice Abrahamson's rationale and conclusion that as enacted the choice legislation substantively violates Wis. Const. art. X, sec. 3.

I respectfully dissent and would affirm the decision of the court of appeals.

SHIRLEY S. ABRAHAMSON, Justice (dissenting).

The majority opinion declares constitutional the "experimental" Milwaukee Parental Choice Program, which involves less than one percent of the city's school population ***556** and, according to the majority, an "inconsequential" amount of funding. Majority op. at 463, 469 n. 11, 470, 474. I dissent even though I have concluded that the majority opinion has very limited application. Any increased coverage of the program or continuation of the program beyond a reasonable time for experimentation could still fall victim to a successful constitutional attack.

Despite the majority opinion's limited application, I dissent because I believe that the existing Parental Choice Program violates art. X, the Education Article, of the Wisconsin Constitution. I would affirm the decision of the court of appeals.

I.

First, I conclude that the Parental Choice Program violates the mandate of article X that the legislature provide a system of free public education for children of a certain age.[1] To determine the constitutionality of the Parental Choice Program the court must look to the words of art. X, the constitutional debates and educational practices in existence in 1848, and the earliest interpretations by the legislature.

State v. Beno, 116 Wis.2d 122, 136–37, 341 N.W.2d 668 (1984). If these sources do not provide an answer, the court will look to "the objectives of the framers in adopting the provision." *Beno,* 116 Wis.2d at 138, 341 N.W.2d 668.

***557** The language of art. X does not grant the legislature authority to create district schools. The legislature has that authority without art. X. [2] Article X *compels* the legislature to exercise its authority to create district schools; it commands the legislature to establish a specific educational system—district schools, statewide uniformity, and free tuition for children of certain ages. *Manitowoc v. Manitowoc Rapids,* 231 Wis. 94, 98, 285 N.W. 403 (1939). In other words, article X prohibits the legislature from refusing to establish district schools. *Zweifel v. Joint Dist. No. 1 Belleville,* 76 Wis.2d 648, 657, 251 N.W.2d 822 (1977); 64 O.A.G. 24, 25–26 (1975). The legislature could not disband the public school system and pay every student in the state or every private school a sum for education. The state constitution through article X, unlike the federal Constitution, makes an equal opportunity for government-supported education a fundamental right of the student and a fundamental responsibility of state and local government. ****482** *Kukor v. Grover,* 148 Wis.2d 469, 488, 436 N.W.2d 568 (1989); *Buse v. Smith,* 74 Wis.2d 550, 569, 247 N.W.2d 141 (1976).

In 1846 when Wisconsin's first constitution was drafted, substantially all schooling was private. 37 O.A.G. 347, 349 (1948). Although art. X was debated at the convention, support for wholly publicly funded district schools was virtually unanimous. The constitutional plan was an express rejection of and remedy for the patchwork system of diverse schools with mixed public and private funding that existed during the territorial period. Article X mandates a state system of free ***558** public education. [3]

From art. X's command to the legislature to establish publicly funded education and its extensive provisions for a general system of free public schools, I conclude that the constitution prohibits the legislature from diverting state support for the district schools to a duplicate, competitive private system of schools. [4] It seems clear that the constitutional system of public education was intended to be the only general school instruction to be supported by taxation. No Wisconsin case has interpreted the constitution as permitting the legislature to create a system of publicly financed private schools that operates in competition with the district schools in delivering basic education. [5]

***559** Under the Parental Choice Program, tax money earmarked for the public schools is transferred to private schools, enabling them to compete directly with public schools in supplying basic primary education. The majority opinion correctly concludes, majority op. at 473, that the legislature is free to establish free public educational programs beyond those that are constitutionally mandated. *See, e.g., Manitowoc v. Manitowoc Rapids,* 231 Wis. 94, 97–98, 285 N.W. 403 (1939). In this case, however, the Parental Choice Program does not augment but instead supplants the educational programs the constitution requires the legislature to provide in public schools. I therefore conclude that the Program violates art. X.

My second reason for concluding that the Parental Choice Program is unconstitutional is that the Program does not ensure that the students who receive basic education through public funding in participating private ***560** schools receive an education as nearly uniform as practicable to that received by other students who receive basic education through public funds. Article X, sec. 3, ****483** requires the legislature to "provide by law for the establishment of district schools, which shall be as nearly uniform as practicable...." [6]

Interpretation of the uniformity provision is difficult because the language is ambiguous and the framers of the constitution did not discuss this particular clause. *Kukor,* 148 Wis.2d at 519, 436 N.W.2d 568 (Heffernan, C.J., Abrahamson, J. & Bablitch, J., dissenting); Erik LeRoy, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation, Buse v. Smith Criticized,* 1981 Wis.L.Rev. 1325, 1350. Nevertheless, the court has derived at least two principles from art. X and from the educational practices in Wisconsin at the time of the adoption of the constitution to govern the interpretation of art. X, sec. 3.

This court has repeatedly asserted the principle that art. X, sec. 3 "applies to the districts after they are formed,—to the character of the instruction given,—rather than to the means by which they are established and their boundaries fixed." *Kukor,* 148 Wis.2d at 486, 436 N.W.2d 568 (quoting *State ex rel. Zilisch v. Auer,* 197 Wis. 284, 290, 223 N.W. 123 (1928)). Therefore we know that the framers were not concerned in art. X, sec. 3, with the structure of the school system established [7] but with the ***561** character of instruction or "the training that these schools should give to the future citizens of Wisconsin." *Kukor,* 148 Wis.2d at 486, 436 N.W.2d 568 (quoting *Zilisch,* 197 Wis. at 290, 223 N.W. 123).

The majority opinion, however, focuses on the organization of the schools providing the education and not on the character of the education provided in interpreting the term "district schools."

The second principle is that the framers of the 1848 constitution viewed uniform public education as the means to strengthen democracy by allowing knowledgeable participation in all public affairs. LeRoy, *supra,* 1981 Wis.L.Rev. at 1325–26, 1345–46. "A general system of education was the only system on which we could depend for the preservation of our liberties." *Kukor,* 148 Wis.2d at 488, 436 N.W.2d 568 (quoting *Journal and Debates of the Constitutional Convention* 238 (1847–48)). Uniform public education provided a unifying force for the citizens of diverse heritages who settled in the new state of Wisconsin. "Universal Education," *Milwaukee Sentinel & Gazette* (August 22, 1846), *reproduced in* Milo M. Quaife, *The Movement for Statehood* 188 (1918); LeRoy, *supra,* 1981 Wis.L.Rev. at 1347. [8] The majority opinion, ***562** however, permits the legislature to subvert the unifying, democratizing purpose of public education by using public funds to substitute private education for public education without the concomitant controls exerted over public education.

Article X, sec. 3 requires the legislature to ensure that all Wisconsin children who receive basic education through public ****484** funding receive a uniform education reflecting the shared values of our state. By failing to guide adequately the education of students who participate in the Parental Choice Program, the legislature has failed to obey its constitutional mandate.

II.

The majority opinion devotes nearly three quarters of its lengthy opinion to the issue whether this experimental program is a private or local bill passed contrary to the procedural requirements set forth in art. IV, sec. 18, Wis. Const. [9] This case once again proves that "the constitutional language embodied in sec. 18, art. IV, is easily understood but not easily applied.... The task of deciding what constitutes a local or private law as opposed to a general law has been the source of difficulty in this state...." *Soo Line R.R. Co. v. Department of Transp.,* 101 Wis.2d 64, 73, 303 N.W.2d 626 (1981), ***563** *quoted with approval in Milwaukee Brewers v. DH & SS,* 130 Wis.2d 79, 107, 387 N.W.2d 254 (1986). Other states have had the same difficulty with similar provisions in their constitutions.

Unfortunately this court's prior opinions, and the majority and two dissenting opinions in this case, have not set forth analyses and tests that the legislature, the public, lawyers, circuit courts or the court of appeals can apply with any certainty or confidence. No one can be sure, until this court decides, probably by a closely divided vote, whether a law sets forth a classification making the *Brookfield* test applicable, *Brookfield v. Milwaukee Metro. Sewerage Dist.,* 144 Wis.2d 896, 426 N.W.2d 591 (1988), or is specific to a person or place requiring the application of the *Milwaukee Brewers* test, and whether the law passes constitutional muster under either test. [10] Chief Justice Heffernan's and Justice Bablitch's dissents add the possibility of the court's not accepting the legislature's classification, recharacterizing the legislation, and testing the court-imposed classification for constitutionality.

The majority opinion, like the court's prior opinions, again fails to explain the overlap between the classification test under art. IV, sec. 18, and the test under the state constitutional equal protection guarantee. [11]

More significantly, while upholding the constitutionality of the statute, the majority opinion has mandated an analysis that seriously infringes on the legislature's autonomy. The majority opinion applies a ***564** presumption of constitutionality only when the legislature has "adequately considered or discussed" or "intelligently participated in considering" the bill at issue. Majority op. at 466, 467. [12] Nothing in the constitution directly or indirectly empowers this court to measure the legislative consideration of a bill for adequacy or intelligence. This court's grading the deliberations of the legislative branch inappropriately invades the functions of the legislative branch and misconstrues art. IV, sec. 18.

If the majority believes a law tested under art. IV, sec. 18, a procedural provision, requires a different presumption than the presumption of constitutionality generally accorded a law tested under a substantive constitutional provision, and I do not think it does, I suggest that the court accord the ****485** law challenged under art. IV., sec. 18, a presumption of regularity. [13]

***565** The constitution speaks of private or local bills; the constitution does not talk about smuggling or degrees of the legislature's awareness of the subject matter of bills. Our opinions interpreting art. IV, sec. 18, should formulate as simple a test as possible for determining whether a law is private or local, the issue addressed by the state constitution, without considering "smuggling."

Because the legislature has the power to enact private and local laws as separate laws and because the statutes are replete with laws affecting only first class cities or specific people or places in the state, I believe the court should, in deference to the separation of powers doctrine, exercise restraint in declaring laws unconstitutional under art. IV, sec. 18. The court should invalidate a statute on the basis of the form of the statute only in exceptional cases where the private and local aspects are pervasive and only a general statewide interest appears.

For the reasons set forth, I dissent. I would affirm the decision of the court of appeals.

BABLITCH, Justice (dissenting).

I make no judgment, public or private, as to whether "choice" is good public policy. That issue is not presented nor is it appropriate for us to so decide. [1] But no one can disagree ***566** that "choice" is major public policy involving fundamental educational decisions. And no one can disagree that it merited full legislative consideration.

It did not receive such consideration. In fact, it received no consideration whatsoever in the senate.

"Choice" was never debated in the senate. It never received a public hearing in the senate. No expression of public sentiment was ever sought by the senate nor received. There was no separate vote taken on it in the senate. It passed the senate as part of the budget bill four legislative days after the senate received it as a separate piece of legislation from the assembly. *See* 1989 Wisconsin Assembly Bulletin, 169; 1989 Senate Bulletin 148–149. The committee in the senate to which the original bill was referred never even dealt with it.

Yet the majority opinion inexplicably concludes that "choice" was "greatly debated in legislative committee public hearings and by the entire legislature." Majority op. at 462, (citation omitted) (footnote omitted). "[W]e find no evidence in this case that suggests the program was smuggled or logrolled through the legislature without the benefit of deliberate legislative consideration.... Clearly, the legislature 'intelligently participate[d] in considering' this program." *Id.* at 466–467.

The evidence, contrary to the assertions of the majority opinion, is overwhelming that the senate never "intelligently participate(d) in considering" this program. On Wednesday, March 15, 1990, the Wisconsin Assembly passed Assembly Bill 601, The ****486** Milwaukee Parental Choice Program, and sent it to the Wisconsin ***567** Senate. It was immediately referred to the Senate Educational Financing Committee where no action was ever taken. Five days later (which includes Saturday and Sunday), on Monday, March 20, 1990, this bill was tucked into the budget bill by the Joint Finance Committee. One day later, on Tuesday, March 21, 1990, the budget passed the senate. The "choice" plan was part of that bill. *See* 1989 Wisconsin Assembly Bulletin, 169; 1989 Senate Bulletin 148–149.

The majority, having concluded that "choice" was debated extensively by the legislature, affords it a presumption of constitutionality. The majority then, after analyzing only one of two classes that the legislation creates, concludes that it is not a private or local bill within the meaning of article IV, section 18.

I agree with Chief Justice Heffernan that the legislation fails the "private or local" constitutional prohibitions of article IV, section 18 with respect to the classification of school children who live in the city of Milwaukee. That is the first classification created by the law, and that is what the majority addresses. What most observers are unaware of, and what the majority does not address, is that the bill creates a second classification which also violates art. IV, sec. 18: private schools located within the city limits of Milwaukee. These are the only eligible recipients of the state's $2.5 million annual outlay for this program. This is an annual outlay, payable only to a small group of eligible private schools, and will continue to be paid for out of state taxpayers' funds, unless and until it is repealed by the legislature. If the legislature wanted this to be law, it could constitutionally do so only as a separate piece of legislation, considered separately by each house of the legislature, and not as part of a "must pass" omnibus budget bill. Including private legislation in a "must pass" omnibus ***568** budget bill, particularly when that legislation receives no consideration in one house of the legislature other than the vote on the budget itself, is precisely what leads to the internal logrolling in the legislature which members of the majority

opinion have in the past found so deplorable.[2] Accordingly, I dissent.

The legislation in question provides that only school children in school districts located within cities of the first class may participate; their "choice" is limited to private schools located within the city of Milwaukee. Thus, the legislation adopts two classifications: 1) school children residing in cities of the first class and attending school districts within cities of the first class; and, 2) private schools located within cities of the first class. The majority opinion addresses only the first classification and finds it constitutionally unobjectionable because, in essence, cities of the first class have the most educational problems (the first prong of the classification tests, e.g. real differences); and because this legislation is "experimental" in nature (the second prong of the classification tests, e.g. germaneness).

Missing in the majority's analysis, completely missing, is any meaningful discussion whatsoever with ***569** respect to the second classification that this legislation also adopts; private schools located within cities of the first class. Had the majority subjected this second classification to the very same classification tests they applied to the first classification, it could not pass constitutional muster.

The first prong of the classification tests provides that the classification employed must be based on substantial distinctions which make one class really different from another. How are private schools located within cities of the first class "really different" ****487** from all other private schools located in the state of Wisconsin? To ask the question is to answer it; there are no differences. None are posited by the petitioners, none are discernible. Yet under this legislation a private school located within the city of Milwaukee can be the recipient of the state's largesse, a private school located just outside the city limits cannot. One can only conclude that the authors of this legislation intended to benefit only private schools located within the city, and there are no reasons given to support that discrimination.

The second prong of the test provides that the classification adopted must be germane to the purpose of the law. The majority opinion argues quite cogently that this is "experimental" legislation. The petitioners argued this same point extensively in their briefs and at oral argument. Assuming both petitioners and the majority are correct in that hypothesis, then how is it that only private schools located in the city of Milwaukee can test that experiment? Why not private schools located in the suburbs of Milwaukee, or any other private school? The classification adopted, private schools located in the city of Milwaukee, is simply not germane to the avowed purpose of educational experimentation. Any other private school, located anywhere in the state, is equally capable ***570** of providing the documentation needed to assess this experiment. Again, just as in the first test, one can only conclude that the authors of this legislation intended to benefit only private schools located within the city, and there are no reasons given nor discernible that support that restriction.

The legislation as drafted puts the emphasis on the first classification. But the above analysis becomes clearer if one simply re-states the legislation and puts the emphasis on the second classification. Assume the legislation said: "Any nonsectarian private school located in the city (of the first class) shall receive $2,500 per year for each student who resides in the city (of the first class) and attends the private school providing that all of the following apply: (Here, the bill would state all the criteria listed in the actual legislation)." With this re-drafting, everything ends up the same as the original legislation. But now it becomes clear why this legislation is constitutionally objectionable. "Why should private schools in Milwaukee be treated preferentially?" one would legitimately ask. "Why should they get this $2.5 million annually and not us?" private schools in suburbs of Milwaukee and other cities in Wisconsin would ask. "What is it about them that makes them different from us?" The answers are obvious. There are no reasons.

I do not doubt the sincerity of the authors of this legislation with respect to their belief that "choice" is good public policy. It may be, it may not be. I make no judgment as to that. Perhaps school children who reside in Milwaukee will be major beneficiaries of such a program. But this legislation also targets another beneficiary, a very small group of private schools located only in the city of Milwaukee who will collect the amount of $2.5 million annually. This benefit is not subject to debate. It is their's until the legislature decides otherwise.

***571** There is a principle at stake here which has been cited numerous times in our previous cases; legislation which benefits only a few must rise or fall on its own merits, and not be a part of a "must-pass" bill. The basis for this principle was recently stated in a concurring and dissenting opinion in *Milwaukee Brewers v. DH & SS,* authored by Justice Ceci:

> The prison siting legislation, buried deep within the budget bill, represents the very worst of the logrolling

> and railroading practices which have become all too commonplace in the legislature.
>
> ....
>
> The very design of art. IV, sec. 18 is disregarded in the legislative practice whereby a provision such as the prison-siting legislation is included in a budget bill. Such a practice breeds unaccountable representation: it necessarily forces a legislator to vote once on two separate matters. A legislator is forced to vote on a matter of statewide importance and prominence—the budget in this instance—the same way in which he or she will vote on a wholly unrelated subject —here, the siting of a prison in the Menomonee ****488** Valley. An affirmative or negative vote on the overall bill necessitates the vote extending to all subject matter within the bill. I find such a practice to be deplorable and untrue to the spirit of art. IV, sec. 18. Certainly the representatives' respective constituencies, which may well have different opinions about the logrolled issues, deserve to have their views be fully represented by separate voting on separate issues.
>
> We do not require that the general electorate vote a straight party ticket; we should not tolerate legislative practices which dictate that only a single vote be cast on wholly separate issues. Such a practice is, at best, a modified form of logrolling, which is ***572** prohibited by statute. Such a practice destroys the accountability of our representatives and reduces the legislature to an internally acquiescent institution, unresponsive to the constituency it purports to represent. *Milwaukee Brewers v. DH & SS,* 130 Wis.2d 79, 156–157, 387 N.W.2d 254 (1986) (footnote omitted).

This principle was also discussed by a different justice in the same opinion in his dissenting and concurring opinion:

> The [majority's] test still requires legislators to vote for a comprehensive budget bill with its many concerns and fiscal necessities without voting directly on matters of private or local effect. Accountability is sacrificed, not because legislators are unaware of the private or local provisions of the budget bill, but because they cannot vote their convictions on such provisions without affecting the entire budget bill. Contrary to the majority's conclusion, therefore, a legislator could credibly claim to oppose a local or private provision, despite voting for the entire budget bill. *Milwaukee Brewers,* 130 Wis.2d at 145 [387 N.W.2d 254].

The principles stated in these prior opinions have however been ignored by their authors who inexplicably have joined the majority in this case. The majority opinion here glosses over these principles by pointing out that a similar separate bill had been passed by the Assembly and "all" the Senate did was include it in the omnibus budget bill. But that gloss completely disregards the legislative history of "choice" in the senate. As explained above, this was never debated in the senate, it never received a public hearing in the senate, there was no expression of public will. It passed the senate as part of the budget four legislative days after it was received from the assembly.

***573** The majority's gloss also ignores another obvious implication. If there were sufficient votes in the Senate to pass the bill as a separate piece of legislation, the Senate would have done so, thereby avoiding any possible constitutional challenge under this section. Given that they did not do so, it is clear that the votes were not there to pass it as a separate piece of legislation. It needed to be tucked into the budget in order to snare otherwise negative votes of senators who felt they had to vote for the omnibus budget bill because of other policy items in the budget they supported which had a higher priority than this "choice" legislation. [3] That is precisely what Section 18 seeks to prohibit; it is precisely what our former opinions attempted to address.

I turn next to the discussion in the majority opinion regarding the presumption of constitutionality that should or should not attach to this legislation. The majority adopts a middle ground which will only serve to confuse. Better had they simply stated that either a presumption of constitutionality always attaches to this type of legislation or it does not. From their opinion, one can only guess as to how much deliberation is sufficient for the presumption to attach.

I conclude a presumption of constitutionality should never attach to legislation that ****489** is challenged as being procedurally unconstitutional, as opposed to legislation ***574** that is challenged as being substantively unconstitutional. The challenge under article IV, section

18 is a procedural challenge. The other challenges to this legislation are substantive, and therefore deserve the presumption. But the two challenges are completely distinct and should be treated as such.

The procedural challenge here asserts that the legislature failed to follow essential procedural steps mandated by our constitution. The challenge, in essence, is that the legislation on its face is private or local and was included in a multisubject bill, and is therefore violative of article IV, section 18. No one disagrees that on its face the legislation is private or local and was part of a multisubject bill. Why, then, is such legislation entitled to a presumption that it is constitutional? On its face, it clearly is not. Neither logic, common sense, nor precedent requires a presumption of correctness when on its face it is not correct. Our only obligation in such a situation is to determine whether the legislation fits within one of the narrowly circumscribed exceptions that have been carved out by this court. If anything, logic would tell us that legislation that on its face is unconstitutional starts with a presumption that it is not constitutional. But I do not argue for that proposition; I urge only that in such a situation, no presumption should attach either way. When legislation that is private or local on its face and could have been passed as a separate piece of legislation, with all the legislative scrutiny that entails, is instead passed as a part of a multisubject bill, it does not warrant a presumption of constitutionality. Because of the potential for abuse that is present in such a situation, it deserves careful scrutiny with no presumption attaching.

Perhaps an example might make this clearer. Assume that an Assembly Bill granted a liquor license to ***575** John Jones of Middleton. Assume also that this bill received the precise treatment that the legislation at issue in this case received. That is, assume it received a public hearing in the Assembly committee with much public testimony, and then assume it passed the Assembly; that it went to the Senate, but the Senate did not consider it separately; and assume that it was then included in the multisubject budget bill and then passed. Assume then the liquor license legislation (that was passed into law as part of the budget) is then challenged as being a "private or local" law. Under the majority's view, this legislation would be entitled to a presumption of constitutionality. That strikes me as being absurd. Yet it is not different from the legislation before us. Other examples of classification legislation could be equally forthcoming. Legislation that on its face is "private or local" (as is classification legislation as well as specific entity legislation), that is part of a multisubject bill, that is challenged as being violative of section 18, has no presumption of constitutionality.

The majority's conclusion rests on their belief that this legislation deserves the presumption because of the attention this issue received in the process. Putting aside the problem addressed earlier in this dissent that the senate never even debated it, that conclusion invites confusion. What, in the future, will constitute sufficient "attention" so as to deserve the presumption? The scenarios under which a bill that passes one house but gets sidetracked in the other, and then appears in the budget bill, are almost infinite in number. And yet the majority gives the same presumption of constitutionality to that situation as attaches when both houses pass the bill. The presumption does not apply, if for no other reason than the simple fact that when a bill passes one house but fails to pass in the other, and then magically appears in ***576** the budget, that usually means there were not sufficient votes to pass it on its own merits. Nothing of significance in the legislative process "just happens".

The majority does not need their presumption analysis to reach the result they reached. They should discard it in favor of the black letter rule which this court adopted three years ago. Only confusion can result.

In conclusion, the result reached by the majority leaves the law regarding article IV, section 18 in serious disarray in two major respects. First, with respect to classification ****490** legislation, the result in this case cannot stand alongside the recently decided case of *Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 896, 426 N.W.2d 591 (1988). Although *Brookfield* involved Milwaukee sewers and this case involves Milwaukee schools, the principles are precisely the same, the results are diametrically opposed. Members of the public, practitioners, and perhaps most importantly the legislature, cannot now state nor predict with any degree of certainty what the law is regarding whether a piece of legislation is "private or local." The second serious problem involves the presumption of constitutionality and when it attaches. The majority's test of legislative consideration simply cannot stand the test of time. The majority's test has no certainty, and therefore no predictability.

All Citations

166 Wis.2d 501, 480 N.W.2d 460, 72 Ed. Law Rep. 1055

Footnotes

† Motion for Reconsideration denied.

1 Article IV, sec. 18 of the Wisconsin Constitution states:

> No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

2 Wisconsin is the first state in the nation to experiment with a parental choice program which involves the use of private schools as an alternative to the public school system. The program is an attempt to identify factors which could improve the quality of education. Clearly, the program is not only of statewide importance but national significance as well because education of our citizens knows no boundaries and other states could benefit from the knowledge resulting from this innovative experiment.

The citizens of Wisconsin have a long and proud tradition of striving for excellence and an improved quality of life. Our state flag proudly displays our motto in its statement of "Forward." The forum of education is just one area in which Wisconsin demonstrates its excellence and innovation. The University of Wisconsin System is widely recognized as one of the nation's leading systems of public higher education. Furthermore, Wisconsin was a pioneer in the establishment of vocational and technical schools. The MPCP represents another illustration of Wisconsin's innovation and willingness to lead the nation in its attempts to further improve the quality of education and life.

3 42 U.S.C. sec. 2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

4 Under sec. 119.23(7)(a), Stats., each private school participating in the program must meet at least one of the following standards:

> 1. At least 70% of the pupils in the program advance one grade level each year.
>
> 2. The private school's average attendance rate for the pupils in the program is at least 90%.
>
> 3. At least 80% of the pupils in the program demonstrate significant academic progress.
>
> 4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.

5 *See* secs. 119.23(7)(b), (8), and (9), Stats.

6 Superintendent Grover attempted to require private schools that wished to participate in the program to execute complex forms certifying that they met numerous requirements in excess of those specified under sec. 118.165, Stats., or in the MPCP.

7 "Logrolling" is the legislative practice of embracing in one bill several distinct matters, none of which could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the separate measures into a majority that will adopt them all. Black's Law Dictionary 942 (6th ed. 1990).

8 Justice Bablitch's dissenting opinion quite adamantly argues that, "[i]f there were sufficient votes in the Senate to pass the bill as a separate piece of legislation, the Senate would have done so, thereby avoiding any possible constitutional challenge under this section. Given that they did not do so, it is clear that the votes were not there to pass it as a separate piece of legislation." Bablitch dissent at 488. While we share his concern about the potential for logrolling, Justice Bablitch presumes a fact that is not supported by the record. There is no indication in the record that there were insufficient votes to pass the MPCP as a separate piece of legislation in the Senate. A plausible alternative explanation could include the Senate's concern that a worthy piece of legislation may be thwarted by the close of a legislative session. Without adequate evidence in the record, we are less inclined to presume the evil that Justice Bablitch so strongly suggests.

We are quite concerned about the dissent's indictment of the legislature's integrity. The legislative branch exists to provide an essential and valued function. Legislators are elected by the public to represent the public's interest. Presumably, they are elected based on many factors, including their wisdom and integrity. We are unwilling to attack that integrity unless evidence exists to the contrary.

9 The circumstances of the present case allow us to presume constitutionality for the process in which this legislation was enacted. Justice Bablitch's analogy to the granting of a liquor license is so dissimilar to the MPCP legislation that it merits very little discussion. *See* Bablitch dissent at 489. We shall point out only that the granting of a liquor license concerns only one or few individuals and is not likely to grasp the attention of the legislature. In contrast, improving educational quality is a statewide concern and, as mentioned, the record is replete with evidence that the MPCP received a substantial amount of serious deliberation by the legislature.

10 Section 990.001(6), Stats.; *Wisconsin Valley Imp. Co. v. Public Service Comm.,* 9 Wis.2d 606, 618, 101 N.W.2d 798 (1960).

11 The court of appeals suggests that we adopt a modified *Brewers* test to accommodate "experimental" legislation. *Davis,* 159 Wis.2d at 167, 464 N.W.2d 220. It is their contention that the nature of the experiment, not the classification, should be subject to the test for a private or local bill. However, creating such a test would unnecessarily further complicate this area of law. In this case, the classification tests adequately address and incorporate the nature of experimental legislation.

12 Milwaukee Public Schools, *Indicators of Educational Effectiveness* 12 (1990).

13 State of Wisconsin, Legislative Reference Bureau, *1991–92 Blue Book* 615 (1991).

14 State of Wisconsin, Legislative Reference Bureau, *1991–92 Blue Book* 797 (1991).

15 State of Wisconsin, Legislative Reference Bureau, *1989–90 Blue Book* 841 (1990).

16 U.S. Department of Education, Center of Education Studies, *The Condition of Education: A Statistical Report,* 20 (1987).

17 Bast & Wittmann, *The Case for Education Choice* (1990).

18 *See* Gretchen Schuldt, *Many black freshmen at less than 'D',* Milwaukee Sentinel, Apr. 23, 1991, at 1A.

19 Milwaukee Public Schools, *Indicators of Educational Effectiveness* (1990).

20 Public Policy Forum, *Public Schooling in the Milwaukee Metropolitan Area,* 37–39 (1988).

21 Chubb & Moe's conclusion that school organization can directly affect student achievement has been criticized by some commentators. For example, Professor John F. Witte of the University of Wisconsin–

Madison Department of Political Science states that the comprehensive measure of school organization incorporates fifty variables and, thus, makes Chubb & Moe's analysis problematic and their combined inference totally unconvincing. Witte, "Public Subsidies for Private Schools: Implications for Wisconsin's Reform Efforts," the Robert M. LaFollette Institute of Public Affairs, University of Wisconsin–Madison 21 (1991). Professor Witte contends that the immense number of variables associated with school organization makes it almost impossible to isolate effects of specific organizational practices. *Id.*

However, in the absence of a constitutional challenge, it is not for us to determine the propriety of choosing one approach over another. This task is more appropriately undertaken by the legislature who is better equipped and possesses greater resources to hold public hearings and grasp public sentiment. As we stated in *State ex rel. Bowman v. Barczak,* 34 Wis.2d 57, 65, 148 N.W.2d 683 (1967), "legislative decisions are more representative of popular opinion because individuals have greater access to their legislative representatives."

22 The scope of the MPCP was necessarily limited to the boundaries of a first class city. Such restriction in the scope of an experiment is necessary for the controlled, orderly, and efficient administration of the experiment. We do not conclude, as does Justice Bablitch's dissent, that "the authors of this legislation intended to benefit *only* private schools located within the city [of Milwaukee]." Bablitch dissent at 487. Rather, the intended beneficiary of the program is the state at large, which can learn from the results of the program. The fact that students participating in the MPCP may only attend private schools located within the first class city is merely a consequence of the boundaries of the experiment. Transportation costs require that available private schools be in the proximity of the students' residence. It would be impractical and absurd to transport a student participating in the program from Milwaukee to a La Crosse or even a Waukesha private school.

23 We hasten to note that the program does not appear to offer any financial advantage or windfall to the participating private schools. There is no evidence that the modest $2,500 per student that is received by participating private schools covers the cost of educating the student. The legislature determined the amount to be paid to the participating private schools without evidence of the actual cost incurred by the private school to provide an education to each enrolled student. Because $2,500 is less than 40 percent of the cost of educating a student in the MPS, we must assume that the participating private schools are either more efficient than public schools or discounting some of the cost to educate the students participating in the program.

24 M. Fisher, "Fiscal Accountability in Milwaukee's Public Elementary Schools," *Wisconsin Policy Research Institute Report,* Vol. 3, no. 4 (Sept. 1990).

25 State of Wisconsin, Legislative Reference Bureau, *1991–92 Blue Book* 620 (1991).

1 For example, it defies reason to consider whether a "rational basis" exists to believe a bill is not private or local. It either is or it isn't. Article IV, sec. 18 refers to a "private or local bill," not a "bill the legislature believes to be private or local."

2 The very proposition that the program is "experimental" is an admission that the program is aimed directly at Milwaukee—that is, it is both private and local. Certainly the possibility that Madison, currently the only city other than Milwaukee with a population exceeding 150,000, may declare itself a first class city is irrelevant to the structure of the "experiment." Thus, if the program is truly experimental, the *Brewers* analysis should apply. Under *Brewers,* 130 Wis.2d at 113, 387 N.W.2d 254, the legislation would clearly fail because the program will have no "direct and immediate effect" upon a matter of statewide concern. The immediate effects of sec. 119.23, Stats., are local and private. If the legislation is valid as a general law, there is no reason to defend it as experimental.

3 The majority states that it is "unclear whether the governor felt that the time limitation was too short or too long." Majority op. at 471. This, of course, is irrelevant. What is clear is that the bill which the governor approved has no sunset clause. He specifically vetoed the experimental language of the legislation. All we know is that the governor did not agree that "choice" was a program that was limited to an experimental period.

1 The majority devotes a mere three and a half pages, less than ten percent of its opinion, to the question whether the legislation satisfies the constitutional requirement of the educational uniformity clause, art. X, sec. 3, an issue of first impression. It devotes seven pages (about 19 percent) to the issue of public purpose.

2 The state constitution is not a grant of power to the legislature but a restriction on legislative authority. *Outagamie County v. Zuehlke,* 165 Wis. 32, 35, 161 N.W. 6 (1917).

3 *Kukor v. Grover,* 148 Wis.2d 469, 518, 436 N.W.2d 568 (1989); Alice Smith, *The History of Wisconsin* 576 (1973); Erik LeRoy, Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation, Buse v. Smith Criticized,* 1981 Wis.L.Rev. 1325, 1344–50.

4 Wisconsin educators have always been aware of the potential detrimental effect of competing private schools on public schools. Responding to charges of "immorality" in the public schools, one early state superintendent asked: "But ... was not this the fault of the private schools? Was not the removal of the best scholars the most severe blow that could be dealt the public schools? Did it not produce the very inferiority that was condemned?" Lloyd P. Jorgenson, *The Founding of Public Education in Wisconsin* 188 (1956) (citing *Wisconsin Journal of Education* 2:23–25 (July 1857)).

5 In 1869, about twenty years after the adoption of the constitution, Justice Paine advanced a similar interpretation of article X. In a case where a private law authorized the town of Jefferson to levy a tax to aid in the construction of buildings for a private educational institution, Justice Paine reasoned that granting public funding for the private school was invalid under article X because article X implied that the public system was designed to be the only instruction to be supported by taxation. "Our constitution provides for a general system of public free schools.... And from the general and extensive character of the provisions upon this subject, I think there is some implication that this system was designed to be exclusive, and to furnish the only public instruction which was to be supported by taxation." *Curtis's Administrator v. Whipple,* 24 Wis. 350, 360 (1869) (Paine, J., concurring).

Chief Justice Hallows, writing for the court in *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 170 N.W.2d 790 (1969), concluded that *Manitowoc v. Manitowoc Rapids,* 231 Wis. 94, 98, 285 N.W. 403 (1939), rejected Justices Paine's view. *Reuter,* 44 Wis.2d at 221, 170 N.W.2d 790. *Manitowoc* does not support Justice Hallows' conclusion. The *Manitowoc* court held that art. X, sec. 3 does not prohibit the legislature from providing free education to people beyond the ages of four through twenty. *Manitowoc* therefore stands only for the proposition that the legislature may augment the free public education system the constitution mandates in article X.

6 Article X, sec. 3 provides in full:

> 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.

7 *See also Larson v. State Appeal Board,* 56 Wis.2d 823, 827–28, 202 N.W.2d 920 (1973); *Joint School District v. Sosalla,* 3 Wis.2d 410, 420, 88 N.W.2d 357 (1958).

8 The framers reinforced this concern for the content of education when they required local financial support for the schools in art. X, sec. 4. The framers believed that local financial contributions would focus local attention on the operation of the schools and the education of their children. "No adequate interest was felt by the people, in common schools, unless they contributed to their support." *Journal and Debates of the Constitutional Convention* 335 (1847–48).

Article X, sec. 4 states: "Each town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund." Article X, sec. 2 established the school fund from the proceeds of the sale of lands that the United States granted to Wisconsin upon its attaining statehood.

9 Article IV, sec. 18 states: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that subject shall be expressed in the title."

10 Why should this court apply a different test to a statute referring to Milwaukee than it would to a statute referring to first class cities?

11 *See* Keith Levy, *Constitutional Limitations on Appropriations,* 11 UCLA–Alaska L.Rev. 189, 200–02 (1982); *State v. Lewis,* 559 P.2d 630, 642–43 (Alaska 1977).

12 All decisions prior to *Brookfield* evaluating a challenge under art. IV, sec. 18 or the similar provisions of art. IV, secs. 31 and 32 applied a presumption of constitutionality. *See, e.g., Soo Line,* 101 Wis.2d at 76, 303 N.W.2d 626; *Madison Metro. Sewerage Dist. v. Stein,* 47 Wis.2d 349, 356–57, 359, 177 N.W.2d 131 (1970); *Milwaukee County v. Isenring,* 109 Wis. 9, 24, 85 N.W. 131 (1901); *Johnson v. City of Milwaukee,* 88 Wis. 383, 391, 60 N.W. 270 (1894). *See also* 2 C. Dallas Sands, *Sutherland Statutory Construction* sec. 40.06, at 215 (1986 Rev. ed.); 1 C. Dallas Sands, *Sutherland Statutory Construction* sec. 2.04, at 29 (1986 Rev. ed.).

13 I continue to wonder why courts and litigants rely on the concepts of presumption of constitutionality and proof of unconstitutionality beyond a reasonable doubt without discussing what these concepts mean in the particular case. What does the presumption mean in terms of what evidence is needed? Does the presumption affect how the evidence is to be presented? What is the significance of who bears the burden of proof? What is the application of the presumption when the facts are undisputed and only the question of constitutionality, that is a question of law, is presented? *See, e.g., Milwaukee Brewers,* 130 Wis.2d at 125–31, 387 N.W.2d 254 (Abrahamson, J., dissenting); *State ex rel. Briggs & Stratton v. Noll,* 100 Wis.2d 650, 663–64, 302 N.W.2d 487 (1981) (Abrahamson, J., dissenting). *See generally* Willard Hurst, *Dealing With Statutes,* 87–99 (1982).

1 In a concurring opinion of less than one page, the refrain "Let's give choice a chance!", or similar verbiage, is repeated four times. The issue here is not whether we agree with the policy choice made by the legislature, the issue is the process by which the policy was enacted into law. The policy of whether "choice" should be law in this state is a legislative decision. It is no more appropriate for judges to applaud a policy decision of the legislature in this context than it is to disparage it. When the court challenge is based on process, it is totally inappropriate and judicially indefensible for judges to base their decision on whether they agree with the policy or not.

2 The majority opinion, in footnote 8 expresses concern at what it perceives to be this dissent's "indictment of the legislature's integrity." That is utter codswallop! The challenge here is to the process by which a bill becomes law. The conclusion of this dissent that the process was constitutionally defective is no more an indictment of the legislature's integrity than were a number of past decisions of this court, some of which the author of this majority opinion participated in and agreed with, that found other legislation "private or local"

and therefore violative of Article IV, Section 18. *See, e.g., Soo Line R. Co. v. Transportation Dep't,* 101 Wis.2d 64, 303 N.W.2d 626 (1981); *Brookfield v. Milwaukee Sewerage,* 144 Wis.2d 896, 426 N.W.2d 591 (1988).

3 The majority suggests, in a footnote that responds to this part of the dissent, that "a plausible alternative explanation could include the Senate's concern that a worthy piece of legislation may be thwarted by the close of a legislative session." Majority op. at 467. If that is a plausible alternative explanation, it is equally repugnant. Is the majority suggesting that "worthy" legislation can escape the constitutional imperatives of article IV, section 18 if such legislation comes up at the end of the legislative session?

368 N.C. 122
Supreme Court of North Carolina.

Alice HART, Rodney Ellis, Judy Chambers, John Harding Lucas, Margaret Arbuckle, Linda Mozell, Yamile Nazar, Arnetta Beverly, Julie Peeples, W.T. Brown, Sara Piland, Donna Mansfield, George Loucks, Wanda Kindell, Valerie Johnson, Michael Ward, T. Anthony Spearman, Brittany Williams, Raeann Rivera, Allen Thomas, Jim Edmonds, Sasha Vrtunski, Priscilla Ndiaye, Don Locke, and Sandra Byrd, Plaintiffs
v.
STATE of North Carolina and North Carolina State Education Assistance Authority, Defendants,
and
Cynthia Perry, Gennell Curry, Tim Moore, and Phil Berger, Intervenor–Defendants.

No. 372A14.
|
July 23, 2015.

Synopsis
Background: Taxpayers brought action against state and State Education Assistance Authority, seeking declaratory and injunctive relief, challenging constitutionality of Opportunity Scholarship Program, under which Authority awarded scholarship grants to low-income students to attend nonpublic schools. The Superior Court, Wake County, Robert H. Hobgood, J., entered summary judgment in favor of taxpayers, and defendants appealed.

Holdings: After certifying the appeal for immediate review, the Supreme Court, Martin, C.J., held that:

Program did not violate constitutional requirements for school funding;

Program did not violate uniformity clause of state constitution; and

appropriations made for Program were for a "public purpose."

Reversed.

Hudson, J., filed a dissenting opinion, in which Beasley and Ervin, JJ., joined.

Beasley, J, filed a dissenting opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

****283** Appeal pursuant to N.C.G.S. § 7A–27(b)(1) from an order and final judgment granting summary judgment and injunctive relief for plaintiffs entered on 28 August 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 10 October 2014, pursuant ****284** to N.C.G.S. § 7A–31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 24 February 2015.

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Liberty, Life, and Law Foundation, by Deborah J. Dewart; Swansboro, Thomas C. Berg, pro hac vice, Minneapolis,

University of St. Thomas School of Law (Minnesota); and Christian Legal Society, by Kimberlee Wood Colby, pro hac vice, for Christian Legal Society; Springfield, North Carolina Christian School Association; Roman Catholic Diocese of Charlotte, North Carolina; Roman Catholic Diocese of Raleigh, North Carolina; North Carolina Family Policy Council; Liberty, Life, and Law Foundation; Association of Christian Schools International; American Association of Christian Schools; and National Association of Evangelicals, amici curiae.

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Opinion

MARTIN, Chief Justice.

***126** When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly. *E.g., In re Hous. Bonds,* 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid. *Baker v. Martin,* 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). North Carolina courts have the authority and responsibility to declare a law unconstitutional, [1] but only when the violation is plain and clear. *State ex rel. Martin v. Preston,* 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt. *Baker,* 330 N.C. at 334–35, 410 S.E.2d at 889.

In this case plaintiffs challenge the Opportunity Scholarship Program, which allows a ****285** small number of students [2] in lower-income families to receive scholarships from the State to attend private school. According to the most recent figures published by the Department of Public Instruction, a large percentage of economically disadvantaged students in North Carolina are not grade level proficient with respect to the subjects tested on the State's end-of-year assessments. [3] Disagreement exists as to the innovations and reforms necessary to address this and other educational issues in our state. Our state and country benefit from the debate between those with differing viewpoints in this quintessentially political dialogue. Such discussions inform the legislative process. But the role of judges is distinguishable, as we neither participate in this dialogue nor assess the wisdom of legislation. Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts. *See In re Alamance Cty. Court Facils.,* 329 N.C. 84, 94, 405 S.E.2d 125, 130 (1991) ("Just as ***127** the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and the other branches of government."). [4] Our constitutionally assigned role is limited to a determination of whether the legislation is plainly and clearly prohibited by the constitution. Because no prohibition in the constitution or in our precedent forecloses the General Assembly's enactment of the challenged legislation here, the trial court's order declaring the legislation unconstitutional is reversed.

I

Under the provisions of the Opportunity Scholarship Program, [5] the State Educational Assistance Authority (the Authority) makes applications available each year "to eligible students for the award of scholarship grants to attend any nonpublic school." N.C.G.S. § 115C–562.2(a) (2014). An "[e]ligible student" is defined as "a student who has not yet received a high school diploma" and who, in addition to meeting other specified criteria, "[r]esides in a household with an income level not in excess of one hundred thirty-three percent (133%) of the amount required for the student to qualify for the federal free or reduced-price lunch program." *Id.* § 115C–562.1(3) (2013). A "[n]onpublic school" is any school that meets the requirements of either Part 1 ("Private Church Schools and Schools of Religious Charter") or Part 2 ("Qualified Nonpublic Schools") of Article 39 of Chapter 115C of the General Statutes. *Id.* § 115C–562.1(5) (2013).

The Authority awards scholarships to the program's applicants, with preference given first to previous scholarship recipients, and then to students in lower-income families and students entering kindergarten or the first grade. *Id.* § 115C–562.2(a). Subject to certain ****286** restrictions, ***128** students selected to participate in the program may receive a scholarship grant of up to $4,200 to attend any nonpublic school. *Id.* § 115C–562.2(b) (2014). Once a student has been selected for the program and has chosen a school to attend, the Authority remits the grant funds to the nonpublic school for endorsement, and the parent or guardian "restrictively endorse[s] the scholarship grant funds awarded to the eligible student to the nonpublic school for deposit into the account of [that] school." *Id.* § 115C–562.6 (2013).

A nonpublic school that accepts a scholarship recipient for admission must comply with the requirements of N.C.G.S. § 115C–562.5(a), which include: (1) providing the Authority with documentation of the tuition and fees charged to the student; (2) providing the Authority with a criminal background check conducted on the highest ranking staff member at the school; (3) providing the parent or guardian of the student with an annual progress report, including standardized test scores; (4) administering at least one nationally standardized test or equivalent measure for each student in grades three or higher that measures achievement in the areas of English grammar, reading, spelling, and mathematics; (5) providing the Authority with graduation rates of scholarship program students; and (6) contracting with a certified public accountant to perform a financial review for each school year in which the nonpublic school accepts more than $300,000 in scholarship grants. *Id.* § 115C–562.5(a)(1)–(6) (2014). Nonpublic schools enrolling more than twenty-five Opportunity Scholarship Program students must report the aggregate standardized test performance of the scholarship students to the Authority. *Id.* § 115C–562.5(c) (2014). Furthermore, all nonpublic schools that accept scholarship program students are prohibited from charging additional fees based on a student's status as a scholarship recipient, *id.* § 115C–562.5(b) (2014), and from discriminating with respect to the student's race, color, or national origin, *id.* § 115C–562.5(c1) (2014); *see also* 42 U.S.C. § 2000d (2012). Nonpublic schools that fail to comply with these statutory requirements are ineligible to participate in the program. N.C.G.S. § 115C–562.5(d) (2014).

The Opportunity Scholarship Program also subjects the Authority to certain reporting requirements. Each year, the Authority must provide demographic information and program data to the Joint Legislative Education Oversight Committee. *Id.* § 115C–562.7(b) (2014). The Authority is also required to select an independent research organization to prepare an annual report on "[l]earning gains or losses of students receiving scholarship grants" and on the "[c]ompetitive effects on public school performance on standardized tests as a result of the ***129** scholarship grant program." *Id.* § 115C–562.7(c) (2014). Following submission of these reports to the Joint Legislative Education Oversight Committee and the Department of Public Instruction, "[t]he Joint Legislative Education Oversight Committee shall review [the] reports from the Authority and shall make ongoing recommendations to the General Assembly as needed regarding improving administration and accountability for nonpublic schools accepting students receiving scholarship grants." *Id.*

The Opportunity Scholarship Program is funded by appropriations from general revenues to the Board of Governors of the University of North Carolina, which provides administrative support for the Authority. In fiscal year 2014–15, the General Assembly appropriated a total of $10,800,000 to the program.

II

On 11 December 2013, plaintiff Alice Hart and twenty-four other taxpayers filed a complaint in Superior Court, Wake County, challenging the constitutionality of the Opportunity Scholarship Program under the Constitution of North Carolina. [6]

Plaintiffs' amended complaint asserted five claims for relief, all of which presented facial challenges under the North Carolina Constitution. First, plaintiffs alleged that the Opportunity ****287** Scholarship Program "appropriates revenue paid by North Carolina taxpayers to private schools for primary and secondary education" in violation of Article IX, Sections 2(1) and 6, and Article I, Section 15. Second, plaintiffs alleged that the law "appropriates revenue paid by North Carolina taxpayers to private schools for the ostensible purpose of primary and secondary education without those funds being supervised by the Board of Education" in violation of Article IX, Section 5. Third, plaintiffs alleged that the law creates "a non-uniform system of schools for primary and secondary education" in violation of Article IX, Section 2(1). Fourth, plaintiffs alleged that in "transfer [ring] revenue paid by North Carolina taxpayers to private schools without

any accountability or requirements ensuring that students will actually receive an education," the law "does not accomplish any public purpose" in violation of Article V, Sections 2(1) and 2(7). Fifth, plaintiffs alleged that in "transfer[ring] revenue paid by North Carolina taxpayers to private schools that are permitted to ***130** discriminate against students and applicants on the basis of race, color, religion, or national origin,"[7] the law serves no public purpose and therefore violates Article V, Section 2(1), and Article I, Section 19. Plaintiffs requested a declaration that the scholarship program is unconstitutional under the challenged provisions, as well as a permanent injunction to prevent implementation and enforcement of the legislation.

On cross-motions for summary judgment, the trial court entered an order and final judgment on 28 August 2014, allowing plaintiffs' motion for summary judgment on all claims, denying defendants' and intervenor-defendants' motions for summary judgment,[8] and declaring the Opportunity Scholarship Program unconstitutional on its face. The trial court permanently enjoined implementation of the Opportunity Scholarship Program legislation, including the disbursement of public funds.

Defendants appealed, and this Court, on its own initiative, certified the appeal for immediate review prior to a determination in the Court of Appeals.[9] For the following reasons, we reverse the trial court's order and final judgment declaring the Opportunity Scholarship Program unconstitutional and dissolve the injunction preventing further implementation and enforcement of the challenged legislation.

III

Defendants' appeal from the trial court's order and final judgment presents questions to this Court concerning the construction and interpretation of provisions in the North Carolina Constitution.[10] As the court of last resort in this state, we answer with finality "issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina." *Preston,* 325 N.C. at 449, 385 S.E.2d at 479 (citations omitted). Accordingly, our review of the constitutional questions presented is de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.,* 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001); ***131** *see Craig v. New Hanover Cty. Bd. of Educ.,* 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

In exercising our de novo review, we apply well-settled principles to assess the constitutionality of legislative acts. At the outset, the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State. *See, e.g., Preston,* 325 N.C. at 448–49, 385 S.E.2d at 478. We therefore presume that a statute is constitutional, and we will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt. ****288** *Baker,* 330 N.C. at 334–35, 410 S.E.2d at 889; *see also Preston,* 325 N.C. at 449, 385 S.E.2d at 478 (stating that an act of the General Assembly will be declared unconstitutional only when "it [is] plainly and clearly the case" (quoting *Glenn v. Bd. of Educ.,* 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936))). Next, when the constitutionality of a legislative act depends on the existence or nonexistence of certain facts or circumstances, we will presume the existence or nonexistence of such facts or circumstances, if reasonable, to give validity to the statute. *In re Hous. Bonds,* 307 N.C. at 59, 296 S.E.2d at 285 (citing *Martin v. N.C. Hous. Corp.,* 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970)). Further, a facial challenge to the constitutionality of an act, as plaintiffs have presented here, is the most difficult challenge to mount successfully. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs,* 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citations omitted). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Id.* (citation omitted); *see also Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450–51, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 (2008) (discussing why facial challenges are disfavored). Accordingly, we require the party making the facial challenge to meet the high bar of showing "that there are no circumstances under which the statute might be constitutional." *Beaufort Cty. Bd. of Educ.,* 363 N.C. at 502, 681 S.E.2d at 280 (citation omitted); *see also United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("[T]he challenger must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the [act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...."). It is through this lens of constitutional review that we begin our analysis in this case.

A

The first question presented by defendants' appeal is whether Article IX, Section 6 of the state constitution prohibits the General Assembly ***132** from appropriating tax revenues to the Opportunity Scholarship Program, which is not part of our public school system.

Defendants contend that Article IX, Section 6 should not be read as a limitation on the State's ability to spend on education generally. In plaintiffs' view, however, even when the General Assembly explicitly intends, as it did here, to appropriate money for educational scholarships to nonpublic schools, the plain text of Article IX, Section 6 prohibits that option and requires that any and all funds for education be appropriated exclusively for our public school system.

Entitled "State school fund," Article IX, Section 6 provides:

> The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. Const. art. IX, § 6.

The manifest purpose of this section is to protect the "State school fund" in order to preserve and support the public school system, not to limit the State's ability to spend on education generally. Section 6 accomplishes this purpose by identifying sources of funding for the State school fund and mandating that funds derived by the State from these sources be "faithfully appropriated for establishing and maintaining in this State a system of free public schools." *City of Greensboro v. Hodgin,* 106 N.C. 182, 186–87, 11 S.E. 586, 587–88 (1890) (quoting a previous version of the provision). The first four clauses of Section 6 identify non-revenue ****289** sources of funding, two of which appear to be mandatory and two of which appear to be within the discretion of the General Assembly to otherwise appropriate as it sees fit. The fifth clause (the revenue clause) states that a portion of the State's revenue "may be set apart for that purpose"—meaning for the purpose of "establishing and maintaining a uniform system of free public schools." This clause ***133** recognizes that the General Assembly may choose to designate a portion of the State's general tax revenue as an additional source of funding for the State school fund.

Thus, within constitutional limits, the General Assembly determines how much of the revenue of the State will be appropriated for the purpose of "establishing and maintaining a uniform system of free public schools." Insofar as the General Assembly appropriates a portion of the State's general revenues for the public schools, Section 6 mandates that those funds be faithfully used for that purpose. Article IX, Section 6 does not, however, prohibit the General Assembly from appropriating general revenue to support other educational initiatives. *See Preston,* 325 N.C. at 448–49, 385 S.E.2d at 478 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (citations omitted)). Because the Opportunity Scholarship Program was funded from general revenues, not from sources of funding that Section 6 reserves for our public schools, plaintiffs are not entitled to relief under this provision.

Faithful appropriation and use of educational funds was a very real concern to the framers of our constitution. Before the introduction of Article IX, Section 6 in the 1868 Constitution, the Literary Fund, which was devoted to funding public education, was routinely threatened to be used during the Civil War to pay for other expenses and was almost completely depleted by the war's end. *See* M.C.S. Noble, *A History of the Public Schools of North Carolina* 242–49, 272 (1930); Milton Ready, *The Tar Heel State: A History of North Carolina* 263 (2005). The framers of the 1868 Constitution sought to constitutionalize the State's obligation to protect the State school fund. In so doing, our framers chose not to

limit the State from appropriating general revenue to fund alternative educational initiatives. Plaintiffs' arguments to the contrary are without merit.

Given our disposition of plaintiffs' claim under Article IX, Section 6, we agree with defendants that plaintiffs are likewise not entitled to relief under Article IX, Section 5. Under Article IX, Section 5, "[t]he State Board of Education shall supervise and administer the free public school system *and the educational funds provided for its support.*" N.C. Const. art. IX, § 5 (emphasis added). Because public funds may be spent on educational initiatives outside of the uniform system of free public schools, plaintiffs' contention that funding for the Opportunity Scholarship Program should have gone to the public schools—and therefore been brought under the supervision and administration of the State Board of Education—is without merit.

***134** The final issue under Article IX presented by defendants' appeal is whether the Opportunity Scholarship Program legislation violates Article IX, Section 2(1). Under Section 2(1), "[t]he 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." *Id.* art. IX, § 2(1). Plaintiffs contend that "[i]f the uniformity clause has any substance, it means that the State cannot create an alternate system of publicly funded private schools standing apart from the system of free public schools mandated by the Constitution."

Plaintiffs' characterization of the Opportunity Scholarship Program is inaccurate. The Opportunity Scholarship Program legislation does not create "an alternate system of publicly funded private schools." Rather, this legislation provides modest scholarships to lower-income students for use at nonpublic schools of their choice. Furthermore, we have previously stated that the uniformity clause requires that provision be made for public schools of like kind throughout the ****290** state. *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.,* 363 N.C. 165, 171–72, 675 S.E.2d 345, 350 (2009). The uniformity clause applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system. Accordingly, the Opportunity Scholarship Program does not violate Article IX, Section 2(1).

B

The next question presented by defendants' appeal is whether the appropriation of general revenues to fund educational scholarships for lower-income students is for a public purpose under Article V, Sections 2(1) and 2(7).

Defendants contend that providing lower-income students the opportunity to attend private school "satisfies the State's legitimate objective of encouraging the education of its citizens." Defendants maintain that, in satisfying this objective, appropriations directed to the Opportunity Scholarship Program are made for a public purpose. Plaintiffs contend that the program does not accomplish a public purpose because the program appropriates taxpayer money for educational scholarships to private schools without regard to whether the schools satisfy substantive education standards.

Under Article V, Section 2(1), "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Under Article V, Section 2(7), "[t]he General Assembly may ***135** enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." *Id.* art. V, § 2(7). Because "[t]he power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury," we subject both legislative powers to the public purpose requirement. *Mitchell v. N.C. Indus. Dev. Fin. Auth.,* 273 N.C. 137, 143, 159 S.E.2d 745, 749–50 (1968).

At the outset, we note that "the fundamental concept underlying the public purpose doctrine" is that "the ultimate gain must be the public's, not that of an individual or private entity." *Maready v. City of Winston–Salem,* 342 N.C. 708, 719, 467 S.E.2d 615, 622 (1996). Thus, in resolving challenges to legislative appropriations under the public purpose clause, this Court's inquiry is discrete—we ask whether the legislative purpose behind the appropriation is public or private. *See id.* at 716, 467 S.E.2d at 620–21; *Mitchell,* 273 N.C. at 144, 159 S.E.2d at 750. If the purpose is public, then the wisdom, expediency, or necessity of the appropriation is a legislative decision, not a judicial decision. *See Maready,* 342 N.C. at 714, 467 S.E.2d at 619.

Accordingly, our public purpose analysis does not turn on whether the appropriation will, in the words of plaintiffs, "accomplish" a public purpose.

Likewise, sustaining a legislative appropriation under the public purpose clause does not require a concurrent assessment of whether other constitutional infirmities exist that might render the legislation unconstitutional. If the challenged appropriation is constitutionally infirm on other grounds, proper redress is under the applicable constitutional provisions, not the public purpose clause. Thus, plaintiffs' contentions that the Opportunity Scholarship Program runs afoul of Article I, Sections 15 and 19, due to scholarships being remitted to allegedly "unaccountable" schools or schools that discriminate on the basis of religion, are inapposite to the public purpose analysis. [11]

Our inquiry under Article V, Sections 2(1) and 2(7), therefore, is whether the appropriations made by the General Assembly to fund the Opportunity Scholarship Program are for a public rather than private purpose. In addressing this question, we are mindful of the general proposition articulated by this Court over forty-five years ago: "Unquestionably, the education of residents of this ****291** State is a recognized object of State government. Hence, the provision therefor is for a public ***136** purpose." *State Educ. Assistance Auth. v. Bank of Statesville,* 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) (citing *Jamison v. City of Charlotte,* 239 N.C. 682, 696, 80 S.E.2d 904, 914 (1954); *Green v. Kitchin,* 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948)).

In determining whether a specific appropriation is for a public purpose, "[t]he term 'public purpose' is not to be narrowly construed." *Madison Cablevision, Inc. v. City of Morganton,* 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citing *Briggs v. City of Raleigh,* 195 N.C. 223, 226, 141 S.E. 597, 599 (1928)). We have also specifically "declined to 'confine public purpose by judicial definition[, leaving] "each case to be determined by its own peculiar circumstances as from time to time it arises." ' " *Maready,* 342 N.C. at 716, 467 S.E.2d at 620 (alteration in original) (quoting *Stanley v. Dep't of Conservation & Dev.,* 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973)). Indeed, "[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions." *Id.* (quoting *Mitchell,* 273 N.C. at 144, 159 S.E.2d at 750). Although the initial determination of the General Assembly in passing the law is given "great weight" by this Court, *Madison Cablevision,* 325 N.C. at 644–45, 386 S.E.2d at 206, "the ultimate responsibility for the public purpose determination rests, of course, with this Court," *id.* at 645, 386 S.E.2d at 206. "[T]wo guiding principles have been established for determining that a particular undertaking by [the State] is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the [State]; and (2) the activity benefits the public generally, as opposed to special interests or persons." *Maready,* 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision,* 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted)).

"As to the first prong, whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Id.; see also Green v. Kitchin,* 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948) ("A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government." (citations omitted)). Here, the provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry. *See State Educ. Assistance Auth.,* 276 N.C. at 587, 174 S.E.2d at 559 ("Unquestionably, the education of residents ***137** of this State is a recognized object of State government."); *see also Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.,* 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992) ("Education is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' "); *Delconte v. State,* 313 N.C. 384, 401–02, 329 S.E.2d 636, 647 (1985) ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education.").

In *State Education Assistance Authority v. Bank of Statesville,* for example, we approved the use of revenue bond proceeds to "make loans to meritorious North Carolinians of slender means" for the purpose of "minimiz [ing] the number of qualified persons whose education or training is interrupted or abandoned for lack of funds." 276 N.C. at 587, 174 S.E.2d at 559. Observing that "[t]he people of North Carolina constitute our State's greatest resource," we held that "bond proceeds are used for *a public purpose* when used to make such loans." *Id.*

Similarly, in *Hughey v. Cloninger* we addressed the legality of an appropriation made by the Gaston County Board of Commissioners to a private school for dyslexic children. 297 N.C. 86, 88, 95, 253 S.E.2d 898, 900, 903 (1979). Although we held that the Board of Commissioners lacked statutory authority to make such an appropriation, we stated, albeit in obiter dictum, that had there been statutory ****292** authority, such an appropriation "would have presented no 'public purpose' difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose." *Id.* at 95, 253 S.E.2d at 903–04. We therefore conclude that the appropriations made to the Opportunity Scholarship Program involve a "reasonable connection with the convenience and necessity of the [State]." *Maready,* 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision,* 325 N.C. at 646, 386 S.E.2d at 207).

As to the second prong of the public purpose inquiry, whether "the activity benefits the public generally, as opposed to special interests or persons," *id.* (quoting *Madison Cablevision,* 325 N.C. at 646, 386 S.E.2d at 207), "[i]t is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community," *id.* at 724, 467 S.E.2d at 625 (quoting *Briggs,* 195 N.C. at 226, 141 S.E. at 599–600). "[A]n expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Id.; see also* ***138** *State Educ. Assistance Auth.,* 276 N.C. at 588, 174 S.E.2d at 560 ("[T]he fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of 'a paramount public purpose.' " (quoting *Clayton v. Kervick,* 52 N.J. 138, 155, 244 A.2d 281, 290 (1968))).

The promotion of education generally, and educational opportunity in particular, is of paramount public importance to our state. Indeed, borrowing language from the Northwest Ordinance of 1787, our constitution preserves the ethic of educational opportunity, declaring that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and *the means of education* shall forever be encouraged." N.C. Const. art. IX, § 1 (emphasis added). Although the scholarships at issue here are available only to families of modest means, and therefore inure to the benefit of the eligible students in the first instance, and to the designated nonpublic schools in the second, the ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry. *Cf. Maready,* 342 N.C. at 724, 467 S.E.2d at 625 (recognizing that an expenditure providing an "incidental private benefit" is for a public purpose if it serves "a primary public goal"). Accordingly, the appropriations made by the General Assembly for the Opportunity Scholarship Program were for a public purpose under Article V, Sections 2(1) and 2(7).

C

The next issue presented by defendants' appeal concerns the independent applicability, if any, of Article I, Section 15 to plaintiffs' claims. Article I, Section 15 declares: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This constitutional provision states a general proposition concerning the right to the privilege of education, the substance of which is detailed in Article IX. Article I, Section 15 is not an independent restriction on the State. *See generally* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62–63 (2d ed. 2013).

Plaintiffs rely on Article I, Section 15 and *Leandro v. State,* 346 N.C. 336, 488 S.E.2d 249 (1997), a case challenging the adequacy of public school funding, for the proposition that "public funds spent for education must go to institutions that will provide meaningful educational services—specifically, to institutions with a sufficient curriculum and competent teachers." Because the Opportunity Scholarship Program legislation does not require that participating nonpublic schools meet the sound basic education standard announced in ***139** *Leandro,* 346 N.C. at 347, 488 S.E.2d at 255, or impose regulatory standards approximating those placed on our public schools in Chapter 115C of the General Statutes, plaintiffs contend that the scholarship program accomplishes no public purpose and is constitutionally inadequate. [12]

****293** As stated above, Article I, Section 15 has no effect on our disposition with respect to plaintiffs' public purpose claim. In its order and final judgment, however, the trial court purported to grant independent relief to plaintiffs under Article I, Section 15, concluding that the Opportunity Scholarship Program legislation fails to " 'guard and maintain' the right of the people to the privilege of education" by "appropriating taxpayer funds to educational institutions that are not required to meet educational standards" and by "expending public funds so that children can attend private

schools." To the extent that plaintiffs rely on Article I, Section 15 as an independent basis of relief, we agree with defendants that such reliance is misplaced.

It is axiomatic that the responsibility *Leandro* places on the State to deliver a sound basic education has no applicability outside of the education delivered in our public schools. In *Leandro* we stated that a public school education that "does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." 346 N.C. at 345, 488 S.E.2d at 254. We concluded that "Article I, Section 15 *and* Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education *in our public schools.*" *Id.* at 347, 488 S.E.2d at 255 (emphases added). Thus, *Leandro* does not stand for the proposition that Article I, Section 15 independently restricts the State outside of the public school context.

Furthermore, our constitution specifically envisions that children in our state may be educated by means outside of the public school system. *See* N.C. Const. art. IX, § 3 ("The General Assembly shall provide ***140** that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, *unless educated by other means.*" (emphasis added)); *see also Delconte,* 313 N.C. at 385, 400–01, 329 S.E.2d at 638, 646–47 (concluding that home school instruction did not violate compulsory attendance statutes and noting that a contrary holding would raise a serious constitutional question under the North Carolina Constitution). Thus, even if Article I, Section 15 could serve as an independent basis of relief, there is no merit in the argument that a legislative program designed to increase educational opportunity in our state is one that fails to "guard and maintain" the "right to the privilege of education."

The final issue presented by defendants' appeal concerns plaintiffs' Article I, Section 19 religious discrimination claim. Article I, Section 19 declares, in pertinent part, "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, *religion,* or national origin." N.C. Const. art. I, § 19 (emphasis added). Plaintiffs couch their religious discrimination claim, both for justiciability purposes and with respect to the merits of the claim, in terms of the public purpose doctrine. In short, plaintiffs contend that the Opportunity Scholarship Program accomplishes no public purpose because it allows funding for educational scholarships to schools that may discriminate on the basis of religion. Again, our analysis of the public purpose doctrine made clear that Article I, Section 19, like Article I, Section 15, has no effect on our disposition with respect to plaintiffs' public purpose claim.

With respect to the independent applicability of Article I, Section 19 as a stand-alone claim, defendants have maintained throughout this litigation that such a claim is not justiciable in this case because plaintiffs, as taxpayers of the state, lack standing. Specifically, defendants contend that plaintiffs have ****294** suffered no injury in fact because they are not in the class of persons against which the program allegedly discriminates. We agree and therefore hold that plaintiffs' Article I, Section 19 claim must be dismissed.

Generally, "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston v. State,* 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). Yet, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Educ. Assistance Auth.,* 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (citations omitted). "[A] person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose ***141** unless he belongs to the class which is prejudiced by the statute." *In re Martin,* 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (quoting 16 Am. Jur. 2d *Constitutional Law* § 123 (1964)). Here plaintiffs are taxpayers of the state, not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the Opportunity Scholarship Program. Because eligible students are capable of raising an Article I, Section 19 discrimination claim on their own behalf should the circumstances warrant such action, plaintiffs have no standing to assert a direct discrimination claim on the students' behalf.

IV

"The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution." *Redev. Comm'n v. Sec. Nat'l Bank of Greensboro,* 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960); *see also New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 386–87, 76 L.Ed. 747 (1932) (Brandeis & Stone, JJ., dissenting) (indicating that an individual state may

serve as a laboratory of democracy and experiment with new legislation in order to meet changing social and economic needs). In this case the General Assembly seeks to improve the educational outcomes of children in lower-income families. The mode selected by the General Assembly to effectuate this policy objective is the Opportunity Scholarship Program.

When, as here, the challenged legislation comports with the constitution, the wisdom of the enactment is a decision for the General Assembly. As this Court has previously recognized, "[i]t may be that the measure may prove eventually to be a disappointment, and is ill advised, but the wisdom of the enactment is a legislative and not a judicial question." *Sec. Nat'l Bank of Greensboro,* 252 N.C. at 612, 114 S.E.2d at 700. To the extent that plaintiffs disagree with the General Assembly's educational policy decision as expressed in the Opportunity Scholarship Program, their remedy is with the legislature, not the courts. Our review is limited to a determination of whether plaintiffs have demonstrated that the program legislation plainly and clearly violates our constitution. Plaintiffs have made no such showing in this case. Accordingly, the trial court erred in declaring the Opportunity Scholarship Program unconstitutional. We therefore reverse the trial court's order and final judgment.

REVERSED.

***142** Justice HUDSON, dissenting.

Because the Opportunity Scholarship Program provides for the spending of taxpayer money on private schools without incorporating any standards for determining whether students receive a sound basic—or indeed, any—education, I conclude that the program violates the North Carolina Constitution in two respects. As a result, I must respectfully dissent.

First, the Opportunity Scholarship Program (also known as the "voucher program") violates the requirements of Article V, Sections 2(1) and 2(7) that public funds be spent for public purposes only. "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Additionally, "[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation ****295** for the accomplishment of public purposes only." *Id.* § 2(7). Second, in so doing, the spending authorized under the voucher program also violates Article I, Section 15, which states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." *Id.* art. I, § 15.

In its order the trial court includes the following among the "Undisputed Material Facts":

> 4. Private schools that receive scholarship funds are (1) not required to be accredited by the State Board of Education or any other state or national institution; (2) not required to employ teachers or principals who are licensed or have any particular credentials, degrees, experience, or expertise in education; (3) not subject to any requirements regarding the curriculum that they teach; (4) not required to provide a minimum amount of instructional time; and (5) not prohibited from discriminating against applicants or students on the basis of religion. *See* N.C. Gen.Stat. § 115C–562.1 *et seq.*
>
> ....
>
> 6. Of the 5,556 scholarship applicants, 3,804 applicants identified 446 private schools they planned to attend. Of those 446 schools, 322 are religious schools and 117 are independent schools. Of the 322 religious schools ***143** scholarship recipients planned to attend, 128 are accredited by some organization and 194 are not accredited by any organization. Of the 117 independent schools scholarship recipients planned to attend, 58 are accredited by some organization and 59 are not accredited by any organization.

The trial court then reached the following conclusions of law, among others:

> 3. The Court concludes from the record beyond a reasonable doubt that the [Opportunity Scholarship Program] Legislation funds private schools with taxpayer dollars as an alternative to the public school system in direct contravention of Article [I], Section[ ] 15 ... and Article V, Sections 2(1) and (7) of the North Carolina Constitution. The legislation unconstitutionally
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> ....
>
> b. appropriates public funds for education in a manner that does not accomplish a public purpose, in violation of Article V, Sections 2(1) and (7), in particular by appropriating funds to private primary and secondary schools without regard to whether these schools satisfy substantive educational standards: appropriating

> taxpayer funds to unaccountable schools does not accomplish a public purpose;
>
> ....
>
> e. fails to "guard and maintain" the right of the people to the privilege of education in violation of Article I, Section 15 by appropriating taxpayer funds to educational institutions that are not required to meet educational standards, including curriculum and requirements that teachers and principals be certified[.]
>
> ....
>
> 4. The General Assembly fails the children of North Carolina when they are sent with taxpayer money to private schools that have no legal obligation to teach them anything.

***144** As noted above, these facts are undisputed, and in my view, these conclusions are correct.

In *Madison Cablevision, Inc. v. City of Morganton* this Court articulated a two-part test for determining if a spending statute complies with the requirements of the North Carolina Constitution as found in Article V, Section 2(1), which is quoted above and known as the "public purpose" clause. 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). As noted by the majority, while "[t]he initial responsibility for determining what is and what is not a public purpose rests with the legislature" and "its determinations are entitled to great weight," "the ultimate responsibility for the public purpose determination rests, of course, with this Court." *Id.* at 644–45, 386 S.E.2d at 206 (internal citations omitted). Further, in *Stanley v. Department of Conservation and Development* this Court articulated the following principle regarding public purpose expenditures: "In ****296** determining what is a public purpose the courts look not only to the ends sought to be attained but also 'to the means to be used.' " 284 N.C. 15, 34, 199 S.E.2d 641, 653 (1973) (citations omitted), *abrogated in part on other grounds by Madison Cablevision,* 325 N.C. at 647–48, 386 S.E.2d at 208, *and superseded by constitutional amendment,* N.C. Const. art. V, §§ 2(7), 9. Therefore, I conclude that the majority's assertion that "our public purpose analysis does not turn on whether the appropriation will ... 'accomplish' a public purpose" is contrary to our precedent. It is precisely this determination that we are called upon to undertake here. To that end, this Court has articulated "[t]wo guiding principles" for determining whether an expenditure of tax funds is for a public purpose. *Madison Cablevision,* 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted) (involving operation of a public enterprise by a municipality). A governmental expenditure satisfies the public purpose clause if: "(1) it involves a reasonable connection with the convenience and necessity of the particular [jurisdiction], and (2) the activity benefits the public generally, as opposed to special interests or persons." *Id.*

Defendants assert, and I agree with the majority, that our courts have long held that education generally serves a public purpose. *See, e.g., State Educ. Assistance Auth. v. Bank of Statesville,* 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) ("Unquestionably, the education of residents of this State is a recognized object of State government. Hence, provision therefor is for a public purpose." (citations omitted)). I further agree with the majority that, in principle, "the provision of monetary assistance to lower-income families so that their children have greater educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."

***145** Nonetheless, I cannot agree that the spending of taxpayer funds on private school education through the Opportunity Scholarship Program here serves "public purposes only" as our constitution requires. N.C. Const. art. V, § 2(1). In *Leandro v. State* this Court concluded that "the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). We went on to say in *Hoke County Board of Education v. State* that a sound basic education should include an "effective instructional program" taught by "competent, certified, well-trained" teachers and led by "well-trained competent" principals. 358 N.C. 605, 636, 599 S.E.2d 365, 389 (2004). Admittedly, this is the standard we have set for our public schools, not our private ones, and it is conceivable that we would set a less comprehensive substantive standard for private schools. However, a large gap opens between *Leandro*-required standards and no standards at all, which is what we have here. When taxpayer money is used, the total absence of standards cannot be constitutional.

Before the legislature created the Opportunity Scholarship Program, taxpayer money had not been used to directly finance any part of a private school education. The expenditure of public taxpayer funds brings the Opportunity Scholarship Program squarely within the requirements of Article V, Sections 2(1) and 2(7). As the trial court noted, the

schools that may receive Opportunity Scholarship Program money have no required teacher training or credentials and no required curriculum or other means of measuring whether the education received by students at these schools prepares them "to participate and compete in the society in which they live and work." *Leandro,* 346 N.C. at 345, 488 S.E.2d at 254. As we have observed in *State Education Assistance Authority v. Bank of Statesville,* "[t]he people of North Carolina constitute our State's greatest resource." 276 N.C. at 587, 174 S.E.2d at 559. Educating our citizens plants the seeds for their participation, and when we are able to reap the rewards of having an educated citizenry, we can see that our people are our greatest resource. *See, e.g., Saine v. State,* 210 N.C.App. 594, 604–05, 709 S.E.2d 379, 388 (2011) ("Educating North Carolinians certainly promotes the welfare of our State, ****297** particularly at a time when unemployment is high and many jobs that have historically not required education beyond a high school diploma, or its equivalent, are rapidly disappearing."). Therefore, while students enrolled in private schools may be receiving a fine education, if taxpayer money is spent on a private school education that does not prepare them to function ***146** in and to contribute to our state's society, that spending cannot be for "public purposes only." In my view, spending on private schools through the Opportunity Scholarship Program, which includes no means to measure the quality of the education, cannot satisfy the second prong of the *Madison Cablevision* test. The main constitutional flaw in this program is that it provides no framework at all for evaluating any of the participating schools' contribution to public purposes; such a huge omission is a constitutional black hole into which the entire program should disappear.

I am not persuaded by any of defendants' arguments that the program, as created, contains standards that are constitutionally relevant or adequate. Defendants assert that "layers" of accountability standards are built into the Opportunity Scholarship Program. I find none of these arguments convincing. First, defendants argue that the "educational marketplace" will regulate the quality of the education provided by participating schools. Defendants assert that parents will not send their children to schools that do not provide a solid education or adequately prepare students for college or beyond. This may be true, but marketplace standards are not a measure of constitutionality. To the contrary, this Court must insulate constitutional standards from the whims of the marketplace. *See Maready v. City of Winston–Salem,* 342 N.C. 708, 739, 467 S.E.2d 615, 634 (1996) (Orr, J., dissenting) ("While economic times have changed and will continue to change, the philosophy that constitutional interpretation and application are subject to the whims of 'everybody's doing it' cannot be sustained.").

In a related argument, both intervenor legislative officers and intervenor parents contend that, because parents choose the private schools, the program is "directly accountable to the parents." This argument serves only to underscore that the program serves the private interests of the particular families and not the public good. While families are surely entitled to choose schools for their children according to their interests, a program like the Opportunity Scholarship Program that spends taxpayer money must, to be constitutional, serve "public purposes only."

Second, defendants look to the statutory requirements governing all private and nonpublic schools in North Carolina. These standards relate to attendance, health, and safety, and also require standardized testing at certain intervals. *See* N.C.G.S. §§ 115C–547 to –562 (2013). Here, however, we are not considering standards for private schools that receive no public funding. Those schools are not governed by the same constitutional requirements as schools receiving public funding; they need not serve "public purposes only." When considering these statutory standards in a ***147** public purpose context, it is clear that they do not help measure whether the students enrolled are receiving an education that prepares them to function in our state's society. Even the requirement regarding standardized testing falls short: that provision simply mandates that all private schools "administer, at least once in each school year, a nationally standardized test ... to all students enrolled or regularly attending grades three, six, and nine." *Id.* § 115C549; *see also id.* § 115C–557. A similar testing requirement exists for eleventh grade students. *Id.* § 115C–550; *see also id.* § 115C–558. These testing standards do not specify that students take any particular test, nor do they require any minimum result. When a wide range of testing options are available and administered, it can be difficult to compare results across schools (a tool which is regularly used to determine the efficacy of our public schools). While the regulations governing private schools do require comparisons with public school populations, these provisions impose no consequences, regardless of test results. Moreover, the standards require no accreditation of schools and no particular training or certification of teachers. As a result, these standards fail to ensure that ****298** spending on these schools through public Opportunity Scholarship Program funds is for any public purpose.

Third, defendants point to statutes regulating schools participating in the Opportunity Scholarship Program. In addition to the above requirements for private and nonpublic schools, schools wishing to participate in the program must also:

> (1) Provide to the [State Education Assistance] Authority documentation for required tuition and fees charged to the student by the nonpublic school.
>
> (2) Provide to the Authority a criminal background check conducted for the staff member with the highest decision-making authority, as defined by the bylaws, articles of incorporation, or other governing document, to ensure that person has not been convicted of any crime listed in G.S. 115C–332.
>
> (3) Provide to the parent or guardian of an eligible student, whose tuition and fees are paid in whole or in part with a scholarship grant, an annual written explanation of the student's progress, including the student's scores on standardized achievement tests.
>
> (4) Administer, at least once in each school year, a nationally standardized test or other nationally standardized ***148** equivalent measurement selected by the chief administrative officer of the nonpublic school to all eligible students whose tuition and fees are paid in whole or in part with a scholarship grant enrolled in grades three and higher. The nationally standardized test or other equivalent measurement selected must measure achievement in the areas of English grammar, reading, spelling, and mathematics. Test performance data shall be submitted to the Authority by July 15 of each year. Test performance data reported to the Authority under this subdivision is not a public record under Chapter 132 of the General Statutes.
>
> (5) Provide to the Authority graduation rates of the students receiving scholarship grants in a manner consistent with nationally recognized standards.
>
> (6) Contract with a certified public accountant to perform a financial review, consistent with generally accepted accounting principles, for each school year in which the school accepts students receiving more than three hundred thousand dollars ($300,000) in scholarship grants awarded under this Part.

Id. § 115C–562.5(a) (2014). Like the standards referenced above for private schools in general, none of these additional requirements relates to the quality of education received by enrolled students. Simply mandating that a report card be sent home to parents provides no guarantee that the education received is sufficient. And the same problems exist as articulated above regarding the requirements to administer standardized tests.

Finally, defendants point out the Opportunity Scholarship Program is required by statute to report to the General Assembly. Under Section 115C–562.7, the program's overseers must report annually to the legislature specific administrative statistics (relating to enrollment numbers, student demographics, and funds received), as well as "[l]earning gains or losses of students receiving scholarship grants." *Id.* § 115C–562.7 (2014). While the data will allow the legislature insight into the successes of the program, such reporting does not determine constitutionality. First, the legislature is under no obligation to act on the reports. Second, as we held long ago in *Madison Cablevision,* it is ultimately up to this Court to determine if public spending serves a public purpose. 325 N.C. at 644–45, 386 S.E.2d at 206. Legislative oversight does not automatically make a ***149** controversial program constitutional, particularly when, as here, the law creating and governing the program mandates no action.

Defendants themselves admit that the program lacks the standards outlined in *Hoke County* for the employment of certified teachers and principals and for curriculum. *Hoke Cty. Bd. of Educ.,* 358 N.C. at 636, 599 S.E.2d at 389. Despite this concession, they argue that because this is a facial challenge ****299** to the statute, plaintiffs must show that the program is unconstitutional under all conceivable facts and circumstances. *See, e.g., Martin v. N.C. Hous. Corp.,* 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970). To that end, defendants argue that even if substantive standards were required under our state constitution, some of the participating private schools would meet those standards. This argument falls short, however, because our state constitution mandates that *every child* obtaining an education paid for by public funds receive an education that prepares him to succeed in society, and because we are analyzing the statutory framework of the program, not the merits of a specific school. N.C. Const. art. I, § 15; *id.* art. IX, § 2(1); *Leandro,* 346 N.C. at 351, 488 S.E.2d at 257 (concluding that our state constitution "requires that *all children* have the opportunity for a sound basic education" (emphasis added)). While I acknowledge that "[w]e seldom uphold facial challenges because it is the role

of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them," it is important to remember that we must also "measure the balance struck in the statute against the minimum standards required by the constitution." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs,* 363 N.C. 500, 502, 681 S.E.2d 278, 280–81 (2009) (citation omitted). Here those minimum standards require that children receiving a publicly funded education obtain an education that serves a public purpose. The statute at issue here creates a program that fails to incorporate any requirement to determine, much less ensure, that any, let alone all, children enrolled are receiving a real education; as such, the statute cannot survive a facial challenge.

Private schools are free to provide whatever education they deem fit within the governing statutes' requirements. When parents send their children to any private school of their choosing on their own dime, as they are free to do, that education need not satisfy our constitutional demand that it be a for a public purpose. However, when public funds are spent to enable a private school education, that spending must satisfy the public purpose clause of our constitution by preparing students to contribute to society. Without meaningful standards meant to ensure that this or any minimum threshold is met, public funds cannot be spent constitutionally through this Opportunity Scholarship Program.

***150** As stated above, I would not necessarily impose the same detailed requirements on our private schools receiving public funds as are imposed on purely public schools by *Leandro* and its progeny. I do conclude that such spending must include some standards by which to measure compliance with the public purpose doctrine; the complete lack of any such standards in North Carolina's voucher program makes determining such compliance impossible. It is instructive that all other states that have adopted similar programs have included substantive requirements. Although other states certainly are not bound by constitutional obligations identical to ours, examining their similar programs and the substantive standards imposed on participating schools exposes the woeful lack of oversight in the Opportunity Scholarship Program here. For example, compared with ten similar programs across the country, North Carolina's program falls painfully short. As opposed to other jurisdictions' legislative requirements for participating private schools in the categories of state approval or accreditation, state-required curriculum, required teacher qualifications, required participation in a state testing program, and required number of instructional days or hours, the Opportunity Scholarship Program fails to incorporate any of those mandates. In comparison, six of the ten other jurisdictions have requirements in all those areas; nine out of ten have requirements in at least four of the five areas; and all ten have requirements in at least one of these areas. [13] For example, in Indiana (which has the largest state wide voucher program in the country), participating schools must be accredited, ****300** Ind.Code. § 20–51–1–6(a)(3) (2010); Ind.Code. Ann. § 20–51–1–4.7(4) (West 2013), and must teach subjects prescribed by the State, Ind.Code. Ann. § 20–51–4–1(f)(9) (West 2011). These schools must participate in state wide testing. *Id.* § 20–51–1–4.7(5) (West 2013). In Louisiana participating schools must be approved by a state board, and approval is contingent on a showing that the quality of the curriculum is at least as high as that mandated for similarly situated public schools. La. Stat. Ann. § 17:11 (2001); *id.* § 17:4021(A) (West Supp. 2012). Even in Arizona, the least regulated jurisdiction behind North Carolina identified by amici, participating schools must educate students in reading, grammar, math, social studies, and science. Ariz.Rev.Stat. Ann. § 15–2402(B)(1) (West Supp.2011). As summarized above, North Carolina's Opportunity Scholarship Program lacks any kind of substantive oversight, curriculum standards, or instructional requirements. Schools receiving public ***151** funding through the program are essentially free to employ whomever they desire to teach whatever they desire. This is a perfectly acceptable scheme for truly private schools, but it fails utterly to satisfy the constitutionally mandated educational standards required when public funds are spent on education.

This failure brings me to the second constitutional flaw in the Opportunity Scholarship Program: the breach of the State's duty to guard and maintain the right to the privilege of education as set forth in Article I, Section 15, which is part of our constitution's Declaration of Rights. Notwithstanding this constitutional provision's clear statement that the people of our State have "a right to ... education" and that it is the State's duty "to guard and maintain that right," N.C. Const. art. I, § 15, the majority indicates that this constitutional provision merely states a "general proposition concerning the right to the privilege of education"; that this provision is merely aspirational, rather than substantive, in nature; and that plaintiffs' reliance on it as an independent source of relief is misplaced. The majority has not, however, cited any decision from this Court in support of this proposition, and

I believe the majority's assertion is inconsistent with this Court's constitutional jurisprudence.

In *Leandro* this Court concluded that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution worked together in combination to "guarantee every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255. In other words, this Court gave Article I, Section 15, considered in conjunction with other constitutional provisions, substantive effect. As such, the plain language of Article I, Section 15 and this Court's decision in *Leandro* regarding the interplay between Article I, Section 15 and Article IX, Section 2 makes me unable to accept the majority's statements regarding the substantive import of this constitutional provision. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62–63 (2d ed.2013) (citing *Leandro* as an example in which, along with other constitutional provisions, Article I, Section 15 was given substantive effect by this Court and stating that "[i]n addition to the substantive component, this section may also secure other rights, the violation of which could subject a local school board to suit without the benefit of governmental immunity or insurance coverage").

Turning to the application of Article I, Section 15 to the instant matter, this voucher program, as explained above, allows for taxpayer funds to be spent on private schooling with no required standard to ensure that teachers are competent or that students are learning at all. I must conclude that by creating this program, the State's legislature has ***152** completely abrogated the duty to "guard and maintain [the] right" to an education. N.C. Const. art. I, § 15. As the trial court concluded, "[t]he General Assembly fails the children of North Carolina when they are sent with taxpayer money to private schools that have no legal obligation to teach them anything." This failure violates the duty set forth in Article I, Section 15.

This Court's duty to the people of our State, as expressed in several clauses of our constitution, is to ensure that if taxpayer money is spent on private education, the expenditure is for an education that can prepare our children to participate and thrive in ****301** our state's society. When the General Assembly fails to ensure that these constitutional requirements are satisfied, this Court must exercise its responsibility to do otherwise. Because the majority fails to do so, I respectfully dissent.

Justices BEASLEY and ERVIN join in this dissenting opinion.

Justice BEASLEY, dissenting.

I join fully Justice Hudson's dissent. I write separately to explain my additional concerns with the Opportunity Scholarship Program as currently enacted. I also write to urge caution and to reiterate the State's duties under the North Carolina Constitution "to guarantee every child of this state an opportunity to receive a sound basic education in our public schools," *Leandro v. State,* 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997), and to "*afford* [ ] *school facilities of recognized and ever-increasing merit to all the children of the State ... to the full extent that our means could afford and intelligent direction accomplish,*" *id.* at 346, 488 S.E.2d at 254 (emphasis added) (quoting *Bd. of Educ. v. Bd. of Cty. Comm'rs,* 174 N.C. 469, 472, 93 S.E. 1001, 1002 (1917)).

The Supreme Court of the United States made the following prescient observation regarding education more than sixty years ago. These words remain equally valid now.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening ***153** the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it,

> is a right which must be made available to all on equal terms.

Brown v. Bd. of Educ., 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880 (1954), *additional proceedings at* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). Central to the Court's decision was the understanding that "[w]e must consider public education in the light of its full development and its present place in American life." *Brown,* 347 U.S. at 492, 74 S.Ct. at 691, 98 L.Ed. at 880.

Free public education historically has been, and today remains, vital to American life. Its diminishment in quality or its concentration among a few invites despots to power and risks oppressing the rest. With continued necessity for preserving and promoting free public education clearly in view, I turn to the Opportunity Scholarship Program.

The Court correctly explains that our circumspect inquiry is constrained to the facial challenge presented in view of established principles of constitutional interpretation. Nonetheless, the majority's opinion should not be read so broadly as to set an impossible standard for a facial challenge to legislation, particularly when the legislation stands to affect the education of the children of North Carolina. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs,* 363 N.C. 500, 502, 681 S.E.2d 278, 280–81 (2009) ("This Court will only measure the balance struck in the statute against the minimum standards required by the constitution."). It is well established that, subject to the constitution, it is for the General Assembly to "establish minimum educational requirements and standards." *Delconte v. State,* 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985); *see id.* at 401–02, 329 S.E.2d at 647 ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education." (citations omitted)). But those standards must comport with the constitutional minimum, and it has long been beyond dispute that this Court has jurisdiction to determine whether legislation meets the minimum allowed by our Constitution. *E.g., Bayard v. Singleton,* 1 N.C. 5 (1787).

****302** This Court already has articulated "the minimum standards required by the constitution," ***154** *Beaufort Bd. of Educ.,* 363 N.C. at 502, 681 S.E.2d at 281, when the General Assembly purports to provide for public education. In *Leandro* we "address[ed] plaintiff-parties' constitutional challenge to the state's public education system." 346 N.C. at 345, 488 S.E.2d at 254. We explained that the North Carolina Constitution guarantees every child the right to a sound basic education, and we defined the mandate for public education by explaining that

> [f]or purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255 (citations omitted).

Although *Leandro* concerned public schools, this Court has established that the particular type of building in which the education occurs is immaterial. *See Delconte,* 313 N.C. 384, 329 S.E.2d 636 (allowing home schools). It is the opportunity for a constitutionally permissible minimum quality of education that is essential. If the General Assembly appropriates public funds [14] for public education, whether that education occurs in public schools or nonpublic schools receiving public funds, the General Assembly is limited to doing so only for the constitutionally permissible public purpose of providing a "sound basic education." ***155** When *public funds* are used for *nonpublic initiatives* to fulfill the constitutional public education mandate, the appropriation may violate the public purpose clause, especially if the grant

recipients are chosen because the public school system fails to meet their educational needs.

In denying relief for plaintiffs under North Carolina Constitution Article IX, Sections 2(1), 5, and 6, the majority posits that these sections constitutionally protect funds designated for education but do not limit the General Assembly's designation of other public funds for additional nonpublic education initiatives. In setting education policy, the danger posed by the General Assembly in designating general funds for nonpublic education and a non-public purpose is that it effectively undermines the support the legislature is constitutionally obligated to provide to the public school system. Because the Opportunity Scholarship Program circumvents the mission of public schools to successfully offer a sound basic education to all students, the General Assembly has failed to meet the mandated minimum standard.

Given North Carolina's history of public education and the State's continued efforts to address shortcomings to deliver on its constitutional mandate, the General Assembly's decision to pursue vouchers at this time and in this way is vexing. [15] The majority notes that ****303** the purpose of the grants is to address grade level deficiencies of a "large percentage of economically disadvantaged students," but as shown below, it is unclear whether or how this program truly addresses those children's needs. While every member of this Court fully recognizes the legislature's responsibility to implement education policy and its right to pursue novel approaches, *Redev. Comm'n v. Sec. Nat'l Bank of Greensboro,* 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960), this Court should not permit the State to lessen its obligation to the children of North Carolina.

In endeavoring to provide its citizens with a sound basic education, North Carolina has long embraced a complex variety of educational initiatives, including public schools, secular and sectarian private schools, and home schools. *See generally* M.C.S. Noble, *A History of the Public Schools of North Carolina* (1930) (discussing the history of public education in North Carolina, including the development of curricula, ***156** religious instruction in public schools, teachers' qualifications, and segregated schools); *see also Delconte,* 313 N.C. at 397–400, 329 S.E.2d at 645–46 (summarizing the development of public education legislation). Our legislature has met the standard with varying degrees of success. It is worth observing that our General Assembly previously embraced vouchers for approximately a decade as a means to avoid the State's obligation under the U.S. Constitution to desegregate public schools as required by the Supreme Court of the United States in its seminal *Brown v. Board* decisions. *See* Milton Ready, *The Tar Heel State: A History of North Carolina* 349 (2005) (describing the "Pearsall Plan" as "a stubbornly conservative strategy that eventually satisfied no one"); *id.* at 355–56 (explaining that beginning in the 1960s and 1970s, "[s]ophisticated racial and segregationist appeals.... took on a more abstract form" and "[m]any of the newer strategies came wrapped in terms as local control, vouchers, charter schools, tax cuts, distributive welfare, and limited government interference in the private affairs of ordinary citizens"); *see also Hawkins v. N.C. State Bd. of Educ.,* No. 2067, 11 Race Rel. L. Rep. 745 (W.D.N.C. Mar. 31, 1966) (declaring the Pearsall Plan facially unconstitutional). Indeed, some of our schools are only now achieving unitary status under long-standing federal orders to desegregate. *E.g., Everett v. Pitt Cty. Bd. of Educ.,* 788 F.3d 132 (4th Cir.2015). Even those victories, however, are tempered by a different reality:

> The rapid rate of de facto resegregation in our public school system in recent decades is well-documented. As one scholar put it, "Schools are more segregated today than they have been for decades, and segregation is rapidly increasing." Erwin Chemerinsky, *Separate and Unequal: American Public Education Today,* 52 Am. U.L. Rev. 1461, 1461 (2003) (footnote omitted); *see also* Lia B. Epperson, *Resisting Retreat: The Struggle for Equity in Educational Opportunity in the Post—Brown Era,* 66 U. Pitt. L. Rev. 131, 145 (2004) ("American public schools have been steadily resegregating for more than a decade, dismantling the integrative successes of hundreds of districts that experienced significant levels of integration in the wake of *Brown* and its progeny. Such racial isolation in public schools is worse today than at any time in the last thirty years.").

Id. at 150–51 (Wynn, J., dissenting).

For now, as noted by the majority, the program is available only to lower-income families. This availability assumes that private schools are ***157** available within a feasible distance, that these families win the grant lottery, and that their children gain admission to the nonpublic school of their choice. With additional costs for transportation, tuition, books, and, at times, school uniforms, for the poorest of these families, the "opportunity" advertised in the Opportunity Scholarship Program is merely a "cruel illusion." *Tenn. Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 154–55 (Tenn.1993)

("[E]ducational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence.... Such a **304 system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.... 'The notion of local control was a "cruel illusion" for the poor districts due to limitations placed upon them by the system itself ....' ") (first and second ellipses in original) (((quoting *DuPree v. Alma Sch. Dist. No. 30,* 279 Ark. 340, 346, 651 S.W.2d 90, 93 (1983)) (third ellipsis in original))).

Without systemic and cultural adjustments to address social inequalities, the further cruel illusion of the Opportunity Scholarship Program is that it stands to exacerbate, rather than alleviate, educational, class, and racial divides. *See generally* Julian E. Zelizer, *How Education Policy Went Astray,* The Atlantic (Apr. 10, 2015), http://www.theatlantic.com/education/archive/2015/04/how-education-policywent-astray/390210/ (last visited July 16, 2015) (discussing changes in American education policy over the past fifty years and the relationship between continually failing education policy and economic inequality). *See also* Br. for N.C. Conference of the NAACP as Amicus Curiae Supporting Plaintiff–Appellees at 3–9, *Hart v. State,* 368 N.C. 122, 774 S.E.2d 281, 2015 WL 4488553 (2015) (No. 372A14) (discussing discriminatory "creaming" and "cropping" practices by which private schools admit "the best and least costly students" or "deny [ ] services and enrollment to diverse learners" (citations omitted)). In time, public schools may be left only with the students that private schools refuse to admit based on perceived lack of aptitude, behavioral concerns, economic status, religious affiliation, sexual orientation, or physical or other challenges, or public schools may become grossly disproportionately populated by minority children. The policy promoted by the Opportunity Scholarship Program, therefore, may serve to widen already considerable gaps and create a larger class of underserved children.

All Citations

368 N.C. 122, 774 S.E.2d 281, 320 Ed. Law Rep. 465

Footnotes

1 *See* N.C. Const. art. IV, § 1; *Bayard v. Singleton,* 1 N.C. 5 (1787) (recognizing the courts' power of judicial review and declaring unconstitutional an act of the legislature infringing upon the right to a trial by jury).

2 In the first year of the Opportunity Scholarship Program, 2300 students were selected to participate. The average daily membership in our State's public and charter schools is approximately 1.5 million students. N.C. Dep't of Pub. Instruction, *Facts and Figures 2012–13,* http://www.dpi.state.nc.us/docs/fbs/resources/data/factsfigures/2012–13 figures.pdf (last visited July 21, 2015) (reporting a combined average daily membership of 1,492,793 in public and charter schools during calendar year 2012–13).

3 N.C. Dep't of Pub. Instruction, *2013–14 School Report Cards,* NC School Report Cards, http://www.ncpublicschools.org/src/ (last visited July 21, 2015).

4 This foundational principle of constitutional law is well established in North Carolina. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *see also id.* art. II (describing the legislative sphere of authority); *id.* art. III (describing the executive sphere of authority); *id.* art. IV (describing the judicial sphere of authority).

* * *

5 The Opportunity Scholarship Program was ratified by the General Assembly and signed into law by the Governor in July 2013 as part of the "Current Operations and Capital Improvements Appropriations Act of 2013"—the State's budget bill for fiscal years 2013–14 and 2014–15. Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, sec. 8.29, 2013 N.C. Sess. Laws 995, 1064–69. The program was amended in August of 2014 to its present form, The Current Operations and Capital

Improvements Appropriations Act of 2014, ch. 100, sec. 8.25, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 371–73, and is codified as amended in Part 2A to Article 39 of Chapter 115C of the General Statutes, N.C.G.S. §§ 115C–562.1 through –562.7 (2013 & Supp.2014).

6 Although plaintiffs generally represent a cross section of individuals who currently interact or have previously interacted with our state's public schools, plaintiffs' complaint in the present action was made in their capacity as taxpayers of the state.

7 Plaintiffs' allegations concerning a nonpublic school's ability to discriminate based on race, color, or national origin were rendered moot by the passage of N.C.G.S. § 115C–562.5(c1). *See* ch. 100, sec. 8.25(d), 2013 N.C. Sess. Laws (Reg. Sess. 2014) at 371.

8 For purposes of this opinion, we will refer to defendants and intervenor-defendants collectively as "defendants."

9 We also certified the companion case of *Richardson v. State,* No. 384A14, for immediate review, which we decide today in a separate opinion.

10 Plaintiffs have not presented any claims under the United States Constitution.

11 The independent applicability of Article I, Sections 15 and 19, in this case is discussed in Part III(C) of our opinion.

12 Plaintiffs acknowledge that at least some nonpublic schools may be able to provide scholarship students a meaningful education. Even so, plaintiffs contend that "[t]he State has an affirmative obligation to ensure that public funds are used to accomplish a public purpose" and that, without built-in accountability standards, the State cannot ensure that the Opportunity Scholarship Program will accomplish its intended purposes as to each scholarship recipient. In making this argument, plaintiffs would require the State to demonstrate that the program operates constitutionally in all circumstances, rather than accepting the burden of showing that there is no set of circumstances under which the law could operate in a constitutional manner.

13 According to the brief filed by amici curiae Education Scholars, the other jurisdictions include Arizona, Cleveland, the District of Columbia, Indiana, Louisiana, Maine, Milwaukee, Ohio, Vermont, and Wisconsin.

14 The General Assembly is conspicuously careful to avoid acknowledging that the grants at issue are public funds. *See, e.g.,* N.C.G.S. § 115C–555 (2013) ("For the purposes of this Article, scholarship grant funds awarded pursuant to Part 2A of this Article to eligible students attending a nonpublic school *shall not be considered funding from the State of North Carolina.*") (emphasis added); *id.* § 115C–562.1(6) (2013) (defining "Scholarship grants" as "Grants awarded annually by the Authority to eligible students"). The majority correctly notes that the program is funded through appropriations from the general revenue of the Board of Governors of The University of North Carolina.

15 There may be instances when the use of public funds for nonpublic schools can serve a public purpose. While public schools are supposed to accommodate all students' educational needs, some circumstances exist in which the public purpose may be best met by funding a nonpublic educational situation, such as the education of children with disabilities under North Carolina General Statutes Chapter 115C, Subchapter IV, Article 9. This issue, however, is not before our Court at this time.

218 Wis.2d 835
Supreme Court of Wisconsin.

Warner JACKSON, Jennifer Evans, Wendell Harris, The Reverend Andrew Kennedy, Rabbi Isaac Serotta, Ceil Ann Libber, Father Thomas J. Mueller, Reverend John N. Gregg, Diane Brewer, Colleen Beaman, Mary Morris, Penny Morse, Kathleen Jones and Philip Jones, Plaintiffs–Respondents,

v.

John T. BENSON, Superintendent of Public Instruction, Department of Public Instruction and James E. Doyle, Defendants–Appellants–Petitioners, Marquelle Miller, Cynthia Miller, Angela Gray, Zachery Gray, Shon Richardson, George Richardson, Latrisha Henry, Faye Henry, Reigne Barrett, Valerie Barrett, Candice Williams, Senton Williams, Clintrai Giles, Sharon Giles, Intervenors–Defendants–Appellants, Parents For School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter and Jeanine Knox, Intervenors–Defendants–Appellants–Petitioners. †

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, by its President, M. Charles HOWARD, Michael Lengyel, Donald Lucier, Tracy Adams, Milwaukee Public Schools Administrators and Supervisors Council, Inc., by its Executive Director, Carl A. Gobel, People for the American Way, by its Executive Vice President and Legal Director, Elliott M. Minceberg, John Drew, Susan Endress, Richard Riley, Jeanette Robertson, Vincent Knox, Bertha Zamudio, James Johnson, Robert Ullman and Sally F. Mills, Plaintiffs–Respondents,

v.

John T. BENSON, Superintendent of Public Instruction, Department of Public Instruction and James E. Doyle, Defendants–Appellants–Petitioners, Marquelle Miller, Cynthia Miller, Angela Gray, Zachery Gray, Shon Richardson, George Richardson, Latrisha Henry, Faye Henry, Reigne Barrett, Valerie Barrett, Candice Williams, Senton Williams, Clintrai Giles, Sharon Giles, Intervenors–Defendants–Appellants, Parents For School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter and Jeanine Knox, Intervenors–Defendants–Appellants–Petitioners.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Felmers O. Chaney, Lois Parker, on behalf of herself and her minor child, Rashaan Hobbs, Derrick D. Scott, on behalf of himself and his minor children, Deresia C.A. Scott and Desmond L.J. Scott, Constance J. Cherry, on behalf of herself and her minor children, Monique J. Branch, Monica S. Branch, and William A. Branch, Plaintiffs–Respondents,

v.

John T. BENSON, Superintendent of Public Instruction of Wisconsin, in his official capacity, Defendant–Appellant.

No. 97–0270.
|
Argued March 4, 1998.
|
Decided June 10, 1998.

Synopsis

Teachers' union and civil rights organization sued state Superintendent of Public Instruction and Department of Public Instruction (DPI), challenging constitutionality of amended statutory school choice program. On cross-motions for summary judgment, the Circuit Court, Dane County, Paul B. Higginbotham, J., granted plaintiffs' motion, and State officials appealed. The Court of Appeals, 213 Wis.2d 1, 570 N.W.2d 407, affirmed, and State officials' petition for review was granted, 215 Wis.2d 421, 576 N.W.2d 278. The Supreme Court, Donald W. Steinmetz, J., held that: (1) amended school choice program did not violate First Amendment establishment clause; (2) school choice program did not violate State Constitution's religious establishment provisions; (3) school choice program was not a constitutionally prohibited private or local bill; (4) school choice program did not violate State Constitution's school uniformity provision; (5) public purpose doctrine was not violated under school choice program; and (6) civil rights organization failed to establish school choice program was enacted with discriminatory intent required to maintain its facial equal protection claim.

Reversed and remanded.

William A. Bablitch, J., filed a dissenting opinion, in which Shirley S. Abrahamson, Chief Justice, joined.

Ann Walsh Bradley, J., did not participate.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

****606** ***841** For the defendants-appellants-petitioners, John T. Benson, et al., there were briefs by Edward S. Marion and Murphy & Desmond, S.C., Madison and Kenneth W. Starr, Jay P. Lefkowitz, Theodore W. Ullyot and Kirkland & Ellis, Washington, DC, and oral argument by Jay P. Lefkowitz.

***842** For the intervenors-defendants-appellants-petitioners, parents for school choice, et al., there were briefs by Steve P. Hurley and Hurley, Burish & Milliken, S.C., Madison; William H. Mellor, III, Clint Bolick, Nicole S. Garnett and Institute for Justice, Washington, DC and Michael D. Dean, Waukesha and oral argument by Clint Bolick.

For the intervenors-defendants-appellants, Marquelle Millter, et al., there were briefs by Kevin Potter and Brennan Steil, Madison and Richard P. Hutchison and Landmark Legal Foundation, Kansas City, MO and oral argument by Richard P. Hutchison.

For the plaintiffs-respondents, Warner Jackson, et al., there was a brief by Jeffrey J. Kassel, Melanie E. Cohen and LaFollette & Sinykin, Madison; Peter M. Koneazny and American Civil Liberties Union of Wisconsin Foundation, Inc., Milwaukee; Steven R. Shapiro and American Civil Liberties Union Foundation, New York City, and Steven K. Green and Americans United for Separation of Church & State, Washington, DC, and oral argument by Jeffrey J. Kassel.

For the plaintiffs-respondents, there was a brief by Robert H. Chanin, John M. West and Bredhoff & Kaiser, P.L.L.C., Washington, DC; Richard Perry, Richard Saks and Perry, Lerner & Quindel, Milwaukee; Bruce Meredith, Chris Galinat and Wisconsin Education Association, Madison; Elliot M. Mincberg, Judith Schaeffer, Washington, DC and Timothy Hawks and Schneidman, Myers, Dowling & Blumenfield, Milwaukee and oral argument by Robert H. Chanin.

For the plaintiffs-respondents, NAACP, et al., there was a brief by William H. Lynch and Law Offices of William H. Lynch, Milwaukee and James H. Hall, ***843** Jr., and Hall, Patterson & Charne, Milwaukee and oral argument by James H. Hall, Jr.

Amicus curiae was filed by K. Scott Wagner and Hale & Lein, S.C., Milwaukee and James C. Geoly, Kevin R. Gustafson and Burke, Warren, MacKay & Serritella, P.C., Chicago, IL for the Center for Education Reform, American Legislative Exchange, CEO America, CEO Central Florida, CEO Connecticut, Putting Children First, James Madison Institute for Public Policy Studies, Jewish Policy Center," I Have a Dream" Foundation (Washington, D.C.Chapter), Institute for Public Affairs, Liberty Counsel, Maine School Choice Coalition, Pennsylvania Manufacturers Association, Reach Alliance, Arkansas Policy Foundation, North Carolina Education Reform Foundation, Texas Justice Foundation, Minnesota Business Partnership, Minnesotans for School Choice, Toussaint Institute, South Carolina Policy Counsel, and United New Yorkers for Choice in Education.

Amicus curiae was filed by Ralph I. Thomas, Madison; Steven T. McFarland, Kimberlee W. Colby and Christian Legal Society, Annandale, VA and of counsel, Thomas C. Berg and Cumberland Law School, Birmingham, AL for The Christian Legal Society, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Lutheran Church–Missouri Synod and the National Association of Evangelicals.

Amicus curiae was filed by David R. Riemer, Milwaukee for Howard L. Fuller, John O. Norquist, Steven M. Foti, Alberta Darling, Margaret A. Farrow, Joseph Leean, John S. Gardner, Warren D. Braun, Bruce R. Thompson, Jeanette Mitchell and David Lucey.

Amicus curiae was filed by Daniel Kelly and McLario, Helm & Bertling, S.C., Menomonee Falls for the Family Research Institute, Christian Defense ***844** Fund, Center for Public Justice, Family Research Council, Toward Tradition, Liberty Counsel and Focus on the Family.

****607** Amicus curiae was filed by Bradden C. Backer and Godfrey & Kahn, S.C., Milwaukee and Robert L. Gordon and Weiss, Berzowski, Brady & Donahue, Milwaukee for The Milwaukee Jewish Council for Community Relations and The Wisconsin Jewish Conference.

Amicus curiae was filed by Marc D. Stern, Lois C. Waldmani and American Jewish Congress, New York City, for American Jewish Congress.

Opinion

¶ 1 DONALD W. STEINMETZ, Justice.

This case raises a number of issues for review:

(1) Does the amended Milwaukee Parental Choice Program (amended MPCP) violate the Establishment Clause of the First Amendment to the United States Constitution? Neither the court of appeals nor the circuit court reached this issue. We conclude that it does not.

(2) Does the amended MPCP violate the religious establishment provisions of Wisconsin Constitution art. I, § 18? In a divided opinion, the court of appeals held that it does. We conclude that it does not.

(3) Is the amended MPCP a private or local bill enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18? The court of appeals did not reach this question, and the circuit court held it is. We conclude that it is not.

(4) Does the amended MPCP violate the uniformity provision of Wis. Const. art. X, § 3? The court of appeals did not reach this issue, and the circuit court ***845** concluded that the amended MPCP does not violate the uniformity clause. We also conclude that it does not.

(5) Does the amended MPCP violate Wisconsin's public purpose doctrine, which requires that public funds be spent only for public purposes? The court of appeals did not reach this issue, and the circuit court concluded that the amended MPCP does violate the public purpose doctrine. We conclude that it does not.

(6) Should children who were eligible for the amended MPCP when this court's injunction issued on August 25, 1995, and who subsequently enrolled in private schools, be eligible for the program if the injunction is lifted? Neither court below addressed this issue. We conclude that they should.

¶ 2 This case is before the court on petition for review of a published decision of the court of appeals, *Jackson v. Benson,* 213 Wis.2d 1, 570 N.W.2d 407 (Ct.App.1997). The court of appeals, in a 2–1 decision, affirmed an order of the Circuit Court for Dane County, Paul B. Higginbotham, Judge, granting the Respondents' motion for summary judgment. The majority of the court of appeals concluded that the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, as amended by 1995 Wis. Act 27, §§ 4002–4009 (amended MPCP), was invalid under Article I, § 18 of the Wisconsin Constitution because it directs payments of money from the state treasury for the benefit of religious seminaries. The majority of the court of appeals declined to decide whether the amended MPCP violates the Establishment Clause of the First Amendment or other provisions of the Wisconsin Constitution. In dissent, Judge Roggensack concluded that the amended MPCP did not violate either the federal or state constitution. The State appealed from the decision of the court of appeals. We granted the State's petition for review and ***846** now reverse the decision of the court of appeals. We also conclude that the amended MPCP does not violate the Establishment Clause or the Wisconsin Constitution.

¶ 3 We are once again asked to review the constitutionality of the Milwaukee Parental Choice Program provided in Wis. Stat. § 119.23 (1995–96). [1] The Wisconsin legislature enacted the original Milwaukee Parental Choice Program (original MPCP) in 1989. *See* 1989 Wis. Act 336. As amended in 1993, the original MPCP permitted up to 1.5 percent of the student membership of the Milwaukee Public Schools (MPS) to attend at no cost to the student any private nonsectarian school located in the City of Milwaukee, subject to certain eligibility requirements.

****608** ¶ 4 Under the original MPCP, the legislature limited the students eligible for participation in the original program. To be eligible for the original MPCP, a student (1) had to be a student in kindergarten through twelfth grade; (2) had to be from a family whose income did not exceed 1.75 times the federal poverty level; and (3) had to be either enrolled in a public school in Milwaukee, attending a private school under this program, or not enrolled in school during the previous year. *See* Wis. Stat. § 119.23(2)(a)(1)–(2)(1993–94).

¶ 5 The legislature also placed a variety of qualification and reporting requirements on private schools choosing to participate in the original MPCP. To be eligible to participate in the original MPCP, a private school had to comply with the anti-discrimination provisions ***847** imposed by 42 U.S.C. § 2000d [2] and all health and safety laws or codes that apply to Wisconsin public schools. *See id.* at § 119.23(2)(a)(4)-(5). The school additionally had to meet on an annual basis defined performance criteria and had to submit to the State certain financial and performance audits. *See id.* at § 119.23(7), (9).

¶ 6 Under the original MPCP, the State Superintendent of Public Instruction was required to perform a number of supervisory and reporting tasks. The legislature required the State Superintendent to submit an annual report regarding student achievement, attendance, discipline, and parental involvement for students in the program compared to students enrolled in MPS in general. *See id.* at § 119.23(5)(d). The original MPCP further required the State Superintendent to monitor the performance of students participating in the program, and it empowered him or her to conduct one or more financial and performance audits of the program. *See id.* at § 119.23(7)(b), (9)(a).

¶ 7 Under the original MPCP, the State provided public funds directly to participating private schools. For each student attending a private school under the program, the State paid to each participating private school an amount equal to the state aid per student to which MPS would have been entitled under state aid distribution formulas. *See id.* at § 119.23(4). In the 1994–95 school year, this amount was approximately $2,500 per participating student. The amount ***848** of state aid MPS received each year was reduced by the amount the State paid to private schools participating in the original program. *See id.* at § 119.23(5)(a).

¶ 8 The original MPCP withstood a number of state constitutional challenges in *Davis v. Grover,* 166 Wis.2d 501, 480 N.W.2d 460 (1992). In *Davis,* this court first held that the original program, when enacted, was not a private or local bill and therefore was not subject to the prohibitions of Wis. Const. art. IV, § 18. *See id.* at 537, 480 N.W.2d 460. The court then held that the program did not violate the uniformity clause in Wis. Const. art. X, § 3 because the private schools did not constitute "district schools" simply by participating in the program. *See id.* at 540, 480 N.W.2d 460. The court finally held that the program, although it applied only to MPS, served a sufficient public purpose and therefore did not violate the public purpose doctrine. *See id.* at 546, 480 N.W.2d 460.

¶ 9 During the 1994–95 school year, approximately 800 students attended approximately 12 nonsectarian private schools under the original program. For the 1995–96 school year, the number of participating students increased to approximately 1,600 and the number of participating nonsectarian private schools increased to 17.

¶ 10 In 1995, as part of the biennial budget bill, the legislature amended in a number of ways the original MPCP. *See* 1995 Wis. Act 27, §§ 4002–4009. First, the legislature removed from Wis. Stat. § 119.23(2)(a) the limitation that participating private schools be "nonsectarian." *See* 1995 Wis. Act 27, § 4002. Second, the legislature increased to 15 percent in the 1996–97 school year the total percentage of MPS membership allowed to participate in the program. *See id.* at § 4003. Third, the legislature deleted the requirement that the State Superintendent ****609** conduct annual performance ***849** evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See id.* at §§ 4007m and 4008m.

¶ 11 Fourth, the legislature amended the original MPCP so that the State, rather than paying participating schools directly, is required to pay the aid to each participating student's parent or guardian. Under the amended MPCP, the State shall "send the check to the private school," and the parent or guardian shall "restrictively endorse the check for the use of the private school." *Id.* at § 4006m. Fifth, the amended MPCP places an additional limitation on the amount the State will pay to each parent or guardian. Under the amended MPCP, the State will pay the lesser of the MPS per student state aid under Wis. Stat. § 121.08 or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by the State. *See id.* The amended MPCP does not restrict the uses to which the private schools can put the state aid. Sixth, the legislature repealed the limitation that no more than 65 percent of a private school's enrollment consist of program participants. *See id.* at § 4003. Finally, the legislature added an "opt-out" provision prohibiting a private school from requiring "a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities." *Id.* at § 4008e. [3]

***850** ¶ 12 The Respondents, Warner Jackson, et al. and Milwaukee Teachers Education Association (MTEA), et al. filed two original actions in August 1995. Together the lawsuits challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. On August 15, 1996, the National Association for the Advancement of Colored People (NAACP) filed a separate lawsuit, alleging the same claims as the first two lawsuits and adding a claim that, on its face, the amended MPCP violated the Equal Protection Clause of the Fourteenth Amendment and Wis. Const. art. I, § 1.

The NAACP then filed a motion to consolidate the lawsuits. The circuit court consolidated the cases, but bifurcated the proceedings so that the equal protection claims would be heard only if the amended MPCP was upheld.

¶ 13 The State filed, under Wis. Stat. § (Rule) 809.70, a petition for leave to commence an original action, seeking from this court a declaration that the amended MPCP was constitutional. This court accepted original jurisdiction and entered a preliminary injunction staying the implementation of the amended program, specifying that the pre–1995 provisions of the original program were unaffected. Following oral argument, this court split three-to-three on the constitutional issues, dismissed the petition, and effectively remanded the case to the circuit court for further proceedings. *See State ex rel. Thompson v. Jackson,* 199 Wis.2d 714, 720, 546 N.W.2d 140 (1996) (per curiam).

¶ 14 Following remand, the circuit court partially lifted the preliminary injunction, thereby allowing the State to implement all of the 1995 amendments ***851** except the amendment allowing participation by sectarian private schools. In January 1997, the circuit court granted the Plaintiffs' motions for summary judgment, denied the State's motion for summary judgment, and invalidated the amendments to the MCPC. The circuit court held that the amended MPCP violates the religious benefits and compelled support clauses of Wis. Const. art. I, § 18, the public or local bill prohibitions of Wis. Const. art. IV, § 18, and the public purpose doctrine as the program applied to sectarian schools. The circuit court also found that the amended program did not violate the uniformity clause in Wis. Const. art. X, § 3 or the public purpose doctrine as it applied to the nonsectarian ****610** private schools. Because the circuit court invalidated the amended MPCP on state constitutional grounds, the court did not address the question whether the program violates the Establishment Clause. The State appealed from the circuit court's order, and the court of appeals, with Judge Roggensack dissenting, affirmed.

¶ 15 A majority of the court of appeals held that the amended MPCP violates the prohibition against state expenditures for the benefit of religious societies or seminaries contained in Wis. Const. art. I, § 18. The court of appeals, therefore, struck the amended MPCP in its entirety and found it unnecessary to reach the other state and the federal constitutional issues. The State appealed to this court, and we granted the State's petition for review.

¶ 16 In the circuit court, the Respondents challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. We address each issue in turn.

***852** ¶ 17 Before we begin our analysis of the amended MPCP, we pause to clarify the issues not before this court. In their briefs and at oral argument, the parties presented information and testimony expressing positions pro and con bearing on the merits of this type of school choice program. This debate largely concerns the wisdom of the amended MPCP, its efficiency from an educational point of view, and the political considerations which motivated its adoption. We do not stop to summarize these arguments, nor to burden this opinion with an analysis of them, for they involve considerations not germane to the narrow constitutional issues presented in this case. In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard.

Standard of Review

¶ 18 Procedurally, this case is before the court pursuant to the circuit court's grant of summary judgment to the Plaintiffs–Respondents. We independently review a grant of summary judgment, *see Burkes v. Klauser,* 185 Wis.2d 308, 327, 517 N.W.2d 503 (1994), applying the same methodology as that used by the circuit court. *See, e.g., Kafka v. Pope,* 194 Wis.2d 234, 240, 533 N.W.2d 491 (1995); *Voss v. City of Middleton,* 162 Wis.2d 737, 748, 470 N.W.2d 625 (1991). A motion for summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Wis. Stat. § 802.08(2). The underlying issue in this case is ***853** the constitutionality of the amended MPCP. The constitutionality of a statute is a question of law which we review independently, without giving deference to the decisions of the circuit court and the court of appeals. *See State v. Post,* 197 Wis.2d 279, 301, 541 N.W.2d 115 (1995); *State v. Migliorino,* 150 Wis.2d 513, 524, 442 N.W.2d 36 (1989).

¶ 19 Like any other duly enacted statute, the amended MPCP enjoys a strong presumption of constitutionality.

All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law. *See State v. Randall,* 192 Wis.2d 800, 824, 532 N.W.2d 94 (1995); *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis.2d 32, 47, 205 N.W.2d 784 (1973). Accordingly, "[it] is not enough that respondent[s] establish doubt as to the act's constitutionality nor is it sufficient that respondent[s] establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt." *La Plante,* 58 Wis.2d at 46, 205 N.W.2d 784; *see also State v. McManus,* 152 Wis.2d 113, 129, 447 N.W.2d 654 (1989); *Quinn v. Town of Dodgeville,* 122 Wis.2d 570, 577, 364 N.W.2d 149 (1985).

I. Establishment Clause

¶ 20 The first issue we address is whether the amended MPCP violates the Establishment Clause of the First Amendment to the United States Constitution. Neither the circuit ****611** court nor the court of appeals reached this issue. Upon review we conclude that the amended MPCP does not violate the Establishment Clause because it has a secular purpose, it will not ***854** have the primary effect of advancing religion, and it will not lead to excessive entanglement between the State and participating sectarian private schools. [4]

¶ 21 The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This mandate applies equally to state legislatures by virtue of the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); *Holy Trinity Community Sch. v. Kahl,* 82 Wis.2d 139, 150, 262 N.W.2d 210 (1978). ***855** The Establishment Clause, therefore, prohibits state governments from passing laws which have either the purpose or effect of advancing or inhibiting religion. *See Agostini v. Felton,* 521 U.S. 203, ——, 117 S.Ct. 1997, 2010, 138 L.Ed.2d 391 (1997).

¶ 22 When assessing any First Amendment challenge to a state statute, we are bound by the results and interpretations given that amendment by the decisions of the United States Supreme Court. *See State ex rel. Holt v. Thompson,* 66 Wis.2d 659, 663, 225 N.W.2d 678 (1975). "Ours [is] not to reason why; ours [is] but to review and apply." *State ex rel. Warren v. Nusbaum,* (*Nusbaum I*), 55 Wis.2d 316, 322, 198 N.W.2d 650 (1972). Our limited role is not aided by the Supreme Court's candid admission that in applying the Establishment Clause, it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Pub. Educ. and Religious Liberty v. Regan,* 444 U.S. 646, 662, 100 S.Ct. 840, 851, 63 L.Ed.2d 94 (1980).

¶ 23 The Supreme Court has repeatedly recognized that the Establishment Clause raises difficult issues of interpretation, and cases arising under it "have presented some of the most perplexing questions to come before [the] Court." *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 760, 93 S.Ct. 2955, 2959, 37 L.Ed.2d 948 (1973); *see, e.g., Mueller v. Allen,* 463 U.S. 388, 392, 103 S.Ct. 3062, 3065, 77 L.Ed.2d 721 (1983); *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). We are therefore cognizant of the Court's warnings that:

> There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of ***856** the physical sciences or mathematics ... [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton v. Richardson, 403 U.S. 672, 678, 91 S.Ct. 2091, 2095, 29 L.Ed.2d 790 (1971); *see also Mueller,* 463 U.S. at 393, 103 S.Ct. at 3066; *Lemon,* 403 U.S. at 612, 91 S.Ct. at 2111.

¶ 24 In an attempt to focus on the three main evils from which the Establishment ****612** Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity, *see Walz v. Tax Commission,* 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970), the Court has promulgated a three-pronged test to determine whether a statute complies with the Establishment Clause. *See Lemon,* 403 U.S. at 612, 91 S.Ct. at 2111. Under this test, a statute does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *See id.* at

612–13, 91 S.Ct. at 2111. We must apply this three-part test to determine the constitutionality of Wis. Stat. § 119.23. [5]

*857 *a. First Prong—Secular Purpose*

¶ 25 Under the first prong of the *Lemon* test, we examine whether the purpose of the state legislation is secular in nature. Our analysis of the amended MPCP under this prong of the *Lemon* test is straightforward. Courts have been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller,* 463 U.S. at 394–95, 103 S.Ct. at 3067.

¶ 26 As the court of appeals recognized, the secular purpose of the amended MPCP, as in many Establishment Clause cases, is virtually conceded. *See Jackson,* 213 Wis.2d at 29, 570 N.W.2d 407. The purpose of the program is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system. The propriety of providing educational opportunities for children of poor families in the state goes without question:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well-educated.

*858 *Mueller,* 463 U.S. at 395, 103 S.Ct. at 3067. The propriety of such legislative purpose, however, does not immunize the amended MPCP from further constitutional challenge. *See Nyquist,* 413 U.S. at 773–74, 93 S.Ct. at 2966. If the amended MPCP either has a primary effect that advances religion or if it fosters excessive entanglements between church and state, then the program is constitutionally infirm and must be struck down. *See id.* at 774, 93 S.Ct. at 2966.

b. Second Prong—Primary Effect of Advancing Religion

¶ 27 Analysis of the amended program under the second prong of the *Lemon* test is more difficult. While the first prong of *Lemon* examines the legislative purpose of the challenged statute, the second prong focuses on its likely effect. A law violates the Establishment Clause if its principal or primary effect either advances or inhibits religion. *See Lemon,* 403 U.S. at 612, 91 S.Ct. at 2111; *see also Agostini,* 521 U.S. at ——, 117 S.Ct. at 2010; *Mueller,* 463 U.S. at 396, 103 S.Ct. at 3067–68.

¶ 28 This does not mean that the Establishment Clause is violated every time money previously in the possession of a state is **613 conveyed to a religious institution. *See Witters v. Washington Dep't of Services for the Blind,* 474 U.S. 481, 486, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986). "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago...." *Tilton,* 403 U.S. at 679, 91 S.Ct. at 2096; *see Nusbaum I,* 55 Wis.2d at 321 n. 4, 198 N.W.2d 650. The constitutional standard is the separation of church and state. *See Zorach v. Clauson,* 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952). "The problem, like many problems in constitutional law, is one of degree." *Id.*

¶ 29 We begin our analysis under the second prong of the *Lemon* test by first considering the cumulative *859 criteria developed over the years and applying to a wide range of educational assistance programs challenged as violative of the Establishment Clause. *See Tilton,* 403 U.S. at 677–78, 91 S.Ct. at 2095. Although the lines with which the Court has sketched the broad contours of this inquiry are fine and not absolutely straight, the Court's decisions generally can be distilled to establish an underlying theory based on neutrality [6] and indirection: [7] state programs that are wholly neutral in offering educational assistance directly to citizens in a *860 class defined without reference to religion do not have the primary effect of advancing religion. The Court has explained:

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8, 113 S.Ct. 2462, 2466, 125 L.Ed.2d 1 (1993).

¶ 30 The Court's general principle under the Establishment Clause has, since its decision in *Everson,* been one of neutrality and indirection.[8] Writing for the majority in *Everson,* Justice Black set out the view of the ****614** Establishment Clause that still guides the ***861** Court's thinking today. The *Everson* Court explained that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " *Everson,* 330 U.S. at 16, 67 S.Ct. at 512 (quoting *Reynolds v. United States,* 98 U.S. 145, 164, 25 L.Ed. 244 (1878)). The Court tempered its statement, however, by cautioning that in maintaining this wall of separation, courts must "be sure that [they] do not inadvertently prohibit [the government] from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16, 67 S.Ct. at 512. Under this reasoning, the Court held that the Establishment Clause does not prohibit New Jersey from spending tax-raised funds to reimburse parents directly for the bus fares of parochial school pupils as a part of a general program under which the State pays the fares of pupils attending public and other schools. *See id.* at 17, 67 S.Ct. at 512.

¶ 31 In *Nyquist,* the Court struck down on Establishment Clause grounds a New York program that, *inter alia,* provided tuition grants to parents of children attending private schools. Under the program, New York sought to assure that participating parents would continue to send their children to religion-oriented schools by relieving their financial burdens. *See Nyquist,* 413 U.S. at 783, 93 S.Ct. at 2971. Before striking the tuition grants, the Court distinguished on two grounds the New York statute from the New Jersey statute reviewed in *Everson:* (1) unlike the statute in *Everson,* the New York statute was non-neutral because it provided benefits solely to private schools and parents with children in private schools, *see id.* at 782 n. 38, 93 S.Ct. at 2970 n. 38; and (2) the New York statute provided financial assistance rather than bus rides, *see id.* at 781–82, 93 S.Ct. at 2970. The Court concluded that the fact that aid was distributed directly to parents rather than the schools, although a ***862** factor in its analysis, did not save the statute because the effect of New York's program was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783, 93 S.Ct. at 2971.

¶ 32 Significant to the case now before us, however, the Court in *Nyquist* specifically reserved the issue whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.

Id. at 782 n. 38, 93 S.Ct. at 2970 n. 38. In cases following its decision in *Nyquist,* the Court has piecemeal answered this question as it has arisen in varying fact situations. *See, e.g., Mueller,* 463 U.S. 388, 103 S.Ct. 3062; *Witters,* 474 U.S. 481, 106 S.Ct. 748; *Zobrest,* 509 U.S. 1, 113 S.Ct. 2462; *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700; *Agostini,* 521 U.S. 203, 117 S.Ct. 1997.[9]

***863** ¶ 33 In *Mueller,* the Court rejected an Establishment Clause challenge to a Minnesota statute allowing taxpayers to deduct certain educational expenses in computing their state income tax, even though a majority of those deductions went to parents whose children ****615** attended sectarian schools. *See Mueller,* 463 U.S. at 401–02, 103 S.Ct. at 3070–71. "Two factors, aside from the States' traditionally broad taxing authority, informed [the *Mueller* Court's] decision." *Zobrest,* 509 U.S. at 9, 113 S.Ct. at 2467. First, the Court noted that, unlike the statute in *Nyquist,* the Minnesota law "permits all parents—whether their children attend public school or private—to deduct their children's educational expenses." *Mueller,* 463 U.S. at 398, 103 S.Ct. at 3069. Second, the Court emphasized that under Minnesota's tax deduction scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from other cases involving "the direct transmission of assistance from the state to the schools themselves." *Id.* at 399, 103 S.Ct. at 3069. The Court concluded:

> The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

***864** *Id.* at 400, 103 S.Ct. at 3070. *Mueller* makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the [*Lemon*] test, because any aid to religion results from the private choices of individual beneficiaries." *Witters,* 474 U.S. at 490–91, 106 S.Ct. at 753 (Powell, J. concurring)(footnote and citations omitted). [10]

¶ 34 The Court reaffirmed the dual importance of neutrality and indirect aid in *Witters*. *See Witters,* 474 U.S. 481, 106 S.Ct. 748. In *Witters,* the Court *unanimously* held that the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who intended to use the grant to attend a Christian college and become a pastor, missionary, or youth director. [11] The Court focused first on the program's indirect aid, finding that because the aid was paid to the student ***865** rather than the institution "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of genuinely independent and private choices of aid recipients." *Id.* at 488, 106 S.Ct. at 752.

¶ 35 As in *Mueller,* the *Witters* Court then emphasized the neutrality of the program, finding that "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' " and therefore "creates no financial incentive for students to undertake sectarian education." *Id.* at 487–88, 106 S.Ct. at 752 (quoting *Nyquist,* 413 U.S. at 782–83 n. 38, 93 S.Ct. at 2970 n. 38). In light of these factors, [12] the ****616** Court held that Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not ***866** advance religion in a manner inconsistent with the Establishment Clause. [13] *See id.* at 489, 106 S.Ct. at 752.

¶ 36 The Supreme Court applied the same logic in *Zobrest,* where it held that the Establishment Clause did not prohibit a school district from providing to a deaf student a sign-language interpreter under the Individuals with Disabilities Education Act (IDEA), even though the interpreter would be a mouthpiece for religious instruction. *See Zobrest,* 509 U.S. at 13–14, 113 S.Ct. at 2469. The *Zobrest* Court, basing its reasoning upon *Mueller* and *Witters,* again looked to neutrality and indirection as its guiding principles. Specifically focusing on the general availability of the statute, the Court found that the "service at issue in this case is part of a general government program that distributes benefits neutrally to any child ... without regard to the ... 'nature' of the school the child attends." *Id.* at 10, 113 S.Ct. at 2467.

¶ 37 The *Zobrest* Court then looked to whether the aid was direct or indirect, explaining that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as result of the private decision of individual parents." *Id.* Based on these two findings, the Court concluded: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that ***867** service does not offend the Establishment Clause." *Id.* (quoting *Witters,* 474 U.S. at 488, 106 S.Ct. at 752).

¶ 38 In *Rosenberger,* the Supreme Court held that the Establishment Clause did not prohibit the university from funding a student organization, which otherwise would have been entitled to publication funds, merely because it published a newspaper with a Christian point of view. The Court clarified that the critical aspect of the analysis was whether the state conferred a benefit which neither inhibited nor promoted religion. *See Rosenberger,* 515 U.S. at 839, 115 S.Ct. at 2521. As long as the benefit was neutral with respect to religion, what the student did with that benefit, even if it was to spend all of it on religion-related expenditures, was irrelevant for purposes of analyzing whether the law or policy violated the Establishment Clause. *Id.* at 842–43, 115 S.Ct. at 2523.

¶ 39 Finally, in *Agostini,* the Supreme Court held that a federally funded program providing supplemental, remedial instruction on a neutral basis to disadvantaged children at sectarian schools is not invalid under the Establishment Clause when sufficient safeguards exist. [14] *See Agostini,* 521 U.S. at ——, 117 S.Ct. at 2016. The Court explained that

while the general principles used to evaluate Establishment Clause cases ***868** have remained unchanged, the Court's "understanding of the criteria used to assess" the inquiry has changed in recent years. ****617** *Id.* at ——, 117 S.Ct. at 2010. [15] The Court reiterated that the unchanged principle under the Establishment Clause remains neutrality, and that the Court will continue to ask whether the government acts with the purpose or effect of advancing or inhibiting religion. *See id.* Writing for the Court, Justice O'Connor set out three criteria the Court has in recent years used to evaluate whether an impermissible effect exists. The aid must "not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at ——, 117 S.Ct. at 2016.

¶ 40 After considering these three criteria, the Court held that the program did not have the primary effect of advancing religion. The Court first concluded that placing full-time employees on parochial school campuses under this program did not result in advancing religion through indoctrination. *See id.* at ——, 117 S.Ct. at 2014. The Court then considered whether the criteria by which the program identified beneficiaries created a financial incentive to undertake religious indoctrination. The Court, synthesizing the central establishment clause principle, concluded that no such incentive existed under the program: "[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* The Court also concluded that the ***869** federal program did not result in an excessive entanglement between church and state. *See id.* at —— – ——, 117 S.Ct. at 2015–16.

¶ 41 The Supreme Court, in cases culminating in *Agostini,* has established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children. The amended MPCP is precisely such a program. Applying to the amended MPCP the criteria the Court has developed from *Everson* to *Agostini,* we conclude that the program does not have the primary effect of advancing religion.

¶ 42 First, eligibility for benefits under the amended MPCP is determined by "neutral, secular criteria that neither favor nor disfavor religion," and aid "is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini,* 521 U.S. at ——, 117 S.Ct. at 2014. Pupils are eligible under the amended MPCP if they reside in Milwaukee, attend public schools (or private schools in grades K–3) and meet certain income requirements. Beneficiaries are then selected on a random basis from all those pupils who apply and meet these religious-neutral criteria. Participating private schools are also selected on a religious-neutral basis and may be sectarian or nonsectarian. The participating private schools must select on a random basis the students attending their schools under the amended program, except that they may give preference to siblings already accepted in the school. In addition, under the new "opt-out" provision, the private schools cannot require the students participating in ***870** the program to participate in any religious activity provided at that school.

¶ 43 Under the amended MPCP, beneficiaries are eligible for an equal share of per pupil public aid regardless of the school they choose to attend. To those eligible pupils and parents who participate, the amended MPCP provides a religious-neutral benefit—the opportunity "to choose the educational opportunities that they deem best for their children." *Davis,* 166 Wis.2d at 532, 480 N.W.2d 460. The amended MPCP, in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian ****618** school. [16] As a result, the amended program is in no way "skewed towards religion." *Witters,* 474 U.S. at 488, 106 S.Ct. at 752.

***871** ¶ 44 The amended MPCP therefore satisfies the principle of neutrality required by the Establishment Clause. As Justice Jackson explained in *Everson:*

> A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he ... is a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church.'

Everson, 330 U.S. at 25, 67 S.Ct. at 516 (Jackson, J., dissenting). The amended MPCP works in much the same way. A student qualifies for benefits under the amended MPCP not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a

poor family and is a student in the embattled Milwaukee Public Schools. To qualify under the amended MPCP, the student is never asked his or her religious affiliation or beliefs; nor is he or she asked whether the aid will be used at a sectarian or nonsectarian private school. Because it provides a neutral benefit to beneficiaries selected on religious-neutral criteria, the amended MPCP neither leads to "religious indoctrination," *Agostini,* 521 U.S. at ——, 117 S.Ct. at 2014, nor "creates [a] financial incentive for students to undertake sectarian education." *Witters,* 474 U.S. at 488, 106 S.Ct. at 752; *Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467. As Judge Roggensack concluded, "[t]he benefit neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement." *Jackson,* 213 Wis.2d at 61, 570 N.W.2d 407.

¶ 45 Second, under the amended MPCP public aid flows to sectarian private schools only as a result of ***872** numerous private choices of the individual parents of school-age children. Under the original MPCP, the State paid grants directly to participating private schools. As explained above, the program was amended so that the State will now provide the aid by individual checks made payable to the parents of each pupil attending a private school under the program. Each check is sent to the parents' choice of schools and can be cashed only for the cost of the student's tuition. Any aid provided under the amended MPCP that ultimately flows to sectarian private schools, therefore, does so "only as a result of genuinely independent and private choices of aid recipients." *Witters,* 474 U.S. at 487, 106 S.Ct. at 752.

¶ 46 We recognize that under the amended MPCP the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools. Nevertheless, we do not view these precautionary provisions as amounting to some type of "sham" to funnel public funds to sectarian private schools. In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters,* not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents. As a result, "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or ****619** belief." *Witters,* 474 U.S. at 493, 106 S.Ct. at 755 (O'Connor, J., concurring); *see also Zobrest,* 509 U.S. at 9–10, 113 S.Ct. at 2467.

¶ 47 The amended MPCP, therefore, places on equal footing options of public and private school ***873** choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit. We are satisfied that the implementation of the provisions of the amended MPCP will not have the primary effect of advancing religion. [17]

c. Third Prong—Excessive Government Entanglement

¶ 48 The final question for us to determine under the *Lemon* test is whether the amended MPCP would result in an excessive governmental entanglement with religion. [18] Stated another way, it is necessary to determine whether "[a] comprehensive, discriminating, and continuing state surveillance will ***874** inevitably be required to ensure that these restrictions [against the inculcation of religious tenets] are obeyed and the First Amendment otherwise respected." *Lemon,* 403 U.S. at 619, 91 S.Ct. at 2114.

¶ 49 Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U.S. at 614, 91 S.Ct. at 2112. Some relationship between the State and religious organizations is inevitable. *See id.* (citing *Zorach,* 343 U.S. at 312, 72 S.Ct. at 683). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *See Agostini,* 521 U.S. at ——, 117 S.Ct. at 2015.

¶ 50 The amended MPCP will not create an excessive entanglement between the State and religion. Under the amended program, the State need not, and in fact is not given the authority to impose a "comprehensive, discriminating, and continuing state surveillance" over the participating sectarian private schools. *Lemon,* 403 U.S. at 619, 91 S.Ct. at 2114. Participating private schools are subject to performance, reporting, and auditing requirements, as well as to applicable nondiscrimination, health, and safety obligations. Enforcement of these minimal standards will require the State Superintendent to monitor the quality of secular education at the sectarian schools participating in the plan. But this oversight already exists. In the course of

his existing duties, the Superintendent currently monitors the quality of education at all sectarian private schools.

***875** ¶ 51 These oversight activities relating to conformity with existing law do not create excessive entanglement merely because they are part of the amended MPCP's requirements. *See, e.g., Mueller,* 463 U.S. at 403, 103 S.Ct. at 3071. As the Court held in *Hernandez v. Commissioner,* 490 U.S. 680, 696–97, 109 S.Ct. 2136, 2147, 104 L.Ed.2d 766 (1989):

> [R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious ****620** body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command.

(citations omitted); *accord, Agostini,* 521 U.S. at —— – ——, 117 S.Ct. at 2014–16; *Board of Educ. of the Westside Community Sch. v. Mergens,* 496 U.S. 226, 253, 110 S.Ct. 2356, 2373, 110 L.Ed.2d 191 (1990); *Hartmann v. Stone,* 68 F.3d 973 (6th Cir.1995). The program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.

¶ 52 In short, we hold that the amended MPCP, which provides a neutral benefit directly to children of economically disadvantaged families on a religious-neutral basis, does not run afoul of any of the three primary criteria the Court has traditionally used to evaluate whether a state educational assistance program has the purpose or effect of advancing religion. Since the amended MPCP has a secular purpose, does not have the primary effect of advancing religion, and ***876** does not create an excessive entanglement, it is not invalid under the Establishment Clause. [19]

II. State Establishment Clause

¶ 53 The next question presented in this case is whether the amended MPCP violates art. I, § 18 of the Wisconsin Constitution. [20] The Respondents argue, and the court of appeals concluded, that the amended MPCP violates both the "benefits clause" and the "compelled support clause" of art. I, § 18. Upon review, we conclude that the amended MPCP violates neither provision.

¶ 54 The "benefits clause" of art. I, § 18 provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." This is Wisconsin's equivalent of the Establishment Clause of the First Amendment. *See King v. Village of Waunakee,* 185 Wis.2d 25, 52, 517 N.W.2d 671 (1994); *Holt,* 66 Wis.2d at 676, 225 N.W.2d 678. This court has remarked that the language of art. I, § 18, while "more specific than the terser" clauses of the First ***877** Amendment, carries the same import, *Holt,* 66 Wis.2d at 676, 225 N.W.2d 678; both provisions "are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *See State ex rel. Warren v. Nusbaum* (*Nusbaum II*), 64 Wis.2d 314, 327–28, 219 N.W.2d 577 (1974)(quoting *Nusbaum I,* 55 Wis.2d at 332, 198 N.W.2d 650). Although art. I, § 18 is not subsumed by the First Amendment, *see State v. Miller,* 202 Wis.2d 56, 63, 549 N.W.2d 235 (1996), we interpret and apply the benefits clause of art. I, § 18 in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment. *See King,* 185 Wis.2d at 55, 517 N.W.2d 671; *American Motors Corp. v. DILHR,* 93 Wis.2d 14, 29, 286 N.W.2d 847 (1979); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner,* 91 Wis.2d 145, 163–64, 280 N.W.2d 773 (1979). [21]

****621** ***878** ¶ 55 Unlike the court of appeals, which focused on whether sectarian private schools were "religious seminaries" under art. I, § 18, we focus our inquiry on whether the aid provided by the amended MPCP is "for the benefit of" such religious institutions. [22] We have explained that the language "for the benefit of" in art. I, § 18 "is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section." *Nusbaum I,* 55 Wis.2d at 333, 198 N.W.2d 650. Furthermore, we have stated that the language of art. I, § 18 cannot be read as being "so prohibitive as not to encompass the primary-effect test." *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 227, 170 N.W.2d 790 (1969). The crucial question, under art. I, § 18, as under the Establishment Clause, is "not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Nusbaum I,* 55 Wis.2d at 333, 198 N.W.2d 650 (quoting *Tilton,* 403 U.S. at 679, 91 S.Ct. at 2096).

¶ 56 Applying the primary effect test developed by the Supreme Court, we have concluded above that the primary effect of the amended MPCP is not the ***879** advancement of a religion. We find the Supreme Court's primary effect test, focusing on the neutrality and indirection of state aid, is well reasoned and provides the appropriate line of demarcation for considering the constitutionality of neutral educational assistance programs such as the amended MPCP. Since the amended MPCP does not transgress the primary effect test employed in Establishment Clause jurisprudence, we also conclude that the statute is constitutionally inviolate under the benefits clause of art. I, § 18.

¶ 57 This conclusion is not inconsistent with Wisconsin tradition or with past precedent of this court. Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Wisconsin Indus. Sch. for Girls v. Clark County,* 103 Wis. 651, 79 N.W. 422 (1899); *accord Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). This court has embraced this principle for nearly a century, recognizing that: "parents as the natural guardians of their children [are] the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligations to give to such children proper nurture, education, and training." *Wisconsin Indus. Sch. for Girls,* 103 Wis. at 668–69, 79 N.W. 422.

¶ 58 In this context, this court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties, *see, e.g., State ex rel. Atwood v. Johnson,* 170 Wis. 218, 175 N.W. 589 (1919), and ***880** that public funds generally may be provided to sectarian educational institutions so long as steps are taken not to subsidize religious functions, *see, e.g., Nusbaum II,* 64 Wis.2d 314, 219 N.W.2d 577.

****622** ¶ 59 In *Nusbaum II,* this court upheld a state program that provided educational benefits without charge to students with exceptional educational needs. Where public resources were inadequate to attend to a student's exceptional needs, the State could under the program directly contract with private sectarian institutions to provide the necessary services. *See Nusbaum II,* 64 Wis.2d at 320–21, 219 N.W.2d 577. Reviewing the program, the *Nusbaum II* court emphasized the neutral process by which students were chosen to participate in the program, *see id.* at 320, 219 N.W.2d 577, and the great lengths to which the legislature had gone to make sure that the inculcation of religious tenets did not take place, *see id.* at 325, 219 N.W.2d 577. Applying the primary effect test of *Lemon,* the court concluded that the program violated neither the Establishment Clause nor art. I, § 18. *See id.* at 322, 329, 219 N.W.2d 577.

¶ 60 In *Atwood,* 170 Wis. 218, 175 N.W. 589, this court upheld a program, much like the amended MPCP, that provided neutral educational assistance. The *Atwood* court considered the constitutionality of educational benefits for returning veterans that encompassed paying the cost of schooling, at any high school or college, including religious schools. Under that program, a student could choose a school, and the State directly paid to the schools the actual increased cost of operation attributed to the additional students. Upholding the program under art. I, § 18, the court concluded:

> The contention that financial benefit accrues to religious schools from [this program] is equally untenable. Only actual increased cost to such ***881** schools occasioned by the attendance of beneficiaries is to be reimbursed. They are not enriched by the service they render. Mere reimbursement is not aid.

Id. at 263–64, 175 N.W. 589.

¶ 61 In concluding that the amended MPCP violated art. I, § 18, the court of appeals relied heavily on this court's decisions in *State ex rel. Weiss v. District Board,* 76 Wis. 177, 44 N.W. 967 (1890) and *State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 156, 115 N.W.2d 761 (1962). We find the court's reliance was misplaced.

¶ 62 In *Weiss,* the court held that reading of the King James version of the Bible by students attending public school violated the religious benefits clause of art. I, § 18. Although the court's reasoning in *Weiss* may have differed from ours, its holding is entirely consistent with the primary effects test the Supreme Court has developed and we apply today. Requiring public school students to read from the Bible is

neither neutral nor indirect. The Edgerton schools reviewed in *Weiss* were directly supported by public funds, and the reading of the Bible was anything but religious-neutral. The program considered in *Weiss* is far different from the neutral and indirect aid provided under the amended MPCP. The holding in *Weiss,* therefore, does not control our inquiry in this case.

¶ 63 In *Reynolds,* 17 Wis.2d 148, 115 N.W.2d 761, the court struck down a publicly supported transportation program it perceived was designed to benefit parochial schools. In reaching its conclusion, the *Reynolds* court applied a stricter standard under art. I, § 18 than that used by the Supreme Court under the Establishment Clause. *See id.* at 165, 115 N.W.2d 761. This court has since rejected applying this stricter standard in cases arising under the benefits clause of art. I, § 18. *See, e.g., Lindner,* 91 Wis.2d at 163–64, 280 N.W.2d 773; *Nusbaum II,* 64 Wis.2d at 328, 219 N.W.2d 577; *Reuter,* 44 Wis.2d at 227, 170 N.W.2d 790. ***882** The court's analysis and conclusion in *Reynolds* are therefore not dispositive in our inquiry here.

¶ 64 The Respondents additionally argue that the amended MPCP violates the "compelled support clause" of art. I, § 18. The compelled support clause provides "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent...." The Respondents assert that since public funds eventually flow to religious institutions under the amended MPCP, taxpayers are compelled to support places of worship against their consent. This argument is identical to the Respondents' argument ****623** under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy. *See Kungys v. United States,* 485 U.S. 759, 778, 108 S.Ct. 1537, 1550, 99 L.Ed.2d 839 (1988).

¶ 65 In *Holt,* 66 Wis.2d 659, 225 N.W.2d 678, this court interpreted the compelled support provision and applied it to a state program under which public school children were released from school so that they could attend religious centers for religious instruction. *See id.* at 676–77, 225 N.W.2d 678. In the context provided in *Holt,* the court interpreted the compelled support clause to prohibit the state from forcing or requiring students to attend or participate in religious instruction. *See id.* at 676, 225 N.W.2d 678. Under this interpretation, the court upheld the program, finding that the children participating in the program did so only by choice and that, although proof of attendance at the religious instruction was required, the program's requirements were directed at preventing ***883** deception rather than compelling attendance. *See id.* "Compulsionto attend is not, initially or subsequently, a part of the program." *Id.* at 677, 225 N.W.2d 678. The court therefore rejected the compelled support challenge.

¶ 66 Applying in this case the interpretation of the compelled support clause provided in *Holt,* we conclude that the amended MPCP does not violate that constitutional provision. Like the program in *Holt,* the amended MPCP does not require a single student to attend class at a sectarian private school. A qualifying student only attends a sectarian private school under the program if the student's parent so chooses. Nor does the amended MPCP force participation in religious activities. On the contrary, the program prohibits a sectarian private school from requiring students attending under the program to participate in religious activities offered at such school. The choice to participate in religious activities is also left to the students' parents. Since the amended MPCP neither compels students to attend sectarian private schools nor requires them to participate in religious activities, the program does not violate the compelled support clause of art. I, § 18.

¶ 67 In assessing whether the amended MPCP violates Wis. Const. art. IV, § 18, art. X, § 3, or the Wisconsin public purpose doctrine, we rely heavily on our analyses and conclusions in *Davis,* 166 Wis.2d 501, 480 N.W.2d 460. In *Davis,* the school choice opponents attacked the original MPCP under a barrage of arguments similar to those raised by the Respondents in this case. Specifically, we concluded in *Davis* that the original MPCP did not violate art. IV, § 18, art. X, § 3, or the public purpose doctrine. In this case, we limit our analysis to determining whether the amendments made to the ***884** original MPCP change either the analyses we relied upon or the conclusions we reached in *Davis.* Upon review we conclude that they do not.

III. Private or Local Bill

¶ 68 The third issue presented in this case is whether the amended MPCP is a private or local bill which was enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18.

¶ 69 Article IV, § 18 of the Wisconsin Constitution states in full: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This constitutional provision addresses the form in which private or local legislation is enacted and not the substance of that legislation. *See Davis,* 166 Wis.2d at 526, 480 N.W.2d 460. As we have explained, art. IV, § 18 serves three underlying purposes:

> 1) to encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Milwaukee Brewers v. DHSS, 130 Wis.2d 79, 107–08, 387 N.W.2d 254 (1986). "The requirements of art. IV, § 18 are prescribed to ensure accountability of the legislature to the ****624** public and to 'guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature.' " *Davis,* 166 Wis.2d at 519, 480 N.W.2d 460 (quoting *Milwaukee County v. Isenring,* 109 Wis. 9, 23, 85 N.W. 131 (1901)). The question here is whether ***885** the amended MPCP comes within the purview of art. IV, § 18.

¶ 70 In *Davis,* we set forth a two-fold analysis for assessing whether a bill or statute violates Wis. Const. art. IV, § 18:

> We must first address whether the process in which the bill was enacted deserves a presumption of constitutionality. Second, we must address whether the bill is private or local. If the bill is found to be private or local, then the requirements of art. IV, § 18 apply; namely, that the legislation must be a single subject bill and the title of the bill must clearly reflect the subject.

Id. at 520, 480 N.W.2d 460. We review the amended MPCP under this two-fold analysis.

¶ 71 Thus, our first inquiry is whether the process by which the amended MPCP was enacted deserves the presumption of constitutionality. Where the legislature is alleged to have violated a constitutional provision mandating the procedure by which bills must pass, we will not indulge in a presumption of constitutionality, "for to do so would make a mockery of the procedural constitutional requirement." *City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.,* 144 Wis.2d 896, 912–13 n. 5, 426 N.W.2d 591 (1988); *see City of Oak Creek v. DNR,* 185 Wis.2d 424, 437, 518 N.W.2d 276 (Ct.App.1994). "Nonetheless, this court may indulge the presumption of constitutionality where it is evident that the legislature did adequately consider or discuss the legislation in question, even where such legislation was passed as part of a voluminous bill." *Oak Creek,* 185 Wis.2d at 437, 518 N.W.2d 276; *see Davis,* 166 Wis.2d at 521–23, 480 N.W.2d 460.

***886** ¶ 72 We find no evidence in this case that the amended MPCP was smuggled or logrolled through the legislature. On the contrary, the record establishes that the legislature "intelligently participate[d] in considering" the amended MPCP. *Davis,* 166 Wis.2d at 523, 480 N.W.2d 460 (quoting *Brookfield,* 144 Wis.2d at 912 n. 5, 426 N.W.2d 591). According to the Agreed Upon Statement of Facts in this case, the amendments to the original MPCP were proposed by the Governor as a portion of the 1995–1997 biennial budget bill, which was referred to the Joint Committee on Finance. During the spring of 1995, the proposed amendments to the original MPCP, along with other aspects of the biennial budget, were discussed at public hearings throughout the state.[23] The proposed amendments were then debated, specifically amended, and in June 1995, adopted by the Joint Committee on Finance. The Assembly then debated, specifically amended, held a public hearing on, and passed the proposed amendments as part of the biennial budget bill. The biennial budget bill was then referred to the Senate. The Senate held public hearings on, debated, and concurred in the proposed amendments to the original MPCP. On July 26, 1995, the amended MPCP was enacted as a portion of the 1995–97 State of Wisconsin Biennial Budget, 1995 Wis. Act 27.

¶ 73 Under the stipulated facts of this case, we find it evident that the amended MPCP was not smuggled through

the legislature, but rather was forged in ***887** the deliberative kiln of public debate. The legislature adequately considered and discussed the amended MPCP, even though the proposed amendments were ultimately enacted as part of a multi-subject bill. We therefore find it proper to apply a presumption of constitutionality to the process in which the amended MPCP was enacted into law.

¶ 74 Our next line of inquiry is whether the amended program is "private or local" legislation. *See Davis,* 166 Wis.2d at 524, 480 N.W.2d 460. The term "private or local" is not defined in the constitution. Legislation that is geographically specific will not ****625** automatically be considered private or local where the general subject matter of the legislation relates to a state responsibility, that is when "the subject thereof is such that the state itself has an interest therein as proprietor, or as trustee, or in its governmental capacity, for the benefit or in the interest of the general public." *Milwaukee Brewers,* 130 Wis.2d at 111, 387 N.W.2d 254 (citations and internal quotations omitted).

¶ 75 To assess whether the amended MPCP is private or local legislation, we apply the test this court created in *Brookfield. See Davis,* 166 Wis.2d at 527, 480 N.W.2d 460.[24] The *Brookfield* test comprises five elements:

> ***888** First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.
>
> Second, the classification adopted must be germane to the purpose of the law.
>
> Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.
>
> Fourth, when a law applies to a class, it must apply equally to all members of the class.
>
> ... [F]ifth, the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Davis, 166 Wis.2d at 526, 480 N.W.2d 460 (quoting *Brookfield,* 144 Wis.2d at 907–09, 426 N.W.2d 591).

¶ 76 In *Davis,* we held that the original MPCP satisfied all five elements of the *Brookfield* test and therefore was not private or local legislation subject to the procedural requirements in art. IV, § 18. *See Davis,* 166 Wis.2d at 537, 480 N.W.2d 460. The 1995 amendments to the original MPCP did not change the program in any way that would alter our analyses or conclusions in *Davis* as to the first, third, fourth, and fifth elements of the *Brookfield* test.[25] In this case, the Respondents assert only ***889** that, as a result of the changes made to the program since *Davis,* the classification imposed by the amended MPCP does not satisfy the second element of the *Brookfield* test. We therefore limit our discussion to the second element of the *Brookfield* test.

¶ 77 The second element of the *Brookfield* test requires that "the classification adopted must be germane to the purpose of the law." *Brookfield,* 144 Wis.2d at 907, 917–20, 426 N.W.2d 591. In *Davis,* we concluded that the original MPCP satisfied this element because it was "an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Davis,* 166 Wis.2d at 530, 535, 480 N.W.2d 460. We there explained:

> [T]he classification of first class cities is germane to the purpose of the law. Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socio-economic and educational disparities are greatest and the ****626** private educational choices are most abundant.

Id. at 535, 480 N.W.2d 460.

¶ 78 The Respondents contend that our holding in *Davis* does not control the determination in this case because the amended MPCP is no longer experimental in nature and therefore the classification of cities of the first class is no longer germane to the purpose of that ***890** law. We disagree. Despite some amendments, the program has retained its experimental character. In concluding that the original MPCP was experimental legislation, the *Davis* court focused on two characteristics of the program: its limited participation (one percent of MPS membership) and its data compilation and

reporting provisions. *See id.* at 533–34, 480 N.W.2d 460. The amended MPCP has retained these two characteristics.

¶ 79 First, like the original program, the amended MPCP is not an abandonment of the public school system. With the 1995 amendments, the legislature expanded the program by increasing to 15 percent of total MPS membership the number of financially disadvantaged students eligible to attend private schools under the amended MPCP. Even though this represents a substantial increase in the total number of students eligible to participate, the program still affects only a small portion of MPS membership. No less than 85 percent of the MPS membership will be unaffected by the amended MPCP. Although it provides a somewhat larger view, the amended MPCP still provides but a "window of opportunity to test the effectiveness of an alternative to the MPS." *Id.* at 533, 480 N.W.2d 460. [26]

¶ 80 Second, like the original program, the amended MPCP continues to allow the State to measure the effects of choice and competition on education. *See Davis,* 166 Wis.2d at 533, 480 N.W.2d 460. With the 1995 amendments, ***891** the legislature deleted some of the monitoring requirements from the original plan. Specifically, the legislature deleted the requirement that the State Superintendent conduct annual performance evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See* 1995 Wis. Act 27 at §§ 4007m and 4008m. The amended MPCP, however, requires the Legislative Audit Bureau to conduct a financial and performance evaluation of the program and to submit it to each house of the legislature by January 15, 2000. *See id.* at § 4008s.

¶ 81 The mere fact that the legislature has chosen to conduct one evaluation in the year 2000 rather than on an annual basis does not destroy the experimental nature of the amended MPCP. As we explained in *Davis,* "[t]his experiment tests a theory of education." *Id.* at 534, 480 N.W.2d 460. The effects of this experiment will be measured not only by the test scores or graduation rates of those students to whom "life preservers" have been thrown, [27] but also by the education those students who remain in MPS receive. Nor will the success or failure of this experiment be measured by focusing solely on those students participating in the program, but also by considering whether parental choice spurs competitiveness and innovation within the public education system. The legislature has provided a reasonable process by which to review the effects of the amended MPCP. Article IV, § 18 does not dictate a ***892** particular timetable for such review. We therefore express no opinion whether yearly evaluations or one evaluation at the end of four years will provide a more accurate or more cost-effective measure of the amended MPCP's effects.

¶ 82 In short, we conclude that the amended MPCP, like the original program, is experimental ****627** legislation intended to address a perceived problem in the quality of education and educational opportunities in Wisconsin. The best location to experiment with such a program is in a city of the first class, where "socio-economic and educational disparities ... are most abundant." *Id.* at 535, 480 N.W.2d 460. The amended MPCP's classification of cities of the first class is therefore germane to the purpose of the law. The second element of the *Brookfield* test is satisfied. Accordingly, we hold that the amended MPCP is not a private or local bill within the meaning of Wis. Const. art. IV, § 18, and thus not subject to its procedural requirements.

IV. Uniformity Clause

¶ 83 The fourth issue presented in this case is whether the amended MPCP violates the uniformity provision of Wis. Const. art. X, § 3. The court of appeals did not reach this issue, and the circuit court concluded that the amended program does not violate the uniformity clause.

¶ 84 Wisconsin Constitution art. X, § 3 states:

> 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;....

***893** ¶ 85 The Respondents first argue that the amendments to the program, primarily the removal of funding limits that prevented a private school from operating solely on public funds, effectively transforms private schools participating in the amended MPCP into district schools subject to the nonsectarian clause of art. X, § 3. As in *Davis,* the key to this

argument is whether private schools, by participating in the amended MPCP, become "district schools" for the purposes of the uniformity clause. We conclude that they do not.

¶ 86 Relying on the classification in Wis. Stat. § 115.01(1) and on the fact that a private school could receive 100 percent of its tuition from public funds, the Respondents contend that private schools participating in the amended MPCP will become "public schools" because they will be "elementary and high schools supported by public taxation." In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original MPCP were "district schools" to which the uniformity requirement applies. *See Davis,* 166 Wis.2d at 538, 480 N.W.2d 460. The court noted that the original MPCP explicitly referred to participating schools as "private schools" and observed that "[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school." *Id.* at 539–40, 480 N.W.2d 460.

¶ 87 We apply the same reasoning in this case. Like the original MPCP, the amended program expressly refers to participating schools as "private schools." The term "private school" is defined by statute to include those private institutions satisfying the requirements of Wis. Stat. § 118.165 or determined to be a private school by the State Superintendent under Wis. Stat. § 118.167. *See* Wis. Stat. § 115.001(3r). "We ***894** assume that the legislature was aware of this statutory meaning and intended to use 'private school' ... as a statutory term of art." *Davis,* 166 Wis.2d at 538, 480 N.W.2d 460. As in *Davis,* we conclude that the mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3. This conclusion is not affected by the amount of public funds a private school receives.

¶ 88 The Respondents also argue that art. X, § 3 prohibits the State from diverting students and funds away from the public school system. Article X, § 3, the Respondents contend, requires that the district schools be the only system of state-supported education. This argument too was raised and specifically rejected in *Davis*. *See Davis,* 166 Wis.2d at 538–40, 480 N.W.2d 460.

¶ 89 In *Davis,* the choice opponents argued that the explicit requirement in art. X, § 3 that the State establish public district schools implicitly prohibits the legislature from spending public funds to support any schools other than district schools. As a dissenting opinion argued: "the constitutional system of ****628** public education was intended to be the only general school instruction to be supported by taxation." *Davis,* 166 Wis.2d at 558, 480 N.W.2d 460 (Abrahamson, J., dissenting). The court, relying on precedent of this court, rejected that contention. *See id.* at 537–38, 480 N.W.2d 460 (citing *State ex rel. Comstock v. Joint Sch. Dist. No. 1,* 65 Wis. 631, 636–37, 27 N.W. 829 (1886) and *Kukor v. Grover,* 148 Wis.2d 469, 496–97, 436 N.W.2d 568 (1989)); *accord Buse v. Smith,* 74 Wis.2d 550, 565, 247 N.W.2d 141 (1976); *Reuter,* 44 Wis.2d at 221, 170 N.W.2d 790; *City of Manitowoc v. Town of Manitowoc Rapids,* 231 Wis. 94, 98, 285 N.W. 403 (1939). Applying the reasoning of *Comstock* and *Kukor,* the court concluded that art. X, § 3 provides not a ceiling but a floor ***895** upon which the legislature can build additional opportunities for school children in Wisconsin:

> The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education.

Davis, 166 Wis.2d at 539, 480 N.W.2d 460.

¶ 90 Similar to the original MPCP upheld in *Davis,* the amended MPCP in no way deprives any student of the opportunity to attend a public school with a uniform character of education. By enacting the amended MPCP, the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by the State under art. X, § 3. The students participating in the amended MPCP do so by choice and may withdraw at any time and return to a public school. "[W]hen the legislature has provided for each [ ] child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Comstock,* 65 Wis. at 636–37, 27 N.W. 829. As in *Davis,* we conclude that the legislature has done so here. The amended MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated.

¶ 91 We therefore hold that the sectarian private schools participating in the MPCP do not constitute "district schools" for the purposes of the uniformity clause. We also reaffirm the position that the ***896** legislature has fulfilled its constitutional duty to provide for the basic education of our children. The State's experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic education in the public school system. *See Davis,* 166 Wis.2d at 539, 480 N.W.2d 460.

V. Public Purpose Doctrine

¶ 92 The fifth issue presented in this case is whether the amended MPCP violates Wisconsin's public purpose doctrine. The court of appeals did not reach this issue, and the circuit court concluded that it does.

¶ 93 The public purpose doctrine, although not recited in any specific clause in the state constitution, is a well-established constitutional doctrine. *See Hopper v. City of Madison,* 79 Wis.2d 120, 128, 256 N.W.2d 139 (1977). As this court stated in *State ex rel. Warren v. Nusbaum,* 59 Wis.2d 391, 414, 208 N.W.2d 780 (1973), "[p]ublic funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin."

¶ 94 Under the public purpose doctrine, "[w]e are not concerned with the 'wisdom, merits or practicability of the legislature's enactment.' Rather we are to determine whether a 'public purpose can be conceived which might reasonably be deemed to justify or serve as a basis for the expenditure.' " *Millers Nat'l Ins. v. City of Milwaukee,* 184 Wis.2d 155, 175–76, 516 N.W.2d 376 (1994)(quoting *Hopper,* 79 Wis.2d at 129, 256 N.W.2d 139)(internal citation omitted). "A court can conclude that no public purpose exists only if it is 'clear and palpable' that there can be no benefit to the public." *La Plante,* 58 Wis.2d at 56, 205 N.W.2d 784 (citation omitted).

***897** ¶ 95 No party disputes that education constitutes a valid public purpose, or that private schools may be employed to further that ****629** purpose. Education ranks at the apex of a state's function. *See Yoder,* 406 U.S. at 213, 92 S.Ct. at 1532; *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). This court has long recognized that equal educational opportunities are a fundamental right, *see, e.g., Buse,* 74 Wis.2d 550, 247 N.W.2d 141, and that the State has broad discretion to determine how best to ensure such opportunities. *See Davis,* 166 Wis.2d at 541–44, 480 N.W.2d 460; *Kukor,* 148 Wis.2d at 492–94, 436 N.W.2d 568; *Atwood,* 170 Wis. at 263–64, 176 N.W. 224.

¶ 96 The parties in this case dispute only whether the private schools participating in the amended program are under proper governmental control and supervision, as required by *Wisconsin Industrial School for Girls,* 103 Wis. at 668, 79 N.W. 422. *See Davis,* 166 Wis.2d at 541–42, 480 N.W.2d 460; *Reuter,* 44 Wis.2d at 216, 170 N.W.2d 790. The Respondents allege that the amended MPCP lacks sufficient control and accountability to secure a public interest. They note that some of the reporting requirements in the original MPCP upon which the court in *Davis* focused have been eliminated by amendment.

¶ 97 The control and accountability requirements imposed under the public policy doctrine are not demanding. *See Reuter,* at 216, 170 N.W.2d 790. In *Davis* we explained:

> To test the propriety of expending public monies to a private institution for public purposes, this court must determine whether the private institution is under reasonable regulations for control and accountability to secure public interests. 'Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required.'

***898** *Davis,* 166 Wis.2d at 542, 480 N.W.2d 460 (quoting *Reuter,* 44 Wis.2d at 216, 170 N.W.2d 790)(internal citation omitted). We therefore must determine only whether the amended MPCP includes control and accountability requirements reasonably necessary to secure the public purpose to which it is directed.

¶ 98 The control and accountability arguments raised by the Respondents in this case were largely handled by this court in *Davis. See id.* at 541–45, 480 N.W.2d 460. In *Davis,* we upheld the original MPCP under a public purpose doctrine challenge. As in this case, the choice opponents in *Davis* argued that the controls in the original MPCP were woefully inadequate. We there concluded that the statutory controls applicable to private schools coupled with parental choice sufficed to ensure that the public purpose was met. *See id.* at 546, 480 N.W.2d 460.

¶ 99 Similarly, in *Reuter* this court held that public appropriations to a private medical school did not violate the public purpose doctrine where the circumstances presented "no frivolous pretext for giving money to a private school

but the using of a private school to attain a public purpose." *Reuter,* 44 Wis.2d at 214, 170 N.W.2d 790. The court noted that the private school was not regulated to the same extent as public schools, but it concluded that:

> A private agency cannot and should not be controlled as two-fistedly as a government agency.... A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary government control.... We do not think it is necessary or required by the constitution that the state must legally be able to control the agency corporation in order to find sufficient regulations for control and ***899** accountability. The state is not interested in controlling the day-to-day operation of the medical school but in its end product.

Id. at 217, 170 N.W.2d 790.

¶ 100 In light of the standard applied in *Davis* and *Reuter,* we conclude that control and accountability safeguards in the amended MPCP are sufficient to ensure that the program fulfills its purpose of promoting education. First, the private schools participating in the amended MPCP continue to be subject to the instruction, curriculum, and attendance regulations that govern all private schools. *See* Wis. Stat. §§ 118.165(1) and 118.167; ****630** *Davis,* 166 Wis.2d at 543, 480 N.W.2d 460. Second, the amended MPCP continues to require an annual financial audit by the State Superintendent and provides for an additional review by the Legislative Audit Bureau covering both financial and performance evaluations of the plan. *See* Wis. Stat. § 119.23(7)(am), (9). Finally, as in *Davis,* the schools participating in the amended MPCP are also subject to the additional checks inherent in the notion of school choice. "Control is also fashioned with the [plan] in the form of parental choice.... If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere." *Davis,* 166 Wis.2d at 544, 480 N.W.2d 460. These combined elements of the amended MPCP are more than sufficient control and accountability measures to ensure that the program serves the public purpose to which it is directed.

¶ 101 The Respondents additionally argue that the amended MPCP violates the public purpose doctrine because it funds religious education and other religious activities that are not public purposes. The Respondents argue, and the circuit court held, that because public funds flow to religious private schools, ***900** the program does not serve a public purpose. We find this argument unfounded. We have never interpreted the public purpose doctrine to incorporate an anti-establishment principle. That the State has chosen to include sectarian private schools in the amended MPCP does not render the program's public purpose invalid. Whether the State may adopt such an approach is an issue we resolve under the provisions of art. I, § 18.

¶ 102 We therefore hold that the amended MPCP does not violate the public purpose doctrine because it fulfills a valid public purpose, and it contains sufficient and reasonable controls to attain its public purpose.

VI. NAACP's Equal Protection Claim

¶ 103 In addition to the challenges raised by the Respondents, the NAACP alleges that the amended MPCP violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution.[28] ***901** Although this issue was not addressed by the circuit court or the court of appeals, it was briefed and argued before this court by the NAACP. Upon review, we conclude that the NAACP's facial equal protection claim must fail as a matter of law.

¶ 104 It is the often repeated rule in this state that issues not considered by the circuit court will not be considered for the first time on appeal. *See Binder v. City of Madison,* 72 Wis.2d 613, 618, 241 N.W.2d 613 (1976); *Wirth v. Ehly,* 93 Wis.2d 433, 443, 287 N.W.2d 140 (1980). This rule is not absolute, however, and exceptions are made. *See Binder,* 72 Wis.2d at 618, 241 N.W.2d 613; *Cords v. State,* 62 Wis.2d 42, 54, 214 N.W.2d 405 (1974). In this case, all the issues raised are legal questions that can be disposed of "based upon a consideration of the record." *State v. Conway,* 34 Wis.2d 76, 83, 148 N.W.2d 721 (1967); *see Smith v. Katz,* 218 Wis.2d 442, ——, 578 N.W.2d 202 (1998); *Wirth,* 93 Wis.2d at 443–44, 287 N.W.2d 140. In the interests of judicial economy and the finality of this decision, we exercise our discretion to decide the entire

case while it is before us. *See Carlson & Erickson Builders v. Lampert Yards,* 190 Wis.2d 650, 656, 529 N.W.2d 905 (1995); *Burger v. Burger,* 144 Wis.2d 514, 518, 424 N.W.2d 691 (1988); *Wirth,* 93 Wis.2d at 444, 287 N.W.2d 140. We therefore proceed to address the NAACP's equal protection claim.

****631** ¶ 105 The Fourteenth Amendment guarantee of equal protection provides "a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae,* 448 U.S. 297, 322, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). ***902** The central purpose of the Equal Protection Clause is to prevent "official conduct discriminating on the basis of race." *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). To show racial discrimination in violation of this guarantee, a plaintiff must show that a statute was enacted with a purpose or intent to discriminate. *See id.* at 242, 96 S.Ct. at 2049; *see also Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264–265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). The Supreme Court has adhered to this principle in school desegregation cases: "that there are both predominately black and predominately white schools in a community is not alone violative of the Equal Protection Clause." *Davis,* 426 U.S. at 240, 96 S.Ct. at 2048 (citing *Keyes v. School Dist. No. 1,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973)). Even accepting the NAACP's allegations as true and construing them liberally, *see Scarpaci v. Milwaukee County,* 96 Wis.2d 663, 669, 292 N.W.2d 816 (1980), we conclude that the NAACP's allegations do not support a claim of a violation of equal protection.

¶ 106 In its facial challenge, the NAACP has not alleged, and we cannot reasonably infer, that the State acted with an intent to discriminate on the basis of race when the State enacted the amended MPCP. Although the NAACP generally concludes that the purposes of the MPCP were expanded to include segregation of the races in the MPS, the NAACP does not allege that the State enacted the amended MPCP with the intent to discriminate based on race. Nor does the NAACP allege that the private schools participating in the amended program have excluded students on the basis of race or have in any other way intentionally discriminated against students based on race. [29]

***903** ¶ 107 We note that, on its face, the amended MPCP is race-neutral. As we have explained, the amended MPCP allows a group of students, chosen without regard to race, to attend schools of their choice. Furthermore, the amended MPCP requires participating schools to comply with the anti-discrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4. In addition, the participating schools are required to select program students on a random basis. *See id.* at § 119.23(3)(a).

¶ 108 None of the facts presented by the NAACP support a claim that the State enacted the amended MPCP with an intent or purpose to discriminate based on race. Relying solely on the racial makeup of the MPS and of the private schools likely to participate in the amended MPCP, the NAACP alleges that the program violates equal protection because its likely effect will be to further segregate the MPS. We recognize that an invidious discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that a challenged law may, in effect, bear more heavily on one race than another. *See Davis,* 426 U.S. at 242, 96 S.Ct. at 2049. We, ***904** however, can make no such inference in this case. In its *facial* challenge, the NAACP cannot establish facts sufficient to show that the amended MPCP has had a disproportionate impact on one race or that its provisions have been applied so as to invidiously discriminate on the basis of race. The NAACP's current facial challenge and our review in this case is limited to the statute on its face and to the stipulated ****632** facts. From the record before us, we conclude that the NAACP has not sufficiently alleged that the State enacted the amended MPCP with the discriminatory intent necessary to establish an equal protection claim. *See Davis,* 426 U.S. at 238–48, 96 S.Ct. at 2046–52.

¶ 109 While we accept as true the facts pled, we are not required to assume as true the legal conclusions pled by the NAACP. *See State v. Wisconsin Tel. Co.,* 91 Wis.2d 702, 720, 284 N.W.2d 41 (1979). We find that there are no circumstances under which the NAACP can prevail in its facial equal protection challenge to the amended MPCP. We therefore conclude that the NAACP's claim must be dismissed as a matter of law for failure to state a claim upon which relief can be granted. *See Voss,* 162 Wis.2d at 748, 470 N.W.2d 625; *Evans v. Cameron,* 121 Wis.2d 421, 426, 360 N.W.2d 25 (1985).

VII. Severability

¶ 110 Since we find that the amended MPCP passes constitutional scrutiny in all the issues presented before this

court, we need not consider whether individual provisions are severable from Wis. Stat. § 119.23.

VIII. Injunction

¶ 111 On August 25, 1995, this court granted an injunction enjoining implementation of all portions of ***905** the amended MPCP. After further proceedings, the circuit court dissolved this injunction for all portions of the amended program except with respect to the participation of sectarian private schools. Since we now conclude that the amended program is constitutional in its entirety, we order the circuit court to dissolve the injunction for all portions of the amended MPCP.

¶ 112 When the injunction first issued against implementation of the amended MPCP, thousands of children who were eligible for full tuition under the program already had enrolled in or begun attending their new private schools. Faced with having to remove their children from their chosen schools, many parents accepted private assistance to keep their children in those schools. When the injunction is lifted, many of these students no longer will be eligible to participate in the amended MPCP because they are already attending private schools. *See* Wis. Stat. § 119.23(2)(a)2. Their ineligibility is no fault of their own, but instead is solely a consequence of this litigation. Those children certainly are among the intended beneficiaries of this program. To require them to return to MPS for a year to reestablish eligibility would be manifestly inequitable and disruptive to the public schools, to the private schools, and most importantly, to the children themselves.

¶ 113 In dissolving the injunction, we therefore remove the disability that the injunction placed on the school children, so that with respect to educational status, eligibility under the amended MPCP is determined on the date the injunction was issued.

*906 IX. Conclusion

¶ 114 In conclusion, based upon our review of both the statute now before us and the stipulated facts, we conclude that the amended MPCP does not violate the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. IV, § 18; art. X, § 3; or the Wisconsin public purpose doctrine. We therefore reverse the decision of the court of appeals and remand the matter to the circuit court with directions to grant the State's motion for summary judgment, to dismiss the NAACP's facial equal protection claim, and to dissolve the injunction barring the implementation of the amended MPCP.

The decision of the court of appeals is reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

¶ 115 ANN WALSH BRADLEY, J., did not participate.

¶ 116 WILLIAM A. BABLITCH, Justice (*dissenting*).
I conclude, as did a majority of the court of appeals, *see Jackson v. Benson* 213 Wis.2d 1, 570 N.W.2d 407 (Ct.App.1997), that the amended Milwaukee Parental Choice Program violates the prohibition contained in Wis. Const. art. I, § 18, against state expenditures for the benefit of religious societies or seminaries. For the reasons recited therein, I respectfully dissent.

****633** ¶ 117 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON joins in this dissent.

All Citations

218 Wis.2d 835, 578 N.W.2d 602, 126 Ed. Law Rep. 399

Footnotes

† Motion for Clarification filed June 26, 1998.

1 Unless otherwise stated, all references to Wis. Stats. are to the 1995–96 version of the statutes.

2 42 U.S.C. § 2000d provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

3 The expansion of the program was set to commence in the 1995–96 school year. By the time of the injunction, more than 4,000 children previously enrolled in Milwaukee Public Schools (MPS) had applied and over 3,400 had been admitted to private schools under the amended choice program.

4 Citing the United States Supreme Court's decision in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the Petitioners argue that since the Respondents challenge the amended Milwaukee Parental Choice Program (MPCP) as facially unconstitutional, as opposed to unconstitutional as applied to a set of particular facts, the Respondents' federal claims must fail unless they can show that under all circumstances the amended MPCP is unconstitutional. In *Salerno,* the Court noted that to succeed with a facial challenge, a party must "establish that no set of circumstances exists under which the [statute] would be valid." *Id.* at 745, 107 S.Ct. at 2100. The Court has not directly held that the *Salerno* standard applies to facial challenges raised under the Establishment Clause. Nor has the Court consistently applied the *Salerno* standard in other contexts. *See Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1175–76 n. 1, 116 S.Ct. 1582, 1583 n. 1, 134 L.Ed.2d 679 (1996) (Mem.) (citing cases in which Court did not apply *Salerno* language). In *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), decided just one year after *Salerno,* the Court considered a facial challenge to the Adolescent Family Life Act under the Establishment Clause. Although it upheld the federal program, the *Bowen* Court did not cite to or apply the "no set of circumstances" language from *Salerno. See id.* at 627 n. 1, 108 S.Ct. at 2583 n. 1 (Blackmun, J., dissenting). We decline to apply the *Salerno* standard here. We leave to the Court the decision whether to apply the *Salerno* standard to facial challenges raised under the Establishment Clause.

5 While the continued authority of the test established in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), is uncertain, we have no choice but to apply it in this case. We recognize that five current United States Supreme Court Justices have questioned the continued use of the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398, 113 S.Ct. 2141, 2149, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring). Until a majority of the Supreme Court directly holds otherwise, however, we continue to apply the *Lemon* test. *See Agostini v. Felton,* 521 U.S. 203, ——, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997) (stating that other courts should leave to the Supreme Court "the prerogative of overruling its own decisions."). Unlike the Supreme Court, we cannot command this "ghoul" to return to its tomb when we wish it to do so. *See Lamb's Chapel,* 508 U.S. at 398–99, 113 S.Ct. at 2150 (Scalia, J., concurring).

6 The Supreme Court has historically looked to whether a program is neutral toward religion in defining its beneficiaries. *See, e.g., Bowen,* 487 U.S. 589, 108 S.Ct. 2562 (rejecting challenge to federal program neutrally providing public funds to sectarian or purely secular institutions for services relating to adolescent sexuality and pregnancy to institutions); *Roemer v. Maryland Bd. of Public Works,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (upholding Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the state, including religiously affiliated institutions); *Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (rejecting challenge to South Carolina statute providing certain benefits to all institutions of higher education in South Carolina, whether or not having a religious affiliation); *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (approving Federal Higher Educational Facilities Act, providing grants to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body"); *Board of Education v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (upholding state provision of secular textbooks for both public and private schools); *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (approving busing services equally available to both public and private school children).

7 The Court has also focused on whether public aid that flows to religious institutions does so only as a result of "genuinely independent and private choices of the aid recipients." *Witters v. Washington Dep't of Services for Blind,* 474 U.S. 481, 487, 106 S.Ct. 748, 752, 88 L.Ed.2d 846 (1986); *see, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 842–43, 115 S.Ct. 2510, 2523, 132 L.Ed.2d 700 (1995); *Mueller v. Allen,* 463 U.S. 388, 398, 103 S.Ct. 3062, 3068–69, 77 L.Ed.2d 721 (1983); *Allen,* 392 U.S. at 243–44, 88 S.Ct. at 1926–27; *Everson,* 330 U.S. at 17–18, 67 S.Ct. at 512–13.

8 The concept of neutrality has developed as a necessary result of the interplay between the Establishment and Free Exercise Clauses of the First Amendment, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other." *Walz v. Tax Commission,* 397 U.S. 664, 668–69, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970). The Court in *Walz* explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669, 90 S.Ct. at 1411–12.

9 We reject the Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). Although the tuition reimbursement program in *Nyquist* closely parallels the amended MPCP, there are significant distinctions. In *Nyquist,* each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist,* the only financially-qualified Milwaukee students excluded from participation in the amended MPCP are those in the fourth grade or higher who are already attending private schools. The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the amended MPCP out of the *Nyquist* construct and places it within the framework of neutral education assistance programs.

10 As to its discussion of the importance of *Mueller,* 463 U.S. 388, 103 S.Ct. 3062, in Establishment Clause jurisprudence, Justice Powell's concurring opinion in *Witters,* 474 U.S. at 490–91, 106 S.Ct. at 753–54, drew the support of five members of the Court. Chief Justice Burger and Justice Rehnquist joined Justice Powell's concurrence, while Justices White and O'Connor wrote separately, but agreed with Justice Powell's opinion with respect to the relevance of *Mueller. See Witters,* 474 U.S. at 490, 106 S.Ct. at 753 (White, J. concurring); *id.* at 493, 106 S.Ct. at 754–55 (O'Connor, J. concurring).

11 On its face, the Washington educational aid program upheld in *Witters* was in all significant aspects similar to the amended MPCP. The public aid was in the form of tuition grants and was made available to disadvantaged students generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited, *see Witters,* 474 U.S. at 488, 106 S.Ct. at 752; student eligibility for the aid was based on nonsectarian criteria, *see id.* at 483 n. 2, 106 S.Ct. at 749 n. 2, and the aid was paid directly to the student who then could transmit it to the school of his or her choice, *see id.* at 488, 106 S.Ct. at 752.

12 The Court in *Witters* further distinguished the Washington program from the tuition grants in *Nyquist* by noting that in application no "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Witters,* 474 U.S. at 488, 106 S.Ct. at 752. The Court's consideration of the percentage of students who would likely transmit program aid to sectarian institutions is inconsistent with its prior decision in *Mueller,* where the Court specifically rejected any statistical analysis showing that in application parents of children in sectarian private schools would take the bulk of the benefits available

under the program. *See Mueller,* 463 U.S. at 401, 103 S.Ct. at 3070. The *Mueller* Court explained: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* The Court recently reaffirmed the position it took in *Mueller. See Agostini,* 521 U.S. at ——, 117 S.Ct. at 2013.

13 In *Witters,* the Court limited its analysis to the first two prongs of the *Lemon* test. The Court held that the Washington program had a secular purpose and that it did not have the primary effect of advancing religion. *See Witters,* 474 U.S. at 485–86, 488–89, 106 S.Ct. at 751, 752. The Court declined to address the entanglement issue and remanded the case for further analysis. *See id.* at 489 n. 5, 490, 106 S.Ct. at 752 n. 5, 753.

14 Unlike the amended MPCP, the education assistance program reviewed in *Agostini* was federally funded under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. *See Agostini,* 521 U.S. at ——, 117 S.Ct. at 2003. The program, however, was designed and implemented by a local educational agency, the Board of Education of the City of New York. *See id.* at —— – ——, 117 S.Ct. at 2003–05. Although New York City's Title I program was federally funded, we find the *Agostini* Court's analysis of that program relevant to our review of the State funded amended MPCP.

15 In upholding New York City's Title I program, the Supreme Court in *Agostini* directly overruled its decision in *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), as well as a portion of its decision in *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985).

16 Our inquiry into the constitutionality of the amended MPCP must encompass "the nature and consequences of the program viewed as a whole." *Witters,* 474 U.S. at 492, 106 S.Ct. at 754 (Powell, J., concurring). According to the stipulated facts in this case, the State's system of per-pupil school financing, in which public funds follow each child, now encompasses a wide range of school choices—mainly public, but some private or religious. Numerous programs have amended the number and type of educational options available to public school students. Qualifying public school students may choose from among the Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for students with exceptional needs, and now sectarian or nonsectarian private schools participating in the amended MPCP. In each case, the programs let state funds follow students to the districts and schools their parents have chosen.

17 The Respondents also argue that the amended MPCP has the primary effect of advancing religion because a substantial percent of the program's aid will flow to sectarian schools. They point out that of the 122 private schools eligible to participate in the amended program 89 are sectarian. We find this argument unpersuasive. The Supreme Court has warned against "focusing on the money that is undoubtedly expended by the government rather than on the nature of the benefit received by the recipient." *Rosenberger,* 515 U.S. at 843, 115 S.Ct. at 2523. "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller,* 463 U.S. at 401, 103 S.Ct. at 3070. The percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry.

18 The United States Supreme Court has considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion and as an independent factor under the *Lemon* test. *See Agostini,* 521 U.S. at ——, 117 S.Ct. at 2015. Regardless of how the Court has characterized the analysis, whether a government aid program results in such entanglement has consistently been an aspect of its Establishment Clause analysis. *See id.*

19 Since we conclude that the amended MPCP does not violate the Establishment Clause, we need not address the issue, raised by Petitioners Marquelle Miller, et al., whether excluding sectarian private schools from the program violates the Free Exercise Clause of the First Amendment.

20 Wis. Const. art. I, § 18 provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

21 Citing our decision in *State v. Miller,* 202 Wis.2d 56, 549 N.W.2d 235 (1996), the Respondents assert that we are precluded from looking to federal establishment clause jurisprudence in analyzing the amended MPCP under the "benefits clause" of Wis. Const. art. I, § 18. We disagree. In *Miller,* we correctly stated that some questions arising under art. I, § 18 "cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution." *Id.* at 64, 549 N.W.2d 235. In *Miller,* however, we interpreted and applied the "freedom of conscience" clause, and not the benefits clause, of art. I, § 18. *See id.* at 63, 65–66, 549 N.W.2d 235. This court has traditionally looked to federal establishment clause jurisprudence, and in particular the primary effects test, when interpreting the "for the benefit of" language in the benefits clause of art. I, § 18. *See, e.g., King v. Village of Waunakee,* 185 Wis.2d 25, 51, 517 N.W.2d 671 (1994); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner,* 91 Wis.2d 145, 163–64, 280 N.W.2d 773 (1979); *State ex rel. Warren v. Nusbaum,* 55 Wis.2d 316, 333, 198 N.W.2d 650 (1972) *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 227, 170 N.W.2d 790 (1969). We continue to do so in this case.

22 This court has construed "religious societies" to be synonymous with religious organizations. At the time of the adoption of our constitution in 1848, the word "seminaries" was synonymous with academies or schools. *See State ex rel. Weiss v. District Board,* 76 Wis. 177, 215, 44 N.W. 967 (1890). Sectarian private schools, therefore, constitute "religious seminaries" within the meaning of art. I, § 18. *See State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 156, 115 N.W.2d 761 (1962).

23 Public hearings on the proposed amendments to the original MPCP and other aspects of the biennial budget bill were held in the City of Milwaukee on April 3, 1995, in Cedarburg on March 21, 1995, in Madison on March 27, 1995, in Portage on March 23, 1995, and in River Falls on March 30, 1995. *See* Record Document 211A at 7.

24 In assessing whether the amended MPCP is private or local legislation, we apply the five-factor test created in *City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.,* 144 Wis.2d 896, 426 N.W.2d 591 (1988), because the amended MPCP is not specific on its face, involves classifications, does not violate Wis. Const. art. IV, § 31, but allegedly runs afoul of art. IV, § 18. *See id.* at 912, 426 N.W.2d 591; *see also Davis v. Grover,* 166 Wis.2d 501, 525, 480 N.W.2d 460 (1992).

25 In all aspects relevant to the first, third, fourth, and fifth elements of the *Brookfield* test, the amended MPCP is identical to the original MPCP upheld in *Davis.* First, like the original program, the amended MPCP involves a classification recognized and accepted by this court: cities of the first class. Second, since other cities can join this class, the classification is subject to being open. Third, the amended MPCP, by its terms, applies equally to all qualifying cities. Finally, the characteristics of cities of the first class are sufficiently different

from those of other classes of cities so to suggest at least the propriety of substantially different legislation. *See* *Davis,* 166 Wis.2d at 526–37, 480 N.W.2d 460.

26 Rather than destroying the program's experimental nature, the expansion of the program to a larger sample of students may make it easier for researchers to measure the effectiveness of this experiment in education. *See* Jay P. Greene, Paul E. Peterson, & Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data From The Program's Evaluation,* at 26–27.

27 *See* *Davis,* 166 Wis.2d at 547, 480 N.W.2d 460 (Ceci, J., concurring)("The Wisconsin legislature ... has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.").

28 The Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The functional equivalent of this clause is found in Wis. Const. art. I, § 1: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." As we noted in *State ex rel. Sonneborn v. Sylvester,* 26 Wis.2d 43, 49–50, 132 N.W.2d 249 (1965) even though art. I, § 1 is based on the Declaration of Independence, "there is no substantial difference" between its equal protection and due process provisions and that of the Fourteenth Amendment. Thus, in our analysis of the NAACP's equal protection argument, the two constitutional provisions are treated as equivalent. *See* *id.* at 50, 132 N.W.2d 249.

29 In its brief and at oral argument, the NAACP relied heavily on *Norwood v. Harrison,* 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). The claims made in *Norwood* are distinguishable from those made by the NAACP in this case. First, the plaintiffs in *Norwood* did not raise a facial challenge to the Mississippi textbook program, but rather challenged the program as it applied to particular private schools. *See* *id.* at 457, 93 S.Ct. at 2806. Second, unlike the NAACP in this case, the plaintiffs in *Norwood* alleged that the private schools receiving benefits under the textbook program had racially discriminatory policies and had excluded students on the basis of race. *See* *id.* Third, the plaintiffs in *Norwood* alleged that the State lent textbooks to private schools without regard to whether any of those schools had racially discriminatory policies. *See* *id.* at 456, 93 S.Ct. at 2806. In contrast to the program in *Norwood,* the amended MPCP requires that all participating schools comply with the anti-discrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4.

193 Ariz. 273
Supreme Court of Arizona,
En Banc.

Penny KOTTERMAN, Panfilo Contreras, Frieda Baker, Rev., Dr. Gerald S. Degrow, Joanne Hilde, Michael J. Hoogendyk, Pastor Stanley Jones, Jann Renert, Louis Rhodes, James Ullman, and Rabbi Joseph Weizenbaum, Petitioners.
v.
Mark W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Respondent, Lisa Graham Keegan, in her capacity as Superintendent of Public Instruction and as a parent and taxpayer; Emmett McCoy, Sr. and Alfreda McCoy, in their own behalves and as natural guardians of their children, Dallas McCoy, Krystal McCoy, Sean McCoy, Brandi McCoy, Daniel McCoy, and Priscilla McCoy; Tanya Phelps, in her own behalf and as natural guardian of her children, Tasha Phelps and Leanessa Phelps; Rita Samaniego, in her own behalf and as natural guardian of her children, Geraldo Wingate, Kristin Wingate, and Sarah Wingate; Felipe Sandoval, in his own behalf and as natural guardian of his children, Felicia Sandoval and Felipe Sandoval; Sally Shanahan, in her own behalf and as natural guardian of her children, Nathan Shanahan, Kaitlyn Shanahan, Gabriel Shanahan, and Jacob Shanahan; and Jeffry Flake and Trent Franks, as taxpayers; Arizona School Choice Trust, Inc., Intervenors/Respondents.

No. CV–97–0412–SA.
|
Jan. 26, 1999.

Synopsis
In a special action, challengers alleged that statute allowing state tax credit of up to $500 for donations to school tuition organizations (STO) violated State Constitution and the Establishment Clause of the Federal Constitution. The Supreme Court, Zlaket, C.J., held that: (1) tax credit did not violate Establishment Clause; (2) tax credit was not an "appropriation" of "public money" to establish religion or aid sectarian schools, for purposes of State Constitution; and (3) tax credit did not violate anti-gift clause of State Constitution.

Relief denied.

Feldman, J., dissented and filed an opinion in which Moeller, Retired Justice, concurred.

Attorneys and Law Firms

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O P I N I O N

ZLAKET, C.J.

¶ 1 Petitioners challenge the constitutionality of A.R.S. § 43–1089 (1997), which allows a state tax credit of up to $500 for those who donate to school tuition organizations (STOs). The statute reads as follows:

A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding five hundred dollars in any taxable year. The five hundred dollar limitation also applies to taxpayers who elect to file a joint return for the taxable year. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.

****610** ***277** B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

C. The credit allowed by this section is in lieu of any deduction pursuant to § 170 of the internal revenue code and taken for state tax purposes.

D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.

E. For purposes of this section:

1. "Qualified school" means a nongovernmental primary or secondary school in this state that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

2. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code and that allocates at least ninety percent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

A.R.S. § 43–1089 (footnotes omitted). Petitioners claim that this law violates the Federal Establishment Clause and three provisions of the Arizona Constitution. We have original jurisdiction pursuant to Ariz. Const. art. VI, § 5(1) and Ariz. R. Spec. Act. 1(a) and 3(b).

FEDERAL CONSTITUTION

¶ 2 The Establishment Clause, applicable to the states by authority of the Fourteenth Amendment, proclaims that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I; *see also Everson v. Board of Educ.,* 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947). The simplicity of this language belies its complex and continually evolving interpretation by the United States Supreme Court. *See generally* Kristin M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test,* 27 Pac. L.J. 121 (1995); *see also* Andrew A. Adams, Note, *Cleveland, School Choice, and "Laws Respecting an Establishment of Religion,"* 2 Tex. Rev. L. & Pol. 165, 171–75 (1997). That Court's decisions reflect an effort to steer a course of "constitutional neutrality," *Walz v. Tax Comm'n,* 397 U.S. 664, 669, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970), aimed "between avoidance of religious establishment on the one hand, and noninterference with religious exercise on the other." Leonard J. Henzke, Jr., *The Constitutionality of Federal Tuition Tax Credits,* 56 Temp. L.Q. 911, 924 (1983). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982). Similarly, religion may not be preferred over nonreligion. *See Everson,* 330 U.S. at 18, 67 S.Ct. at 513.

¶ 3 This emphasis on neutrality is apparent in a recent line of Supreme Court cases upholding a variety of educational assistance programs. *See Agostini v. Felton,* 521 U.S. 203, ——, 117 S.Ct. 1997, 2016, 138 L.Ed.2d 391 (1997), *overruling Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (public school teachers providing remedial education to disadvantaged children in parochial schools); *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 845–46, 115 S.Ct. 2510, 2524–25, 132 L.Ed.2d 700 (1995) (state university funds used to pay printing costs of student newspaper espousing religious viewpoint); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 3, 113 S.Ct. 2462, 2464, 125 L.Ed.2d 1 (1993) (sign-language interpreter provided for deaf student in sectarian high school); ****611** ***278** *Witters v. Washington Dep't of Servs. for the Blind,* 474

U.S. 481, 482, 106 S.Ct. 748, 749, 88 L.Ed.2d 846 (1986) (state financial assistance to blind student attending private Christian college); *Mueller v. Allen,* 463 U.S. 388, 390–91, 103 S.Ct. 3062, 3064–65, 77 L.Ed.2d 721 (1983) (state income tax deduction for educational expenses, including those incurred at sectarian schools).

¶ 4 Other courts in recent years have also found state educational aid programs to be in compliance with the First Amendment. *See Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602, 619 (1998), *cert. denied,* 525 U.S. 997, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998) (distribution of tuition vouchers for use in private, including sectarian, schools); *Matthew J. v. Massachusetts Dep't of Educ.,* 989 F.Supp. 380, 391–92 (D.Mass.1998) (reimbursement of special education tuition costs at private sectarian school).

¶ 5 In *Lemon v. Kurtzman,* 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), the Supreme Court adopted a three-pronged test for evaluating compliance with the Establishment Clause. Simply stated, a statute does not violate the First Amendment if (1) it serves a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not "foster an excessive government entanglement with religion." *Id.* (quoting *Walz,* 397 U.S. at 674, 90 S.Ct. at 1414). While other approaches have been considered by the Court, [1] we believe that the "well settled" *Lemon* standard provides an appropriate framework for our review. *See Mueller,* 463 U.S. at 394, 103 S.Ct. at 3066.

Secular Purpose

¶ 6 The Supreme Court rarely attributes an unconstitutional motive to a legislative act such as this, "particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller,* 463 U.S. at 394–95, 103 S.Ct. at 3067. The Minnesota law at issue in *Mueller* permitted a tax deduction for tuition, textbook, and transportation expenses of children attending elementary or secondary schools. *Id.* at 391, 103 S.Ct. at 3065. In upholding it, the Court said:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated.

Id. at 395, 103 S.Ct. at 3067.

¶ 7 The Arizona Legislature has, in recent years, expanded the options available in public education. *See, e.g.,* A.R.S. § 15–181 (1994) (establishing charter schools in order to "provide additional academic choices for parents and pupils"); A.R.S. § 15–816.01(A) (1995) (requiring all public school districts to "implement an open enrollment program without charging tuition"). It now seeks to bring private institutions into the mix of educational alternatives open to the people of this state.

¶ 8 The encouragement of private schools, in itself, is not unconstitutional. Such a policy can properly be used to facilitate a state's overall educational goals. As the *Mueller* majority noted, private schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition. 463 U.S. at 395, 103 S.Ct. at 3067 (quoting *Wolman v. Walter,* 433 U.S. 229, 262, 97 S.Ct. 2593, 2613, 53 L.Ed.2d 714 (1977) (Powell, J., concurring in part and dissenting in part)). They also further the objective of making quality education available to all children within a state. Thus, the legislature may "conclude that there is a strong public interest in assuring the continued financial health of private schools, both ****612 *279** sectarian and non-sectarian." *Id.* at 395, 103 S.Ct. at 3067. In our view, the secular purpose prong of *Lemon* is satisfied here.

Primary Effect

¶ 9 We next examine whether the principal effect of the law is to further "sectarian aims of the nonpublic schools." *Id.* at 396, 103 S.Ct. at 3067 (quoting *Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 662, 100 S.Ct. 840, 851, 63 L.Ed.2d 94 (1980)). We begin by noting that the legislature's taxing authority is very broad. *See Kelly v. Allen,* 49 F.2d 876, 877 (9th Cir.1931) ("The power of the state to tax is unlimited."); *Tanque Verde Enters. v. City of Tucson,* 142 Ariz. 536, 542, 691 P.2d 302, 308 (1984) ("[S]etting tax rates is a legislative function."). Therefore, courts extend considerable deference and great latitude to the legislative

creation of "classifications and distinctions in tax statutes." *Mueller,* 463 U.S. at 396, 103 S.Ct. at 3067 (quoting *Regan v. Taxation With Representation,* 461 U.S. 540, 547, 103 S.Ct. 1997, 2002, 76 L.Ed.2d 129 (1983)).

¶ 10 The *Mueller* Court identified certain significant features of the Minnesota statute in upholding its constitutionality, namely: (1) the deduction in question was one of many allowed by the state; (2) it was open to all parents incurring educational expenses; and (3) funds were available "only as a result of numerous, private choices of individual parents." 463 U.S. at 396–400, 103 S.Ct. at 3067–70. In other words, aid was provided on a neutral basis with any financial benefit to private schools sufficiently attenuated.

One of Many

¶ 11 Petitioners contend that credits are constitutionally different from deductions, which they concede to be perfectly proper. At oral argument they asserted that a tax credit is the "functional equivalent of depleting the state treasury by a direct grant," while a tax deduction merely serves as "seed money" to encourage philanthropy. We disagree.

¶ 12 It is true, of course, that there are mechanical differences between deductions and credits. The former are subtracted from gross income, reducing the net amount on which a tax is assessed according to the taxpayer's marginal rate, while the latter are taken directly from the tax as tentatively calculated. Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen,* 31 Wayne L.Rev. 157, 172–73 (1984); *see* James J. Freeland et al., *Fundamentals of Federal Income Taxation* 969 (7th ed.1991). Moreover, limits placed on these benefits may be sharply divergent. We do not believe, however, that such distinctions are constitutionally significant. Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce "socially beneficial behavior" by taxpayers. Baergen, *supra,* at 173.

¶ 13 In *Committee for Public Education & Religious Liberty v. Nyquist,* a case heavily relied upon by the petitioners, the Supreme Court said that the constitutionality of a tax benefit "does not turn in any event on the label we accord it." 413 U.S. 756, 789, 93 S.Ct. 2955, 2974, 37 L.Ed.2d 948 (1973). This statement is consistent with the Court's earlier observation in *Lemon* that the form of any tax measure must be examined "for the light that it casts on the substance." 403 U.S. at 614, 91 S.Ct. at 2112. In *Nyquist,* a New York statute provided state funds for the maintenance and repair of private schools. It also contained a tax deduction for parents of children attending such schools. 413 U.S. at 762–64, 93 S.Ct. at 2960–61. The Supreme Court struck down these provisions, holding that they amounted to direct stipends having the primary effect of impermissibly advancing religion. *Id.* at 779–80, 791, 93 S.Ct. at 2969, 2975. It is important to note, however, that the New York "deduction," based on a statutory formula, was plainly designed to achieve a net per-family gain. *Id.* at 790, 93 S.Ct. at 2974. This preset benefit was offered to parents without regard for the amount of expense they actually incurred. *Id*.

¶ 14 As the *Mueller* Court described a decade later, *Nyquist* involved "thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children attending private schools." 463 U.S. at 394, 103 S.Ct. at 3066. The Court also observed ****613 *280** that the New York deduction had been totally inconsistent with others allowed under the laws of that state. *Id.* at 396 n. 6, 103 S.Ct. at 3068 n. 6. In contrast, the Minnesota deduction for actual school expenses was "only one among many" available under the state's tax code, including those for medical expenses and charitable contributions. *Id.* at 396, 103 S.Ct. at 3067. Unlike the measure in *Nyquist,* which was likened to an outright grant, the Minnesota statute embodied a "genuine tax deduction." *Id.* at 396 n. 6, 103 S.Ct. at 3068 n. 6.

¶ 15 Deductions and credits are legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals. *See* Baergen, *supra,* at 172–76. We conclude that the Arizona school tuition tax credit is one of an extensive assortment of tax-saving mechanisms available as part of a "genuine system of tax laws." *Mueller* at 396 n. 6, 103 S.Ct. at 3068 n. 6. For instance, the state permits its taxpayers to take the full "amount of itemized deductions allowable" under the Internal Revenue Code. A.R.S. § 43–1042(A). This, of course, includes charitable contributions made directly to churches, religious schools, and other § 501(c)(3) organizations.[2] *See* 26 U.S.C. § 170(c)(2)(D). Arizona's tax code also provides for numerous credits beyond those permitted at the federal level, each operating in the same general way. *See* A.R.S. §§ 43–1071 through 43–1090.01. Among them is a credit for voluntary cash contributions made to qualifying organizations that provide assistance to the working poor. *See* A.R.S. § 43–1088. Such organizations clearly count among their number churches, synagogues, missions, and other sectarian institutions. Also noteworthy in the context of the present discussion is a $200 tax credit for *public* school

extracurricular activity fees, covering items such as band uniforms, athletic gear, and scientific laboratory equipment. A.R.S. § 43–1089.01. Thus, as in Minnesota, the Arizona tax benefit now under consideration is "only one among many." *Mueller,* 463 U.S. at 396, 103 S.Ct. at 3067.

Availability

¶ 16 The *Mueller* Court placed particular emphasis on the fact that the benefits of Minnesota's tax deduction extended to a broad class of recipients, not just to the parents of private school children as in *Nyquist.* 463 U.S. at 397–98, 103 S.Ct. at 3068. By way of comparison, the Arizona tuition credit is available to all taxpayers who are willing to contribute to an STO. Any individual, not just a parent, may donate to the scholarship program. Thus, Arizona's class of beneficiaries is even broader than that found acceptable in *Mueller,* and clearly achieves a greater level of neutrality.

Private Choices

¶ 17 The Supreme Court also stressed the means by which funds reach sectarian schools and the importance of "numerous, private choices" in contrast to direct state financial aid. *Mueller,* 463 U.S. at 399, 103 S.Ct. at 3069. Where assistance to religious institutions is indirect and attenuated, i.e., private individuals choose where the funds will go, the Justices have generally been reluctant to find a constitutional impediment. ****614 *281** *See Witters,* 474 U.S. at 488, 106 S.Ct. at 752 (aid flowing to religious institutions does so "only as a result of the genuinely independent and private choices of aid recipients"); *Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467 (presence of government-paid interpreter in sectarian school was result of the "private decision of individual parents").

¶ 18 A recent decision by the Wisconsin Supreme Court upholding the constitutionality of school vouchers provides further support. *Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602 (1998), *cert. denied,* 525 U.S. 997, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998). In 1995, the Wisconsin Legislature amended a statute requiring the state to pay the educational costs of low-income Milwaukee parents who desired to send their children to private schools. *Id.* at 607–08. Under the amended Milwaukee Parent Choice Program (MPCP), parents were permitted to select a private school, which could be sectarian or secular, and received a payment from the state to cover expenses. *Id.* at 608–09. The check was sent directly to the school but was made out to the parents, who endorsed it over to the educational institution. *Id.* at 609. No restrictions were placed on the use to which the school could put the money. [3] *Id.* The Wisconsin court held that the program was permissible under both the federal and state constitutions, *id.* at 607, stating in part:

> In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters,* not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents.
>
> *Id.* at 618.

¶ 19 Arizona's statute provides multiple layers of private choice. Important decisions are made by two distinct sets of beneficiaries—taxpayers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions. The donor/taxpayer determines whether to make a contribution, its amount, and the recipient STO. The taxpayer cannot restrict the gift for the benefit of his or her own child. A.R.S. § 43–1089(D). Parents independently select a school and apply to an STO of their choice for a scholarship. Every STO must allow its scholarship recipients to "attend *any* qualified school of their parents' choice," and may not limit grants to students of only one such institution. A.R.S. § 43–1089(E)(2) (emphasis added). Thus, schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents.

¶ 20 The decision-making process is completely devoid of state intervention or direction and protects against the government "sponsorship, financial support, and active involvement" that so concerned the framers of the Establishment Clause. *Walz,* 397 U.S. at 668, 90 S.Ct. at 1411. As the *Mueller* Court noted, "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit." 463 U.S. at 400, 103 S.Ct. at 3070. Under the circumstances, we believe that "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." ****615 *282** *Witters,* 474 U.S. at 493, 106 S.Ct. at 755 (O'Connor, J., concurring); *see also Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467.

¶ 21 The dissent essentially characterizes the option offered to taxpayers as a sham because "there is no real choice—one may contribute up to $500 to support private schools or pay the same amount to the Arizona Department of Revenue."[4] *Infra* at ¶ 90. Such an argument plainly ignores the many other credits and deductions available in Arizona. It also assumes that maximum tax avoidance is the inescapable motive of taxpayers in every decision they make. We know, however, that people frequently donate to causes or organizations offering limited or no tax benefits. Moreover, while it seems a part of human nature to bemoan taxes, their importance to society is generally recognized. This tax credit may provide incentive to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all.

¶ 22 We see little difference in the levels of choice available to parents under the Minnesota and Arizona plans. In both, parents are free to participate or not, to choose the schools their children will attend, and to take advantage of all other available benefits under the state tax scheme. Moreover, these programs will undoubtedly bring new options to many parents. Basic education is compulsory for children in Arizona, A.R.S. § 15–802(A), but until now low-income parents may have been coerced into accepting public education. These citizens have had few choices and little control over the nature and quality of their children's schooling because they have been unable to afford a private education that may be more compatible with their own values and beliefs. Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education. *See Mueller,* 463 U.S. at 402, 103 S.Ct. at 3070–71 (educational expense deduction worked as set-off against added financial burden faced by parents of private school students); *Jackson,* 578 N.W.2d at 619 (school voucher program "place[d] on equal footing options of public and private school choice, and vest[ed] power in the hands of parents to choose where to direct the funds allocated for their children's benefit").

¶ 23 Petitioners argue that this law is fatally deficient because religious schools are the practical beneficiaries of the tax credit. They contend that the "pervasively sectarian" composition of private schools in this state presumes an inevitable constitutional breach. Like the appellants in *Mueller,* petitioners purport to rely on a statistical analysis of private school populations. *See* 463 U.S. at 400–01, 103 S.Ct. at 3070. The Supreme Court dismissed this approach as follows:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. at 401, 103 S.Ct. at 3070. According to the statistics offered in *Mueller,* ninety-five percent of Minnesota's private school students attended sectarian schools. *Id.* at 391, 103 S.Ct. at 3065. Petitioners' numbers reflect a lower rate of religious school attendance in Arizona. Like the *Mueller* Court, however, we refuse to hinge constitutional scrutiny on such ephemeral numbers. School populations change, as does the quality of education. No one yet knows how many taxpayers will take the credit, what dollar amounts will be generated, or how many students will receive tuition scholarships, let alone their statistical distribution among schools. We also cannot predict how ****616 *283** this tax credit may affect the ratio of secular to sectarian private institutions in the state.

¶ 24 Both Minnesota and Arizona provide by statute for free public education. *See* Minn.Stat. § 120.06 (1959); A.R.S. § 15–816.01 (1995). Consequently, parents of children seeking to attend tuition-charging schools are those most in need of financial assistance. This does not mean, however, that the statute unconstitutionally benefits a narrow segment of the population. As we have seen, the Arizona tax credit allows *all* taxpayers to give their funds voluntarily in support of a multi-dimensional educational system for the state, and its benefits flow in virtually every direction.

¶ 25 It is argued that A.R.S. § 43–1089 is unconstitutional because it does not provide a credit for those who wish to support public education. We disagree. A contemporaneous and related statute, A.R.S. § 43–1089.01, allows a tax credit of up to $200 for fees paid by taxpayers in support of public school extracurricular activities. The fact that this benefit is capped at $200 does not render the $500 credit for STO donations unconstitutional. The tuition expense of a private education is usually greater than the fees associated with extracurricular activities in a public school. The legislature's decision to set a lower amount for the latter is likely an acknowledgment of that disparity. Moreover, it strikes us as meaningless to offer a tax credit for tuition scholarships to schools that charge no tuition. The taxpayers in this state already pay for the establishment and operation of a public school system. Even parents who send their children to private schools must pay taxes in support of public education. Finally, because the ultimate goal of educational assistance programs is to reimburse parents for expenses incurred in schooling their children, a credit for contributions to the "educational mission of the public school system," *infra* at ¶ 76, is both distinguishable and unnecessary for purposes of our constitutional analysis.

¶ 26 The primary beneficiaries of this credit are taxpayers who contribute to the STOs, parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves. We realize, of course, that the benefits do not end there. The ripple effects can, when viewed through a wide-angle lens, radiate to infinity. But while direct subsidies to sectarian schools may affront the Constitution, "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Witters,* 474 U.S. at 486, 106 S.Ct. at 751. Private and sectarian schools are at best only incidental beneficiaries of this tax credit, a neutral result that we believe is attenuated enough to satisfy *Mueller* and the most recent Establishment Clause decisions. *See* 463 U.S. at 399, 103 S.Ct. at 3069; *Agostini,* 521 U.S. at ——, 117 S.Ct. at 2014; *Zobrest,* 509 U.S. at 8, 113 S.Ct. at 2466; *Witters,* 474 U.S. at 488–89, 106 S.Ct. at 752; *Matthew J.,* 989 F.Supp. at 392.

¶ 27 In summary, we conclude that the tuition tax credit does not prefer one religion over another, or religion over nonreligion. It aids a "broad spectrum of citizens," *Mueller,* 463 U.S. at 399, 103 S.Ct. at 3069, allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion.

Excessive Entanglement

¶ 28 Finally, we find no "excessive government entanglement with religion." *Lemon,* 403 U.S. at 613, 91 S.Ct. 2105 (citation omitted). The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive. Taxpayers who choose to participate may deduct the amount of an STO contribution on their tax returns. The STO operates free of government interference beyond ensuring that it qualifies for § 501(c)(3) tax exempt status and complies with state requirements. Any perceived state connection to private religious schools is indirect and attenuated.

¶ 29 We are persuaded that § 43–1089 falls within the parameters of the Establishment Clause.

ARIZONA CONSTITUTION

¶ 30 Petitioners argue that this tax credit channels public money to private and sectarian ****617 *284** schools in violation of the state constitution. Specifically, they charge that the law offends article II, § 12 and article IX, § 10 (the "religion clauses"), as well as article IX, § 7 (the "anti-gift clause").

¶ 31 Legislative enactments are presumptively constitutional. *Hall v. A.N.R. Freight Sys.,* 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). The party challenging a statute bears the burden of demonstrating its invalidity, *State v. Arnett,* 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978), and we resolve all uncertainties in favor of constitutionality. *Arizona Downs v. Arizona Horsemen's Found.,* 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981).

Religion Clauses

¶ 32 Article II, § 12 states in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article IX, § 10 says, "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."

"*Public Money or Property* "

¶ 33 The parties are in considerable disagreement over the meaning of "public money or property." No definition of these words appears in the Arizona Constitution or in our statutes. We must therefore look to their "natural, obvious and ordinary meaning." *County of Apache v. Southwest Lumber Mills,* 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962); *see also McElhaney Cattle Co. v. Smith,* 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982) ("When the words of a constitutional provision are not defined within it, the meaning to be ascribed to the words is that which is generally understood and used by the people."); *Dunn v. Industrial Comm'n,* 177 Ariz. 190, 194, 866 P.2d 858, 862 (1994) (requiring court to give clear and unambiguous statutory language its plain meaning unless doing so would lead to absurd results).

¶ 34 In *McClead v. Pima County,* our court of appeals observed that "state funds" are those "raised by the operation of some general law and therefore belonging to the state." 174 Ariz. 348, 356, 849 P.2d 1378, 1386 (App.1992). A decade earlier we identified "state money" as "money in the state treasury credited to a particular fund therein." *Grant v. Board of Regents,* 133 Ariz. 527, 529, 652 P.2d 1374, 1376 (1982). State title to funds, however, does not always vest when money enters the state treasury. For example, when the government is a mere custodian or conduit, funds so held do not constitute "state monies." *Navajo Tribe v. Arizona Dep't of Admin.,* 111 Ariz. 279, 280–81, 528 P.2d 623, 624–25 (1974).

¶ 35 Other courts have reached similar conclusions. *See Philip Morris Inc. v. Glendening,* 349 Md. 660, 709 A.2d 1230, 1241 (1998) ("gross recovery from the tobacco litigation is not 'State' or 'public' money" until deposited into state treasury); *State Bd. of Accounts v. Indiana Univ. Found.,* 647 N.E.2d 342, 348 (Ind.Ct.App.1995) (private donations received by corporation for use or benefit of state university were not public funds because they did not come into the possession of, and were not entrusted to, a public officer); *Sherard v. State,* 244 Neb. 743, 509 N.W.2d 194, 199–200 (1993) (money in workers' compensation Second Injury Fund is not state property because it is not raised by taxation and is held in trust by custodian, State Treasurer); *Parsons v. South Dakota Lottery Comm'n,* 504 N.W.2d 593, 596 (S.D.1993) (state lottery prize proceeds not public funds because money does not revert to state's general fund); *McIntosh v. Aubry,* 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680, 688–89 (1993) (rent forbearance and inspection cost waivers are not public funds because they involve no payment of funds out of county coffers); *Wells v. Kentucky Local Correctional Facilities Constr. Auth.,* 730 S.W.2d 951, 955 (Ky.Ct.App.1987) (construction bond proceeds do not constitute state monies because they are trust funds not in control of any state organization); *State ex rel. Sego v. Kirkpatrick,* 86 N.M. 359, 524 P.2d 975, 986 (1974) (private donations to state university under control of Board of Regents are not subject to appropriation, therefore legislature has no power to limit use or disbursement of these funds).

****618 *285** ¶ 36 According to Black's Law Dictionary, "public money" is "[r]evenue received from federal, state, and local governments from taxes, fees, fines, etc." *Black's Law Dictionary* 1005 (6th ed.1990). As respondents note, however, no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

¶ 37 Petitioners suggest, however, that because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature. That body has plenary power to set tax rates, categorize taxable income, and determine the type and amount of adjustments including deductions, exemptions, and credits. *See Tanque Verde Enters.,* 142 Ariz. at 539–40, 691 P.2d at 305–06 (recognizing the virtually unlimited authority of taxing bodies to set rates of taxation).

¶ 38 Equally problematic is the fact that petitioners' contention directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions. Indeed, it seems to us that unless a constitutionally significant difference between credits and deductions can be demonstrated, petitioners' argument must fail. The dissent, recognizing this dilemma, attempts to construct a distinction based on an alleged disparity in the amount of benefits flowing from credits and deductions. That, however, would appear to be a matter of form rather than substance. In our judgment, neither the dissent nor petitioners have offered a principled way in which to address this contradiction.

¶ 39 The calculation of personal income tax can be broken into several stages. First comes a determination of adjusted gross income, achieved by combining all sources of income and subtracting certain expenditures, such as contributions to individual retirement and medical savings accounts. *See* I.R.S. Form 1040, U.S. Individual Income Tax Return, Lines 7 through 32 (1997); Arizona Form 140, Resident Personal Income Tax Return, Lines 11 through 14 (1997). Next, taxpayers may take certain deductions and exemptions. The resulting subtotal is taxable income. *See* Arizona Form 140, Lines 15 through 26. This figure is then referenced to the tables for a determination of preliminary tax liability. *Id.* at Line 27. But the process does not end there. In fact, this point occurs about midway through the tax calculation and is, at most, a determination of *tentative,* not *actual,* tax liability. *See* Freeland, *supra,* at 969. The tax preparer may continue to reduce this amount by subtracting credits and other payments. Only after exhausting all of these opportunities does the taxpayer arrive at the bottom of the tax form and the inevitable —amount owed.

¶ 40 We do not accept the proposition, implicit in petitioners' argument, that the tax return's purpose is to return state money to taxpayers. For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined,[5] if not before. The tax on that amount would then instantly become public money. We believe that such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.[6]

****619** ***286** ¶ 41 We realize that this view may conflict with the "tax expenditure" approach advanced by the petitioners. Nevertheless, it is consistent with the traditional method of constitutional construction that accords to words their plain and simple meaning. The tax expenditure theory is of recent origin, having been first advanced by Professor Stanley Surrey during the late 1960s and early '70s. *See* Richard P. Davies, *A Flat Tax Without Bumpy Philanthropy: Decreasing the Impact of a "Low, Single Rate" on Individual Charitable Contributions,* 70 S. Cal. L.Rev. 1749, 1767 (1997). Proponents of the concept argue that deductions, credits, exemptions, and exclusions " constitute a form of hidden spending in the tax code and ought accordingly to be compared with equivalent nontax spending programs." Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy,* 83 Cornell L.Rev. 365, 377 n. 30 (1998). This theory has been used by government as a tool for analyzing budgetary policy.[7] *See* Jean Harris, *Tax Expenditures: Concept and Oversight, in* Public Budgeting and Finance 385, 397 (Robert T. Golembiewski & Jack Rabin, eds., 4th rev. ed. 1997). It has not, however, been universally accepted as a doctrine of judicial decision-making.[8] Even the Supreme Court's treatment of the concept "changes depending on the substantive area of law being considered." Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making,* 28 Wake Forest L.Rev. 855, 857 (1993). As the author notes:

> [T]he Court has fully accepted the equivalence of direct spending programs and tax expenditures in the area of Free Speech rights, but it has not fully applied this concept in the context of Establishment Clause analysis.... [D]ifferent constitutional standards have been applied to direct spending programs and to tax expenditures that have the same economic effect. For example, the refusal to treat tax expenditures and direct spending programs in a consistent manner allows benefits to flow to religious institutions through the Internal Revenue Code when the same benefits would be struck down if distributed in a direct spending program.

Id. (citation omitted). In the same term of Court, now Chief Justice Rehnquist wrote both *Regan v. Taxation With Representation,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), a "Free Speech" case, and *Mueller,* an "Establishment Clause" decision. We assume it is no accident that the tax expenditure thesis appears in the former opinion, but not in the latter. The Court has generally refused to recognize the tax expenditure concept where religion is involved.[9] *See* Joseph M. Kuznicki, Comment, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit,* 61 Temp. L.Rev. 443, 473 (1988).

¶ 42 Modern economic theory, under some circumstances, may be helpful to our understanding. As has been shown, however, it does not necessarily govern constitutional interpretation. *But see Opinion of the Justices to the Senate,* 401 Mass. 1201, 514 N.E.2d 353, 355 (1987) (advisory opinion stating that "tax expenditures ... are the practical equivalent of direct government grants"). Moreover, while

the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, we see no evidence of a similar concern for indirect benefits. One court has noted a similar distinction in the context of a state Freedom of Information Act (FOIA). ****620** ***287** *Sebastian County Chapter of the Am. Red Cross v. Weatherford,* 311 Ark. 656, 846 S.W.2d 641 (1993). That court said:

> Refusal to read indirect government benefits or subsidies into the term "public funds" is not at odds with a liberal construction of FOIA. Were we to construe "public funds" to include an entirely separate and new category of government support, we would be amending the FOIA to expand its application significantly.

Id. at 644.

¶ 43 We also note with interest that Arizona's framers did not hesitate to extend tax-exempt status to churches. *See* Ariz. Const. art. IX § 2(2). In fact, they uniformly supported property tax exemptions for all "religious associations or institutions not used or held for profit." *Id.; see also The Records of the Arizona Constitutional Convention of 1910* 469–76, 850, 861, 891, 931, 933–34 (John S. Goff, ed.1991) (hereinafter "*Records* "). Clearly, these exemptions constitute benefits to religious organizations, suggesting either that the framers did not regard such tax-saving measures as direct grants of "public money," or that their intent in prohibiting aid to religious institutions was not as all-encompassing as petitioners would have us hold.

"*Appropriated For or Applied To* "

¶ 44 An appropriation "set[s] aside from the public revenue ... a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money." *Rios v. Symington,* 172 Ariz. 3, 6–7, 833 P.2d 20, 23–24 (1992) (quoting *Hunt v. Callaghan,* 32 Ariz. 235, 239, 257 P. 648, 649 (1927)). The power of appropriation belongs only to the legislature. *Prideaux v. Frohmiller,* 47 Ariz. 347, 357, 56 P.2d 628, 632 (1936).

¶ 45 Petitioners argue that the STO tax credit diverts to private schools funds that would otherwise be state revenue. This, they claim, has the same effect as an appropriation. We agree that *Community Council v. Jordan,* 102 Ariz. 448, 455, 432 P.2d 460, 467 (1967), rejected a narrow interpretation of "appropriations," finding the word to encompass executive and administrative contracts as well as disbursements. It does not follow, however, that reducing a taxpayer's liability is the equivalent of spending a certain sum of money. An appropriation earmarks funds from "the general revenue of the state" for an identified purpose or destination. *Black & White Taxicab Co. v. Standard Oil Co.,* 25 Ariz. 381, 399, 218 P. 139, 145 (1923). Furthermore, we disagree with petitioners' characterization of this credit as public money or property within the meaning of the Arizona Constitution. Therefore, we are unwilling to hold that a proscribed appropriation or application occurs by operation of this statute.

Religious worship, exercise, aid, or establishment

¶ 46 Section 12 prohibits the use of public money for religious worship, exercise, instruction, or to support any religious establishment. Even if we were to agree that an appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization violates this clause. The way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach.

¶ 47 As discussed earlier, safeguards built into the statute ensure that the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves. *See* A.R.S. § 43–1089(E)(2). Moreover, to qualify for § 501(c)(3) tax treatment, the STO must supply the Internal Revenue Service with copies of the scholarship application and program brochures, rules of eligibility, selection criteria and scholarship processing procedures. I.R.S. Publication 557, at 19 (Rev. May 1997).

¶ 48 The dissent expresses concern over the prospect that an Arizona taxpayer might be able to make a profit by taking both the state tuition credit and a charitable deduction on the federal return. *Infra* at ¶ 148 n. 17. Whether or not such a maneuver would be ****621** ***288** possible or allowable is a policy matter for the legislature and the taxing authorities to address, rather than this court. It in no way changes our

constitutional analysis. Similarly, our role is not to make judgments about the overall wisdom of the tax credit before us. That obligation falls to the other branches of government. We hold that the school tax credit does not violate article II, § 12 of the Arizona Constitution.

¶ 49 As previously indicated, article IX, § 10 states that "[n]o tax shall be laid or appropriation of any public money made in aid of any church, or private or sectarian school, or any public service corporation." It applies to all private schools, whether sectarian or not.

¶ 50 We have already concluded that this tax credit is not an appropriation of public money. Likewise, no tax has been laid here. To the contrary, this measure *reduces* the tax liability of those choosing to donate to STOs. We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it. Such a construction tortures the plain meaning of the constitutional text. In addition, if we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed. Because we see no constitutional difference between a credit and a deduction, we would also be forced to rule that deductions for charitable contributions to private schools were unconstitutional because they too, would amount to the laying of a tax. This we decline to do. We find no violation of article IX, § 10 of the Arizona Constitution.

Anti–Gift Clause

¶ 51 Under article IX, § 7, the state shall not "give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." We have upheld giving when the state action served a public purpose and adequate consideration was provided for the public benefit conferred. *See Wistuber v. Paradise Valley Unified Sch. Dist.,* 141 Ariz. 346, 348–49, 687 P.2d 354, 356–57 (1984) (holding that state payment of portion of teacher association president's salary did not violate anti-gift clause).

¶ 52 This constitutional provision was historically intended to protect against the "extravagant dissipation of public funds" by government in subsidizing private enterprises such as railroad and canal building in the guise of "public interest." *State v. Northwestern Mutual Ins. Co.,* 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959) (citation omitted). Such "evils" do not exist here. Neither do we agree with petitioners that a tax credit amounts to a "gift." One cannot make a gift of something that one does not own.

Framers' Intent

¶ 53 Petitioners claim that Arizona's founders intended to implement a much more stringent prohibition against aid to religion than did their federal counterparts. They offer an historical analysis in support of this position. The dissent, despite acknowledging the "explicit text" of the constitution, *infra* at ¶ 73, advances a similar argument. We are persuaded, however, that our textual analysis is sufficient to decide the issues presented here.

¶ 54 "We interpret constitutional provisions by examining the text and, *where necessary,* history in an attempt to determine the framers' intent." *Boswell v. Phoenix Newspapers, Inc.,* 152 Ariz. 9, 12, 730 P.2d 186, 189 (1986) (emphasis added). Even if we agreed that an historical search for the framers' intent was appropriate, we would not conclude that the statute in question violates the Arizona Constitution. There is sparse recorded evidence respecting the clauses at issue here, and any historical analysis is necessarily filled with speculation. *See* Thomas E. Sheridan, *Arizona: A History* 385 (1995) ("There is also no comprehensive history of the Arizona constitutional convention or the political milieu out of which it arose."). The verbatim transcript of the 1910 constitutional convention reveals little discussion on the convention floor about the religion clauses. *See Records,* ****622 *289** *supra,* at 660, 894, 940. "In reading through the proceedings one is impressed by the fact that major issues were often glossed over with no debate or discussion." *Records, supra,* at iv. Our dissenting colleague has himself noted that "[t]his court has properly been skeptical of some approaches to divining legislative intent." *Business Realty v. Maricopa County,* 181 Ariz. 551, 558, 892 P.2d 1340, 1347 (1995). We believe even greater skepticism is called for in "divining" the intent of language drafted almost 90 years ago and about which so little has been recorded or preserved. Thus, we cannot subscribe with any confidence to the "framers' indisputable desire to exceed the federal requirements" of the Establishment Clause. *Infra* at ¶ 130.

¶ 55 Moreover, the boundaries limiting judicial interpretation of framers' intent are amorphous and "subject to continuous adjustment." Terrance Sandalow, *Constitutional Interpretation,* 79 Mich. L.Rev. 1033, 1033 (1981). A provision's meaning is necessarily conditioned by contemporary understandings of the drafters' intentions. *Id.* at 1065. In practice, courts engaging in the search for

original intent often look for the "larger purposes" to which the constitution gives expression, *id.* at 1037, mediating differences between the historical document and the need to accommodate changing circumstances and the passage of time. *See id.* at 1036. Further, "historical analysis does not suggest that the original intent of the drafters—an uncertain concept at best—governs or controls the interpretation of those clauses today; it merely recognizes that the history of a constitutional provision influences future interpretations to some degree." Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution,* 15 Hastings Const. L.Q. 451, 451 (1988).

¶ 56 For example, in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court considered the framers' intent in adopting the Fourteenth Amendment, including the political climate of the time and long-standing practices of racial segregation. *Id.* at 489–90, 74 S.Ct. at 688–89. The Court stated:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492–93, 74 S.Ct. at 691.

¶ 57 We have said as much ourselves in the very context of Arizona's religion clauses:

> The state constitutional provisions must be viewed in light of *contemporaneous assumptions* concerning the appropriate sphere of action for each institution. History is clear that as a state evolves from one decade to another the role of the state "transcends traditional boundaries and assumes new dimensions" necessitating a revision of the idiomatic meaning of "separation" to align it with "the new realities if original purposes and expectations are to be realized."

Community Council, 102 Ariz. at 451–52, 432 P.2d at 463–64 (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 80 Harv. L.Rev. 1381, 1383 (1967)) (emphasis added).

¶ 58 This court long ago rejected "the strict view that in essence no public monies may be channeled through a religious organization for any purpose whatsoever without, in fact, aiding that church contrary to constitutional mandate." *Community Council,* 102 Ariz. at 451, 432 P.2d at 463. Instead, we said:

> The prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state, the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches.

Id. In fact, as we review Arizona history and scan the present day horizon, it is apparent that religion has never been hermetically ****623 *290** sealed off from other institutions in this state, or the nation. *See, e.g., Bauchman v. West High Sch.,* 132 F.3d 542, 554 (10th Cir.1997) ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally."). Arizona's motto, *Ditat Deus,* means "God enriches." *See* Ariz. Const. art. XXII, § 20. And even though, as we have noted, the transcripts of our constitutional convention reveal almost nothing about the clauses in question, they clearly reflect religion as part of the proceedings. Each day's session was opened by a prayer from the convention chaplain, Rev. Seaborn Crutchfield. Indeed, to this day Arizona legislative sessions begin with a prayer delivered by the Chaplain of the Day. The constitutional delegates also negotiated over whether the preamble should refer to "Almighty God," the " Supreme Being," or "Almighty God for Liberty." *Records, supra,* at 41, 77, 82–83. They ultimately agreed that the

preamble should read, "We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." *Id.* at 1399.

¶ 59 In a more contemporary vein, tax codes, both state and federal, permit churches and other religious institutions to acquire tax-free status and allow deductions for contributions made directly to such entities. *See* 26 U.S.C. §§ 501(a), (c)(3), 170(a), (c)(2)(B); A.R.S. §§ 43–1201, 43–1042. "[T]he doctrine of separation of church and state does not include the doctrine of total nonrecognition of the church by the state and of the state by the church." *Community Council,* 102 Ariz. at 451, 432 P.2d at 463.

¶ 60 Clearly, the state constitution forbids the creation of a state church or religion. It also guarantees freedom of worship and belief by demanding absolute neutrality in the treatment of religious groups. "The State is mandated by [article II, § 12] to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally." *Pratt v. Arizona Bd. of Regents,* 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974). There is no evidence, however, that the framers intended to divorce completely any hint of religion from all conceivably state-related functions, nor would such a goal be realistically attainable in today's world.

¶ 61 We do know that the framers "took education seriously," as evidenced by their creation of a separate constitutional article on the subject. John D. Leshy, *The Making of the Arizona Constitution,* 20 Ariz. St. L.J. 1, 96 (1988). They expressed the belief that educated citizens are vital to a free and united society. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop,* 179 Ariz. 233, 239, 877 P.2d 806, 812 (1994). Thus, Arizona compels its children to attend school—public, private, or home school. *See* A.R.S. § 15–802(A). We must respect the framers' intent in this area as we decide the present issue.

¶ 62 One of the most enviable attributes of our constitutional form of government is its adaptability to change and innovation. As stated in *Community Council,* we must view constitutional provisions "in light of contemporaneous assumptions." 102 Ariz. at 451, 432 P.2d at 463. Today's reality is that primary and secondary education systems are facing nationwide reform. Many states are exploring alternatives to traditional public education—from charter schools to private school vouchers. *See* Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon–Aid from the Lemon Test,* 70 St. John's L.Rev. 273, 275–77 (1996). In 1994, Arizona authorized the creation of charter schools supported by public funds. *See* A.R.S. §§ 15–181 through 15–189.02. In doing so, the legislature hoped to encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices for parents and children. *See* A.R.S. § 15–181(A). It has now adopted a tax policy presumptively intended to further the same or similar goals. The pursuit of such a strategy falls squarely within the legislature's prerogative.

¶ 63 Some might argue that the statute in question runs counter to these goals by encouraging more students to attend private schools, thereby weakening the state's public school system. But that is a matter for the legislature, as policy maker, to ****624 *291** debate and decide. It is not for us to pass on the wisdom of this or any other social policy. Concerning ourselves only with matters of constitutionality, we have concluded that the religion clauses of the Arizona Constitution do not invalidate this attempt to keep pace with changing economic conditions and societal goals.

Blaine Amendment and Washington State Constitution

¶ 64 The dissent relies to a great extent on external, peripheral sources such as the Blaine amendment, introduced in Congress more than 100 years ago, and the Washington State Constitution. These do not control our decision today.

¶ 65 In 1875, Maine Congressman James Blaine introduced a Constitutional amendment prohibiting the states from granting public funds or taxes for the benefit of any religious sect or denomination. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism,* 15 Yale L. & Pol'y Rev. 113, 144 (1996). The bill failed to muster enough votes for passage, but was later resurrected in a number of state constitutions. *Id.* at 146–47.

¶ 66 The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing "Catholic menace." Viteritti, *supra,* at 146; *see also* Stephen K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38, 54 (1992). Its supporters were neither shy nor secretive about their motives. As one national publication which supported the measure wrote:

> Mr. Blaine did, indeed bring forward ... a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.

Green, *supra,* at 54 (quoting *The Nation,* Mar. 16, 1876, at 173). Other contemporary sources labeled the amendment part of a plan to "institute a general war against the Catholic Church." Green, *supra,* at 44 (quoting *The New York Tribune,* July 8, 1875, at 4). While such efforts were unsuccessful at the federal level, the jingoist banner persisted in some states. By 1890, twenty-nine states had incorporated at least some language reminiscent of the Blaine amendment in their own constitutions. Viteritti, *supra,* at 147. There is, however, no recorded history directly linking the amendment with Arizona's constitutional convention. In our judgment, it requires significant speculation to discern such a connection. In any event, we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.

¶ 67 The Arizona constitutional convention consumed a mere two months from beginning to end. Leshy, *supra,* at 40–41. As one of the last states admitted to the Union, Arizona borrowed much from those that preceded it. *See* Leshy, *supra,* at 5. Language was lifted from the constitutions of Washington, Oregon, Texas, and Oklahoma, to name a few. *See, e.g., Records, supra,* at 167, 179, 182, 660.

¶ 68 On several occasions we have acknowledged similarities between provisions of the Washington Constitution and our own. *See Schultz v. City of Phoenix,* 18 Ariz. 35, 42, 156 P. 75, 77 (1916); *Faires v. Frohmiller,* 49 Ariz. 366, 372, 67 P.2d 470, 472 (1937). Nevertheless, while Washington's judicial decisions may prove useful, they certainly do not control Arizona law. We alone must decide how persuasive the legal opinions of other jurisdictions will be to our holdings. *See Desert Waters, Inc. v. Superior Court,* 91 Ariz. 163, 167–68, 370 P.2d 652, 655 (1962) (noting that while a certain provision of Washington's constitution was "identical" to Arizona's, "it becomes apparent that the same meaning and effect was not intended by its adoption"). At least thirty states have constitutions that contain provisions similar to one or both of our religion clauses. [10] To our knowledge, none of these jurisdictions ****625 *292** has faced the precise issue before us today.

¶ 69 The dissent points to three Washington State cases holding that state money could not be used to provide financial assistance to students. *See Witters v. Washington Comm'n for the Blind,* 112 Wash.2d 363, 771 P.2d 1119 (1989) (direct financial aid for visually impaired student to pursue religious studies at private bible college); *Washington State Higher Educ. Assistance Auth. v. Graham,* 84 Wash.2d 813, 529 P.2d 1051 (1974) (state agency purchasing and making loans to students in post-secondary educational institutions); *Weiss v. Bruno,* 82 Wash.2d 199, 509 P.2d 973 (1973) (direct financial assistance to students attending both public and private elementary and high schools, as well as private colleges and universities). In each instance, the Washington Supreme Court found that the program violated the state's constitutional prohibitions against using public money to benefit sectarian schools. While these cases are informative, they are also distinguishable on their facts. In each instance, direct appropriations of state monies were involved.

¶ 70 It is also important to recall that Arizona and Washington were founded under markedly different historical circumstances, and their subsequent development reflects those differences. It is difficult, if not impossible, to apply the intent of one group of constitutional framers to another operating at a different time and place. Thus, we must cautiously view the constitutional decisions of other state courts as we attempt to place our own founding document in historical perspective. As the now Chief Justice of the Wisconsin Supreme Court has so aptly said in describing her approach to constitutional interpretation: "I look at the peculiarities of my state—its land, its industry, its people, its history." Shirley S. Abrahamson, *Reincarnation of State Courts,* 36 Sw. L.J. 951, 965 (1982).

¶ 71 Washington State was carved from the British Northwest Territories, controlled by the large fur trading companies. Climate, geography and the abundance of natural resources —timber, fish, and water—are reflected in myriad ways in that state's governmental institutions and sources of economic power. The trans-Pacific influences are readily apparent to anyone who walks Seattle's waterfront or Chinatown. Arizona, in contrast, emerged from an entirely different orientation reaching from Spain and Mexico. Our founding

documents are the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. Our first settlers came looking for gold, silver, and copper, or range land for cattle. The economic, political, and social ramifications of the lack of a resource such as water can hardly be overestimated. In such vastly dissimilar milieus, even identical words can carry with them a freight of startlingly different meanings.

CONCLUSION

¶ 72 We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution. We find it a valid exercise of legislative prerogative. Relief denied.

JONES, V.C.J., and MARTONE, J., concur.

FELDMAN, Justice, dissenting.

¶ 73 Believing A.R.S. § 43–1089 (the Arizona tax credit) violates the explicit text of our state constitution and the Establishment Clause of the federal constitution, I respectfully dissent.

¶ 74 Today's decision upholding the use of a tax credit to support private and sectarian ****626 *293** schools is unfortunate in several respects. First, the court allows the government to provide assistance to private, predominantly sectarian schools despite a clear prohibition in article II, § 12 and article IX, § 10 of the Arizona Constitution. Next, it overlooks the historical background of these sections and consequently ignores the framers' plain intent. It then confuses non-neutral, direct tax credits with neutral deductions and benefits when there is, in fact, a clear difference in their constitutionality. Fourth, it errs in suggesting that funds derived from tax credits are not public funds. Finally, because the statute permits uncontrolled, government-reimbursed grants to private, primarily religious institutions and denies similar grants to public institutions, it directly subsidizes religious education and thus violates the Establishment Clause of the First Amendment to the United States Constitution.

THE ARIZONA TAX CREDIT PLAN

¶ 75 This case does not deal with or question reference to the deity in the state's seal or preamble to the constitution. Nor does it deal with public or charter schools, voucher programs providing educational aid to low-income families, or even charitable contributions. Constitutionality in this case, as in most, turns on analysis of statutory purpose and effect. The Arizona tax credit does not survive this analysis. The tax credit statute permits any taxpayer, not just parents of school children, a $500 direct credit against taxes, but only to reimburse so-called contributions to school tuition organizations (STOs) supporting nongovernmental schools. At least seventy-two percent of these schools are sectarian. *See* Coffey, A Survey of Arizona Private Schools (1993) (Appendix I of Intervenor Lisa Graham Keegan, Arizona Superintendent of Public Instruction). Contributions to public schools will not qualify for the credit because a "qualified school" is limited to "a *nongovernmental* primary or secondary school" of the "parents' choice." § 43–1089(E)(1), (2) (emphasis added).

¶ 76 It is true the public school system is tuition-free and students at those schools therefore need no scholarships or tuition grants, but provisions could have been made for a tax credit for contributions supporting the educational mission of the public school system. This would have put the state's private, sectarian, and public schools on the same basis. But § 43–1089.01 allows only a maximum $200 credit for contributions to public schools and is available only to reimburse fees paid for extracurricular activities. The majority intimates that comparison of the two school credits is "unnecessary" to the analysis because the costs of public school establishment and operation are already borne by the state. Op. at ¶ 25. The problem with that argument is apparent from reading our own opinions on the deficiencies of state financing of public schools and the underfinanced and unfilled educational missions of those schools. *See, e.g., Roosevelt Elem. Sch. Dist. v. Bishop,* 179 Ariz. 233, 877 P.2d 806 (1994). If we are to consider equality or neutrality of the two credits, we must bear in mind that public schools, like private schools, need assistance to perform their educational mission.

¶ 77 Notably, the private school tax credit does not restrict use of the grant money to secular purposes. Thus, the recipient schools may use the government's subsidy for direct support of sectarian education or observance, the very thing both

our state and federal constitutions forbid. Further, while prohibiting the STOs from making grants to "only students of one school," the statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect. § 43–1089(E)(2). In fact, a group of taxpayers who subscribe to a particular religion may form an STO that will support only schools of that religion. Worse, in defining the schools qualified to receive STO grants, the Legislature excluded schools that "discriminate on the basis of race, color, sex, handicap, familial status, or national origin" but not those that limit admission on the basis of religious adherence, preference, or observance. § 43–1089(E)(1). Indeed, STOs are to use the grant money to "allow" children to "attend any qualified school of their parents' choice." § 43–1089(E)(2). Thus, nothing forbids an STO from limiting its grants or scholarships to students who adhere ****627 *294** to a particular religion and will participate in the required religious observance.

¶ 78 There is, of course, nothing bad and everything good in private support for religious schools and sectarian education. But both state and federal constitutions forbid using the power of government to provide the type of support encompassed by Arizona's statute. I turn first to the federal constitution.

THE FEDERAL CONSTITUTION

¶ 79 The majority believes the standard of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), provides an appropriate framework for its review of the constitutionality of § 43–1089. Op. at ¶ 5. The second prong of *Lemon* 's three-part test requires that a statute be "neutral on its face and in its application" and not have the "primary effect" of advancing sectarian aims of nonpublic schools. *See Mueller v. Allen,* 463 U.S. 388, 392, 103 S.Ct. 3062, 3065, 77 L.Ed.2d 721 (1983); *see also Committee for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 788, 93 S.Ct. 2955, 2973, 37 L.Ed.2d 948 (1973). To comply, "aid to sectarian schools must be restricted to ensure that it may not be used to further the religious mission of those [religious] schools." *See Mueller,* 463 U.S. at 406, 103 S.Ct. at 3073 (citing *Wolman v. Walter,* 433 U.S. 229, 250–51, 97 S.Ct. 2593, 2606–07, 53 L.Ed.2d 714 (1977)). I believe § 43–1089 fails this analysis.

A. The primary effect of A.R.S. § 43–1089 is not neutral

¶ 80 The Establishment Clause issue turns on the United States Supreme Court's opinions in *Nyquist* and *Mueller.* Arizona's tax credit contains each of the factors that led the Court to declare the credit unconstitutional in *Nyquist* and none of the provisions that saved the deduction in *Mueller.*

¶ 81 The New York plan considered in *Nyquist* involved a tuition grant program for low income families, together with a tuition tax deduction program that varied by income level. Both plans were limited to families whose children attended private schools; neither program was available for parents of children who attended public schools.

¶ 82 The Court noted that the private schools were predominantly religious and concluded that both tuition aid programs violated the Establishment Clause.

> [When] grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.

413 U.S. at 786, 93 S.Ct. at 2972.

¶ 83 In *Nyquist,* New York issued vouchers redeemable only at private schools. Arizona's tax credit is available only for private school contributions. The result is state support of private, mostly sectarian schools. And contrary to the majority's assertion, it is not affected even though the "final destination" of the money is chosen by "individual parents," not the state. Op. at ¶ 19. In New York, the funds went first to the parents and then to the school of their choice. *Id.* at 785–86, 93 S.Ct. at 2972. Similarly, under the Arizona plan, the money goes first to the STO and then to the school of its choice. In a footnote, the *Nyquist* Court made it clear that the result might be different if the scholarships and tuition grants were neutrally "available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 782 n. 38, 93 S.Ct. at 2970 n. 38.

Arizona's tax credit, however, may be used only at private, mostly sectarian schools.

¶ 84 In *Mueller,* the Court upheld a Minnesota law allowing a deduction, in part because it was "available for educational expenses incurred by all parents including those whose children attend public schools." Making the benefit available to this neutral and "broad class" is an "important index of secular effect." 463 U.S. at 397, 103 S.Ct. at 3068 (quoting *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981)). The Court said the Establishment Clause does "not encompass the sort of attenuated ****628 *295** financial benefit ... that eventually flows to parochial schools from the neutrally available tax benefit at issue...." *Id.* at 400, 103 S.Ct. at 3070. Indeed, the *Mueller* Court described *Nyquist* 's unconstitutional, nonneutral, private school program in words directly applicable to the Arizona: "thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children attending private schools," the majority of which were sectarian. *Id.* at 394, 103 S.Ct. at 3066.

¶ 85 This case is very like *Nyquist* and very unlike *Mueller.* The Arizona tax credit is available only to those who choose to support private, predominantly religious schools. Those who wish to contribute to public schools are allowed only a $200 credit, and their contributions can be used only to reimburse fees paid for extracurricular activities. Thus, the tax credit does not offer the same or even similar benefits to all taxpayers, is not neutral, and the "money involved represents a charge made upon the state for the purpose of religious education." *Nyquist,* 413 U.S. at 791, 93 S.Ct. at 2974.

B. The tax credit is not one of a group of permissible, generally available tax benefits

¶ 86 The majority argues that "both credits and deductions ... are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by taxpayers." Op. at ¶ 12 (quoting Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen,* 31 WAYNE L. REV. 157, 173 (1984)). The court goes on to say there are "mechanical differences between deductions and credits," but "that these distinctions are [not] constitutionally significant." *Id.*

¶ 87 I fear the court conflates personal philanthropy with government grants. The difference is one of substance, not mechanics or labels. Unlike deductions allowed for general charitable giving, the tax credit provides a dollar-for-dollar reimbursement available only to those who support our primarily sectarian private school system. It is everything *Nyquist* held unconstitutional—a direct stipend that has the primary effect of advancing religion by tuition grants to religious schools. *Nyquist,* 413 U.S. at 779–80, 791, 93 S.Ct. at 2969, 2974–75.

¶ 88 The court sees this quite benignly, as just one of the "tools by which government can ameliorate the tax burden while implementing social and economic goals." Op. at ¶ 15. But the Establishment Clause forbids the government from promoting religious education by special benefits unavailable for general, charitable giving. This, of course, includes tax subsidies available only for religious education. *Nyquist,* 413 U.S. at 782–83, 93 S.Ct. at 2970–71; *see also Witters v. Washington Dep't of Serv. for the Blind,* 474 U.S. 481, 487–88, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986) (discussing impermissible direct subsidies to religious education). As the Court recognized in *Nyquist* 's companion case, a statute that implicates the Establishment Clause cannot "*single[ ] out a class of its citizens for a special economic benefit.*" *Sloan v. Lemon,* 413 U.S. 825, 832, 93 S.Ct. 2982, 2986, 37 L.Ed.2d 939 (1973). When such a benefit acts as a tuition subsidy that helps only children attending primarily sectarian schools, it supports religiously oriented institutions. *Id.*

¶ 89 Thus, in arguing that the Arizona tax credit is but one of many tax credits provided by the Arizona Legislature, the court overlooks this crucial distinction: the Establishment Clause is not implicated when the Legislature grants tax credits to support socially beneficial programs such as environmental cleanups or assistance to the working poor. Op. at ¶ 15; *see also* §§ 43–1086, 43–1088. If it wished, the Legislature could, without constitutional conflict, make direct appropriations for these purposes. But credits that support religious education implicate the religion clauses of both the state and federal constitutions. *Illinois ex rel. McCollum v. Board of Educ.,* 333 U.S. 203, 218–19, 68 S.Ct. 461, 468–69, 92 L.Ed. 649 (1948). And when the tax credit is available only for support of private, predominantly religious schools, the Establishment Clause is not just implicated, it is violated. *Nyquist,* 413 U.S. at 793, 93 S.Ct. at 2975.

C. There is no real private choice—religious institutions primarily benefit

****629 *296** ¶ 90 The court argues that the decision to contribute is purely a matter of individual choice and that religious institutions are only "incidental beneficiaries." Op. at ¶ 26. Under the provision upheld in *Mueller,* religious

schools benefitted only as a result of true choice made among a *wide selection of alternatives,* both public and private. 463 U.S. at 397–99, 103 S.Ct. at 3068–69. Under the Arizona plan, there is no real choice—one may contribute up to $500 to support private schools or pay the same amount to the Arizona Department of Revenue. In reality, this is not a choice but government action designed to induce taxpayers to direct financial support to predominantly religious schools. The majority seems to argue that the "primary beneficiaries" of STO contributions are "scholarship recipients," not the schools. Op. at ¶ 21 n. 4. No doubt the STOs, the students, the schools, and those taxpayers wishing to support private schools are all beneficiaries. The question, however, is not who is a primary beneficiary but whether the state may subsidize private, secular education, thus benefitting any or all of these beneficiaries.

¶ 91 The Supreme Court has assessed a law's effect by examining the character of the institutions benefited to determine whether they are predominantly religious. *See, e.g., Meek v. Pittenger,* 421 U.S. 349, 363–64, 95 S.Ct. 1753, 1762–63, 44 L.Ed.2d 217 (1975). As the majority indicates, the *Mueller* Court voiced concern over whether statistics could be used to determine whether legislation will have a predominantly religious effect. 463 U.S. at 401, 103 S.Ct. at 3070. But there is a big distinction between *Mueller* and the present case. Because the *Mueller* statute was facially neutral and available for support of both public and private schools, the Court chose not to examine statistics showing which taxpayers—those deducting for private school expenses or those deducting for public school expenses—actually took advantage of the tax benefit. *Id.* "We would be loath to adopt a rule grounding the constitutionality of a *facially neutral* law on annual reports reciting the extent of various classes of private citizens who claimed benefits under the law." *Id.* (emphasis added).

¶ 92 The Arizona statute is not facially neutral because its beneficiaries are supporters of Arizona's private schools, not parents who may take a deduction for either public or private school expenses. The Arizona tax credit, unlike that in *Mueller,* is not limited to helping all parents with school children but is available only to taxpayers willing to direct the money to private schools. When the benefit can flow only to private schools, the court must determine what percentage of those private schools is sectarian. This is the precise statistic the Court examined in *Meek,* 421 U.S. at 364, 95 S.Ct. at 1762–63 (system seventy-five percent sectarian); *Nyquist,* 413 U.S. at 757, 93 S.Ct. at 2957 (eighty-five percent sectarian); *Sloan,* 413 U.S. at 830, 93 S.Ct. at 2985–86 (ninety percent sectarian); and *Lemon,* 403 U.S. at 610, 91 S.Ct. at 2110 (ninety-five percent sectarian).

¶ 93 In *Meek,* the Court described Pennsylvania's seventy-five percent sectarian private school system as "predominantly religious." 421 U.S. at 363, 95 S.Ct. at 1762. This phrase is, of course, applicable to Arizona's private, seventy-two percent sectarian schools. Thus, "it simply defies reason to say that such a statute does not aid sectarian schools." *Kosydar v. Wolman,* 353 F.Supp. 744, 762 (S.D.Ohio 1972), *aff'd sub nom. Grit v. Wolman,* 413 U.S. 901, 93 S.Ct. 3062, 37 L.Ed.2d 1021 (1973). Contrary to the majority's assertion, the statute promotes support of religious schools. It does this without prohibiting use for sectarian instruction, thereby allowing direct state subsidy of religious instruction and observance.

D. A.R.S. § 43–1089 places no limitation on use of the tuition grants

¶ 94 The Establishment Clause is violated when state aid is directed exclusively to private, mostly sectarian schools *without limitation* on use. *See Nyquist,* 413 U.S. at 780, 93 S.Ct. at 2969; *Sloan,* 413 U.S. at 829, 93 S.Ct. at 2985; *Lemon,* 403 U.S. at 616–17, 91 S.Ct. at 2113–14; *see also Meek,* 421 U.S. at 365–66, 95 S.Ct. at 1763–64. The *Nyquist* Court held that *"[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological* ****630 *297** *purposes, it is clear from our cases that direct aid in whatever form is invalid.*" 413 U.S. at 780, 93 S.Ct. at 2969 (emphasis added). *Mueller* did not disapprove that statement. In fact the Minnesota statute, unlike Arizona's, disallowed deductions for instructional books used to teach or "inculcate religious belief, tenets, doctrine, or worship." *Mueller,* 463 U.S. at 401, 103 S.Ct. at 3062. As the majority notes, *Mueller* can be construed to allow some types of unrestricted aid when neutrally available to both public and private schools, but the Court has never permitted unrestricted aid in a program, like Arizona's, available only to private, mostly sectarian schools. Instead, it has required mechanisms to restrict the aid to secular uses. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–10, at 1226 (2d ed.1988). Those mechanisms are absent from the Arizona statute.

E. The Arizona tax credit, unrestricted as to use, exceeds the boundaries set in the United States Supreme Court's Establishment Clause jurisprudence

¶ 95 Because Arizona's tax credit statute does not require that grant use be restricted to the secular aspects of education, the STOs' grants to private schools may be used in any manner the recipient school wishes. Nor does the statute prevent an STO from directing all of its grant money to schools that restrict enrollment or education to adherents of a particular religion or sect. Moreover, there is no limit on the dollar amount the STO can give to a school on behalf of a student. Thus, an STO could pool several contributions and then pay the full tuition for any student, group of students, or for that matter, all students in any group of schools of a single religious faith.

¶ 96 None of the Court's cases permits such a government subsidy. The majority incorrectly relies on a number of cases that have built on *Mueller.* In *Witters,* for example, the benefit was used to provide vocational rehabilitation services for a blind student at a Christian college, but the benefit was equally available to any eligible student at any school, public or private. 474 U.S. at 488, 106 S.Ct. at 752.

¶ 97 In *Zobrest v. Catalina Foothills School District,* the Court approved a school district's provision of sign language interpreters under a federal act benefiting individuals with disabilities. 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). Thus, interpreters were available for deaf students attending classes at a Catholic high school, but also for students attending public schools. The Court held that the government had offered "a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion'...." *Id.* at 10, 113 S.Ct. at 2467.

¶ 98 In *Agostini v. Felton,* the Court held that grants for general remedial services available to aid the educational, nonreligious function of religious and public schools are not *per se* invalid. 521 U.S. 203, ——, 117 S.Ct. 1997, 2010, 138 L.Ed.2d 391 (1997). The Court relied on the principles established in *Nyquist* and *Mueller:* neutral government benefits do not violate the Establishment Clause when provided without regard to the sectarian-nonsectarian or publicnonpublic nature of the institutions supported. *Id.* at ——, 117 S.Ct. at 2011. The Arizona program, however, is available only to private schools and may be used for sectarian instruction and observance.

¶ 99 The majority today puts great reliance on the Wisconsin case of *Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602, *cert. denied,* 525 U.S. 997, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998). Op. at ¶ 18. Even if we are to assume that *Jackson* will eventually withstand Establishment Clause analysis, it does not support the majority's result because the Wisconsin program is quite different from Arizona's. First, the Wisconsin statute contains an "opt-out" provision by which students may be excused from the religious aspects of sectarian education. Second, Wisconsin requires schools receiving grants to admit applicants without regard to religious/nonreligious preference. Third, Wisconsin limits support to the private institution's educational programs. Finally, Wisconsin's program is designed to help low income families send their children to private schools.

****631** ***298** ¶ 100 Arizona's statute, on the other hand, contains no religious instruction opt-out provision, appears to permit religious discrimination, permits funding of religious observance, and makes the tax credit available to all taxpayers, those who have children in school and those who do not, the rich and the poor. Further, our statute makes no limitation on the amount of funding a school can receive from an STO for a particular student. Wisconsin, in short, has made some attempt, successful or not, to limit the use of state subsidies for religious instruction and ceremony. Arizona's program, on the other hand, will inevitably and primarily benefit religious observance and instruction.

¶ 101 The majority has cited Professor Baergen's article for several points. *See, e.g.,* Op. at ¶¶ 12, 15. Professor Baergen's conclusion, however, provides a good summation for the Establishment Clause issue:

> Mueller v. Allen held that facially neutral income tax deductions for educational expenses are not an unconstitutional infringement of the Establishment Clause. This note suggests that tax credit provisions, which could entirely subsidize private sectarian education, should be carefully scrutinized for an unconstitutional legislative purpose. Such an *impermissible purpose should be found if the credit is limited to private educational expenses* or if the credit gives such an unbalanced benefit to the parents of private school children that it is clearly intended as a tax incentive to subsidize private, primarily sectarian education. Likewise, *a credit limited to*

> *private school expenses would suffer an unconstitutional primary effect of advancing religious education, unmitigated by the deference shown by courts to true legislative tax enactments [such as deductions]* which equitably allocate tax burdens based upon a definition of net income. Moreover, tax credit provisions which are facially neutral but only supply a [*de minimis*] benefit to parents of public school children should be subject to statistical analysis to determine the true beneficiaries of the program and expose the facial neutrality as a facade.

Baergen, *supra,* 31 WAYNE L. REV. at 184 (emphasis added).

THE STATE CONSTITUTION

A. Historical background

¶ 102 The Arizona tax credit violates the state constitution's prohibition that "[n]o public money ... shall be applied to any religious worship, exercise, or instruction or to the support of any religious establishment." Article II, § 12. It also violates the prohibition on laying any "tax ... in aid of any ... private or sectarian school...." Article IX, § 10. The text is clear and unambiguous. Thus, the case should have ended there. But for those who somehow find ambiguity in the quoted words, we can turn to the intent of those who wrote our constitution.

¶ 103 The majority says we should use great "skepticism" in divining the framers' intent. Op. at ¶ 54. We are to look instead for the framers' "larger purposes." Op. at ¶ 55. But this court has always prided itself on its devotion to text and framers' intent. *E.g., Fain Land & Cattle Co. v. Hassell,* 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990) ("The cardinal rule ... is to follow the text and the intent of the framers...."). Putting aside the explicit text, I believe the framers' intent is quite plain, even to our contemporary understanding, and their larger purposes quite apparent from a closer look at state history and the text of the relevant constitutional clauses.

¶ 104 The authors of the Arizona Constitution did not adopt the religion clauses in a historical vacuum. Article II, § 12 and article IX, § 10 were the product of contemporary social forces and a national and local battle over separation of church and state in public school instruction. The people who formed this state attempted to save us from religious bigotry by separating religion from state funding and support through our explicit religion clauses.

1. The national scene

¶ 105 In the nineteenth century atmosphere, before the Establishment Clause applied to the states, the emerging public ****632 *299** schools commonly included explicit religious instruction. The religious make-up of the United States was predominantly Protestant, and public school instruction reflected this majority religion. The latter half of the nineteenth century, however, witnessed large Catholic immigration into the United States. Catholic church leaders resisted the open Protestantism that pervaded public school curriculum. As Catholic political power grew, so did efforts to secure state aid to parochial schools. At the same time, Protestants sought to "preserve the [Protestant] religious aspects of the public school curriculum and to protect the common culture from the growing Catholic menace. The Blaine Amendment was a product of that sentiment." Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism,* 15 YALE L. & POL'Y REV. 113, 145–46 (1996).

¶ 106 These education-related contests between Protestants and Catholics led to calls for stringent separation of church and state in education finance. President Grant took up the cause in an 1875 address to the Army of Tennessee:

> Let us then begin by guarding against every enemy threatening this perpetuity of free republican institutions.... *The free school is the promoter of that intelligence which is to preserve us.* ... Let us all ... *[e]ncourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools.* Resolve that either the state or the nation, or both combined, shall support institutions of learning sufficient to

> afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. *Leave the matter of religion to the family circle, the church, and the private school supported entirely by private contributions. Keep the church and state forever separate.*

CONRAD HENRY MOEHLMAN, THE AMERICAN CONSTITUTIONS AND RELIGION 16 (1938) (emphasis in original). In his next message to Congress, President Grant recommended a constitutional amendment to preclude state funding of private (Catholic) schools, while permitting continued Protestant influence in the public schools via reading of the King James Bible. The proposal, named after its sponsor, Rep. John Blaine, became known as the Blaine Amendment.

¶ 107 As passed by the House of Representatives, the amendment provided, *inter alia,* that "no money raised by taxation in any state, *for the support of the public schools or derived from any public fund therefor,* shall ever be under the control of any religious sect...." One of the Senate's principal objections to the amendment was that it "would only forbid *school* funds [from aiding religion and denominational schools]; it would not prohibit the States from using any other public funds for religion or sectarian schools. To block *every avenue,* the Senators wrote several new strictures into the House project." William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798,* 4 WASHBURN L. REV. 183, 193 (1965) (second emphasis added; cites to Congressional Record omitted). As a result, the version of the Blaine Amendment that narrowly failed to receive Senate approval read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. *No public property, and no public revenue* of, nor any loan of credit by *or under the authority* of, the United States, *or any State, Territory,* District, or municipal corporation, *shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or antireligious sect, organization, or denomination,* or wherein the particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; *and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets.* This article shall not be construed to prohibit the ****633** ***300** reading of the Bible in any school or institution.

MOEHLMAN, *supra,* at 17 (emphasis added).

¶ 108 While the Blaine Amendment, and similar proposals, [11] failed in Congress, it ultimately met with considerable success in the states. Between 1877 and 1917, its language was adopted in whole or in part in twenty-nine state constitutions. Ann Marlow Grabiel, Comment, *Minnesota Public Money and Religious Schools: Clearing the Federal and State Constitutional Hurdles,* 17 HAMLINE L. REV. 203, 223 (1993). Ironically, however, the anti-Catholic bigotry that inspired the Blaine Amendment was displaced in many of those states by a principled commitment to strict separation between church and state in education. "It is one of the great ironies of American constitutional history that the Blaine Amendment, which erupted out of a spirit of religious bigotry and a politics that sought to promote Protestantism in public schools, eventually became an emblem of religious freedom in some states." Viteritti, *supra,* 15 YALE L. & POL'Y REV. at 147. Arizona was one of those states.

2. The Arizona scene

¶ 109 Arizona's Blaine Amendment clauses contain a stringent proscription on educational aid, forbidding state aid to all private schools, sectarian or secular. *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 216 (1993)(our article IX, § 10 "is a more targeted (and potentially more stringent) specification

of the prohibition against subsidies to private entities"); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions,* 71 VA. L. REV. 625, 633 (1985). The history of Arizona public schools and the pertinent legislation leading up to the constitutional convention confirm that the strict language of our constitution emerged from the framers' firm conviction that the state should be absolutely prohibited from subsidizing any form of sectarian education—a conclusion drawn from the framers' territorial experience.

¶ 110 In 1864, the territory's First Legislative Assembly established a publicly funded common school system. *See* chapter XXIII, § 11, The Howell Code (1864). Ironically, the first school appropriation was an 1866 grant of $250 to the mission school at San Xavier. JAY J. WAGONER, ARIZONA TERRITORY, 1863–1912: A POLITICAL HISTORY 51 (Tucson 1970). In the following decade, however, the national battle over public funding for sectarian schools hit Arizona's emerging public education system, and Arizona forged a clear path toward separation by prohibiting state aid to sectarian education.

¶ 111 In light of the large Mexican–American, predominantly Catholic population of the territory, the possibility of public funding for Catholic schools would have had a substantial impact. *See* Samuel Pressly McCrea, *Establishment of the Arizona School System, in* BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF ARIZONA, FOR THE YEARS ENDING JUNE 30, 1907 AND JUNE 30, 1908, at 95 (1908). Governor A.P.K. Safford, known as the father of Arizona education, expressed early concern that sectarian, primarily Catholic, schools would attract public moneys for their support. McCrea, *supra, in* BIENNIAL REPORT, at 96. The Legislative Assembly apparently shared Governor Safford's concern and in 1871 sought to prevent such a result by enacting a prohibition against use of sectarian books or other documents and teaching of "sectarian or denominational doctrine" in Arizona's public schools. Any school in which such sectarian or denominational doctrine had been taught could not receive public school funds. Act to Establish Public Schools in the Territory of Arizona § 34 (approved Feb. 18, 1871).

****634 *301** ¶ 112 In a report to the Federal Commissioner on Education, Governor Safford explained and endorsed the logic of such a provision:

> To the end that children of every religious faith may consistently attend these schools, the legislature wisely prohibited the use of sectarian books and religious teaching in them. Therein children of parents of any and every faith can meet in harmony and upon an equality in all respects. Based upon any other character of law, the free-school-system would and should soon be destroyed. Were one religious doctrine taught, children of other religious doctrines would surely be driven from the schools. In this age of science, learning, and religious and political independence, it will not do to promote any sect at the common expense. The funds which maintain the grand free schools are drawn from people of every creed, and it is but just that all shall be equally benefited, without the least attempt to inculcate any of the many religious beliefs. Religious instruction peculiarly belongs to the family-circle and church. The most cruel and bloody wars recorded in the pages of history show that they were the offspring of the intolerance of religious sects. Bigotry has brought untold thousands of innocent men and women to torture and death. The cloak of religion has been used to cover dire crimes against mankind; but happily for poor and rich of all beliefs and conditions, the time for such cruel intolerance has passed away. Under the benign influences of our free Republic, every one has and can exercise the inalienable right, free from threats and oppression, to worship God in his own way; and our public schools constitute the safe foundation upon which the prosperity and endurance of our beloved country rest and our rightful liberties are secured and assured. In the public-school-room the children of every

> creed are gathered, not to despise and hate each other, as in olden times, under sectarian teaching, but to love and respect manly and womanly virtues wherever or in whomsoever found, regardless of the faith one or the other entertains.

Report of Hon. A.P.K. Safford, in REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1873, at 426–27 (G.P.O.1874).

¶ 113 The 1871 act was also the first to provide for a general or territorial tax to support schools. WAGONER, *supra,* at 106. Section 32 stated: "No portion of the public school funds, whether derived from Territorial, county or district taxation, shall be used or appropriated to any other than school purposes." Yet in a separate act, the 1871 Legislative Assembly appropriated $300 from the general fund to the Sisters of St. Joseph of Tucson to reimburse them for school books purchased. [12] This appropriation, which was renewed by the 1873 Legislative Assembly, was apparently not paid because the territorial treasurer believed payment would be illegal. But in 1875, the Legislative Assembly ordered it paid from the Territory's general fund. McCrea, *supra,* in BIENNIAL REPORT, at 88.

¶ 114 This 1875 payment, coupled with the Catholic community's apparent boycott of fundraising efforts on behalf of the public schools, set off a wave of debate on the issue of state funding of private religious institutions. *See* John C. Bury, Dissertation, *The Historical Role of Arizona's Superintendent of Public Instruction* 114–29 (Northern Arizona University 1974). The cause for public support of Catholic schools was championed by Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court. He argued before the 1875 Legislative Assembly that either Catholics whose children attended private, sectarian schools should be exempt from paying taxes to support public schools or public moneys should be used to support Catholic schools. *Id.* at 117–18. He sought to enforce his vision of state-funded Catholic schools by asking the Assembly to create corporations that would establish private schools. These corporations would then receive tax funds based on the number of enrolled students in their schools. *Id.* The ****635 **302** measure was ultimately defeated, [13] and Chief Justice Dunne was relieved of his position by the federal government. *Id.* at 119–20, 124.

¶ 115 Governor Safford remained publicly silent on the issue until after the Legislative Assembly settled it in favor of nonsectarian instruction. In his 1877 message to the Legislative Assembly, Governor Safford recounted the achievements of the nascent Arizona public schools and strongly argued for continuing nonsectarian instruction and limiting expenditure of public school funds to support of public schools:

> The school room is peculiarly an American institution. It is organized and kept free from sectarian or political influences.... *To surrender this [public school] system, and yield to a division of the school fund upon sectarian grounds, could only result in the destruction of the general plan for the education of the masses, and would lead, as it always has wherever tried, to the education of the few and the ignorance of the many.* This proposition is so self-evident, and experience has proved it so true, that it does not require argument.

Journal of the Ninth Legislative Assembly, at 32 (1877) (emphasis added).

¶ 116 Resolution of the 1875 school controversy was not, however, the final legislative word on sectarian influence in the public schools. In 1885, the Legislative Assembly revised the school laws to provide far more stringent protections. The first change was to amend the earlier proscription on sectarian instruction to read:

> No books, tracts or papers of a sectarian character shall be used in, or introduced into any school established under the provisions of this act, nor shall any sectarian doctrine be taught therein, *nor shall any school whatever under the control of any religious denomination, or which has not been taught in accordance with the provisions of this act, receive any*

> *of the public school funds, and upon satisfactory evidence of such violation the county school superintendent must withhold all apportionments of school moneys from said school.*

Act to Establish a Public School System and to provide for the maintenance and supervision of Public Schools in the Territory of Arizona § 84 (approved March 12, 1885) (emphasis added).

¶ 117 While this first amendment did little more than strengthen the existing proscription on sectarian influence in the public schools, a second legislative measure distinguished Arizona from the anti-Catholic bigotry pervading most of the nation on the church/school question. In contrast to the Blaine Amendment and constitutional amendments in states that discriminated against Catholics and promoted Protestantism through reading the King James Bible in schools, Arizona legislated against *all religious exercise:*

> Any teacher who shall *use any sectarian or denominational books or teach any sectarian doctrine, or conduct any religious exercises* in his school, or who shall fail to comply with any of the provisions mentioned in section 89 of this act, shall be deemed guilty of unprofessional conduct, and it shall be the duty of the proper authority to revoke his or her certificate, or diploma.

Id. § 93 (emphasis added). As noted in a United States Bureau of Education Report on Public School Education in Arizona:

> Every school law since that of 1871 had contained provisions against the introduction of tracts or papers of a sectarian character into the public school, also against the teaching of any sectarian doctrine in them. For some reason this was not believed to be drastic enough, and a section was added to the law which provided for revoking teachers' certificates for using in their schools sectarian or denominational books, for teaching in them any ****636 *303** sectarian doctrine, or for conducting any religious exercise therein. The lawmakers evidently aimed to relegate all religious teaching to the home and the church. *The prohibiting of "religious exercises" in schools has met with strong condemnation from many Protestant church members, but with the variety of religious creeds represented in the Territory it is doubtful whether a better policy could have been found.*

STEPHEN B. WEEKS, UNITED STATES BUREAU OF EDUCATION, HISTORY OF PUBLIC SCHOOL EDUCATION IN ARIZONA 55 (Bulletin No. 17, 1918) (quoting McCrea, *supra, in* BIENNIAL REPORT, at 121–22) (emphasis added). Thus, by 1885 Arizona had firmly demonstrated its commitment to the separation of church and state in education. Moreover, it had radically distinguished itself from most of the rest of the nation by extending its separationist commitment to preclude Protestant, Catholic, and all other religious influence in its public schools.

¶ 118 Arizona's continued commitment to church/state separation in education was next evinced in the 1891 Draft Constitution proposed as part of the statehood movement. Article VIII, § 3 stated:

> *All common schools, universities and other educational institutions,* for the support of which lands have been granted to the State, or *which are supported by a public tax, shall remain under the absolute and exclusive control of the State, and no money raised for the support of the public schools of the State shall be appropriated or used for the support of any educational institution, wholly, or in part, under sectarian or ecclesiastical control.* No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any books, papers, tracts, or documents of a political, sectarian or denominational

> character be used or introduced in any school established under the provisions of this Article.

Notably, the latter portion is copied practically verbatim from Arizona's longstanding legislation on the subject.

3. The 1910 constitutional convention

¶ 119 Unless we assume our convention delegates lived in isolation from the issues of the day and were ignorant of their recent past, the foregoing leaves little doubt about the separationist intent of the framers of article II, § 12 and article IX, § 10. We need not, however, infer the intent of those proscriptions solely from the history leading up to the convention. The events surrounding their enactment speak directly to the question.

¶ 120 The substance of the Arizona Constitution, like that of numerous other state constitutions, was not entirely under the framers' control. Arizona's admission into the Union was authorized by a federal enabling act. *See* 36 U.S. Stat. 568–79 (1910). Strict separation of church and state continued to be important to Congress at the time it passed the Arizona Enabling Act, and statehood was expressly conditioned on the "perfect toleration of religious sentiment." Arizona Enabling Act § 20, ¶ First. In addition, Congress required that "provisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said State and free from sectarian control." *Id.* ¶ Fourth. Further, "no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university." *Id.* § 26. Such conditions were common to several western states seeking admission to the union. *See* ROBERT LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846–1912 (1968); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution,* 15 HASTINGS CONST. L.QQ. 451, 458–69 (1988) (description of background and emotion surrounding Blaine Amendment and influence on wording of constitutions in emerging western states).

¶ 121 Numerous, and often repetitive, propositions bearing on religion and education were introduced, considered, and either ****637 *304** incorporated or rejected at our 1910 convention. As initially drafted, Proposition 15, which was the first dealing with education, contained a detailed proscription of state funding of sectarian schools and then substantially tracked the language of the 1891 Draft Constitution and prior legislation. It provided:

> Neither the Legislature or any county, city, town, township, school district or other public corporation shall ever make any appropriation or pay from any public fund or moneys whatever in aid of any church or sectarian or religious society, or any sectarian or religious purpose, or to help support or sustain any schools, academy, seminary, colleges, universities, or other literary or scientific institutions controlled by any church or sectarian or religious denomination whatsoever, nor shall any grants or donations of any lands, moneys or other personal property ever be made by the State or any other such public corporation to any church, or any sectarian or religious purpose.
>
> No ... teacher or student of any [public educational] institutions shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrine or doctrines shall ever be taught in public schools. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of the Legislature of the State of Arizona, nor shall any teacher of any district receive any of the public school money in which the schools have not been taught in accordance with the provisions of this section.

THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 (John S. Goff, ed.) (hereinafter RECORDS), Proposition 15, §§ 4 and 6, at 1065–66.

¶ 122 One day after the introduction of Proposition 15, delegate Crutchfield, a Methodist minister, introduced Proposition 41. Notably, Crutchfield's proposal differed from Proposition 15 in that it explicitly permitted nonsectarian religious instruction by omitting Proposition 15's proscription that "no teacher or student of any [public educational] institutions shall ever be required to attend or participate in any religious service whatever" and closing with a clause borrowed directly from the Blaine Amendment: "Provided, [t]hat nothing herein contained shall be interpreted as forbidding the reading of the Bible in the public schools." *Id.* at 1139.

¶ 123 Both Propositions 15 and 41 were referred to the Committee on Education. On November 14, the Committee recommended rejection of Proposition 41 and approval of a Substitute Proposition 15 that more concisely stated the

proscription on use of public funds for sectarian purposes: "[N]o public funds of any kind or character whatever, state, county or municipal, shall be used for sectarian purposes." *See id.* at 555, 1360, 1364–65. The convention eventually rejected Proposition 41 by postponing it indefinitely. *Id.* at 540. The majority is not correct, therefore, in stating that the convention transcripts "reveal almost nothing about the clauses in question." Op. at ¶ 58.

¶ 124 Thus far in the convention, no explicit discussion of state support of religion had taken place. On November 19, the only speech given on the issue was made by delegate William J. Morgan, a former territorial legislator from Navajo County. The *Arizona Gazette* reported his speech on tax exemption of church property as follows:

> He began his address by quoting from former President Grant, who said that if the evils resulting from the extensive acquisition of property by the churches were not corrected they would soon lead to trouble. General Grant in that famous argument said that with the growth of ecclesiastical property the time would probably come when sequestration would come about and that it would in all probability be attended by the shedding of blood.
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> * * *
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> Morgan argued for free speech, free thought and a free press[,] for the separation of church and state, for keeping the Bible out of the public schools, and for the taxation of all property. He quoted decisions of the supreme courts of Illinois and ****638** ***305** Wisconsin that the Bible is legally sectarian.
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> Arizona Gazette, Nov. 19, 1910, at 1.

¶ 125 While it is impossible to discern the precise effect of Morgan's strong words on the delegates, his speech nonetheless demonstrates that some of the delegates adhered to extreme views on separating church from state. More important, Morgan's statements referring to President Grant's calls for strict separation of church and state show the delegates' familiarity with the Blaine Amendment. *See id.* This, coupled with Morgan's calls to proscribe Bible reading in public schools, mirrors the strict separationist positions previously taken by the Legislative Assembly as evidenced, for example, by the 1885 school law proscribing all religious exercises.

¶ 126 Although Morgan's proposals to prohibit tax exemptions were ultimately rejected, his views on Bible reading were adopted. Crutchfield's Proposition 41 was killed only three days after Morgan's speech, and the amended Proposition 15 was adopted by the delegates. RECORDS, at 555.

B. Text and intent

¶ 127 From this record, it is clear the delegates sought to preserve strict separation of church and state in the public schools by excluding all religious exercise, consistent with Arizona's territorial history. In fact, Arizona's constitution far exceeds the Enabling Act's requirements. *Cf.* Utter & Larson, *supra,* 15 HASTINGS CONST. L.QQ. at 467–69 (discussing how the Washington clauses were adopted to effectuate Blaine agenda). In my view, the import of the framers' choice not to adopt Proposition 41's Bible-reading provisions is clear: Given the delegates' stance on religious exercise in the public schools and the breadth of Arizona's strong policy of refusing to fund private or sectarian education, the delegates clearly intended to prohibit state sponsorship or support of sectarian schools. They expressed this intent three times and in clear English. In article II, § 12: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." And in article 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." And in article XI, § 7: "No sectarian instruction shall be imparted in any school or State educational institution that may be established under this Constitution...."

¶ 128 Additional evidence of Arizona's separationist commitment is adduced from an examination of the Blaine clauses of the 1889 Washington Constitution, [14] after which much of the Arizona Constitution, especially article II, was modeled. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n,* 160 Ariz. 350, 356 n. 12, 773 P.2d 455, 461 n. 12 (1989). [15] Article I, § 11 of the Washington Constitution is in pertinent part identical to Arizona's article II, § 12. It is therefore safe to assume that our provision was borrowed. Thus, Washington cases interpreting their constitution are persuasive authority with respect to our constitution. *See* ****639** ***306** *Schultz v. City of Phoenix,* 18 Ariz. 35, 42, 156 P. 75, 77 (1916) (When clauses in the Washington Constitution are "very much like the same provisions" in our constitution, "we think the law announced by [the Washington

Supreme Court] is very persuasive."). The court does not tell us why we should abandon that rule, except to say that Washington and Arizona are different. Op. at ¶ 68, 70. No doubt this is true, but our constitutional text was extensively borrowed from Washington and our jurisprudence has always looked to Washington.

¶ 129 The Washington cases demonstrate that state's absolute proscription on any state support, direct or indirect, to secular education. *See Witters v. Washington Comm'n for the Blind,* 112 Wash.2d 363, 771 P.2d 1119 (1989) (financial vocational assistance to student who was pursuing a Bible studies degree violated state constitution); *Washington State Higher Educ. Assistance Auth. v. Graham,* 84 Wash.2d 813, 529 P.2d 1051 (1974) (state purchase of loans made to students at sectarian schools, while indirect and incidental, was unconstitutional attempt to circumvent provisions of state constitution forbidding any use of public funds to support sectarian schools); *Weiss v. Bruno,* 82 Wash.2d 199, 509 P.2d 973 (1973) (public funds for financial assistance to secondary and elementary students at nonpublic schools violates state constitution). As with Arizona's tax credit, none of these programs dealt with direct appropriation to schools.

¶ 130 Given the history of the Blaine Amendment, the stringent language of our constitution, the framers' indisputable desire to exceed the federal requirements, the Washington model, and the specificity of our constitution's proscription of state aid to private and secular schools, I think it is absolutely clear the constitution prohibits the tax credit at issue in this case. Leaving aside its facade and ingenious methodology, the Arizona tax credit grants a state subsidy to private and sectarian schools and thus violates both the text and the intent of our constitution.

¶ 131 The majority concedes the potential that the government subsidization of private schools may weaken the public school system. The wisdom of such policy making, it says, is a matter left to the Legislature. Op. at ¶ 63. But the history and text of Arizona's religion clauses make it clear that the delegates to the 1910 convention were well aware of the recent sectarian battles and the resulting Blaine Amendment and did not intend to give the Legislature the power to subsidize a private, sectarian school system.

¶ 132 Of course, if legislators wish to revive what is foreclosed by our constitutional history and text, they may propose a constitutional amendment. Should Arizona's citizens want to repeal our constitutional prohibitions, they may adopt such an amendment. But this court ought not destroy our framers' intent, which is exactly what it does by finding some distinction between direct appropriation and government-sponsored diversion of tax funds. Constitutional principle prevents the state from doing by indirection what the constitution forbids it to do directly.

C. Public money—deductions and credits

¶ 133 The majority next suggests an overly narrow interpretation of the term "public money" and concludes there is no constitutionally significant difference between a general tax deduction for a contribution to a private school and the Arizona tax credit. Op. at ¶ 38. I believe the majority is wrong on both counts.

1. Whether tax credits are public money

¶ 134 The majority argues that because the state lacks possession and immediate control of the tax credit funds, they are not public money. Op. at ¶¶ 36–38. The same can be said, of course, about funds in an escrow account that are payable to the state on closing, debts owed the state but not yet due and payable, taxes due (after all credits) but not yet paid, and innumerable other funds that are owed but have not yet reached the treasury. It is a dangerous doctrine that permits the state to divert money otherwise due the state treasury and apply it to uses forbidden by the state's constitution. But that, of course, is the exact result of today's decision.

****640** ***307** ¶ 135 The majority observes that neither the constitution nor the statutes explicitly define public money. Op. at ¶ 33. It then strains to extrapolate a definition of public money to be applied to the religion clauses from taxpayer standing cases such as *Grant v. Board of Regents,* 133 Ariz. 527, 652 P.2d 1374 (1982), and state tax forms. Op. at ¶¶ 34–36. The issue in Grant, however, was whether "a taxpayer can maintain an action to enjoin the wrongful expenditure of state funds where the funds in question are not raised by taxation or where the plaintiffs have not in some way contributed to them." 133 Ariz. at 529–30, 652 P.2d at 1376–77.

¶ 136 *Grant* and the other authorities the majority cites involve bureaucratic management and mismanagement of public finances, problems that can arise only when funds are in actual possession or control of state agencies. The definitions in those cases are irrelevant to cases involving state subsidies. If the court need infer a definition of public

money, we would be better to find it in the statutory provisions dealing with the precise matters at issue in this case.

¶ 137 The tax code does define public money when read in conjunction with legislative and executive branch implementation of our constitution. Article IX, § 4 provides that an "accurate statement of the receipts and expenditures of the *public money* shall be published annually, in such manner as shall be provided by law." (Emphasis added.) The Legislature has implemented this constitutional requirement:

> A. The director [of the Department of Revenue] shall be directly responsible to the governor for the direction, control and operation of the department and shall:
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> * * *
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> 4. In addition to the report required by paragraph 2 of this subsection, on or before November 15 of each year issue a written report to the governor and legislature detailing the approximate costs in lost revenue for all state tax expenditures in effect at the time of the report. For the purpose of this paragraph, *"tax expenditure"* means any tax provision in state law which exempts, in whole or in part, any persons, income, goods, services or property from the impact of established taxes including deductions, subtractions, exclusions, exemptions, allowances and *credits.*

A.R.S. § 42–105 (emphasis added). Thus, the Legislature clearly views the article IX, § 4 words "receipts and expenditures of public money" to embrace "tax expenditures," including tax credits.

¶ 138 The executive branch also views tax credits and deductions as "tax expenditures" similar to direct appropriations. Thus, in the annual report to the Legislature required by § 42–105, the Department of Revenue explains:

> *Tax expenditures are* provisions within the law (exemptions, exclusions, *deductions and credits*) that are designed to encourage certain kinds of activity or aid to taxpayers in certain categories. Such provisions, when enacted into law, result in a loss of tax revenues, thereby reducing the amount of revenues available for state (as well as local) programs. *In effect, the fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds.*

ARIZONA DEPARTMENT OF REVENUE, THE REVENUE IMPACT OF ARIZONA'S TAX EXPENDITURES 1 (May 1998) (emphasis added).

¶ 139 Legislative and executive branch determination that tax expenditures such as tax credits comprise public money, plainly comports with long established, fundamental principles of public finance.[16] *See, e.g.,* Stanley S. Surrey, *Tax Incentives as a Device for* ****641** ***308** *Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REVV. 705, 706 (1970) ("The term 'tax expenditure' has been used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives."). The majority debates our characterization of a tax credit as an expenditure of public money. Op. at ¶¶ 37–38, 40. But it is clear that the leading scholars in the field reject the majority's views. So also do Arizona's legislative and executive branches, charged with the power and responsibility to collect and spend public funds.

¶ 140 Courts throughout the country also are well aware that tax credits are expenditures of public money. The majority overlooks the great body of precedent dealing with the religion clauses. Other courts, state and federal, have long viewed "tax subsidies or tax expenditures [similar to Arizona's tax credit as] the practical equivalent of direct government grants." *Opinion of the Justices to the Senate,* 401 Mass. 1201, 514 N.E.2d 353, 355 (1987); *see also Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 236, 107 S.Ct. 1722, 1731, 95 L.Ed.2d 209 (1987) (Scalia, J. dissenting) ("Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' ") (quoting *Regan v. Taxation With Representation,* 461 U.S. 540, 544, 103 S.Ct. 1997, 2000, 76 L.Ed.2d 129 (1983)); *Nyquist,* 413 U.S. at 791, 93 S.Ct. at 2974 (money available through tax credit is charge made against state treasury; tax credit is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a certain act the state desires to encourage"); *Public Funds for Public Schools v. Byrne,* 444 F.Supp. 1228 (D.N.J.1978), *aff'd,* 590 F.2d 514 (3d Cir.1979); *Minnesota Civil Liberties Union v. Minnesota,* 302 Minn. 216, 224 N.W.2d 344 (1974), *cert. denied,* 421 U.S. 988, 95 S.Ct. 1990, 44 L.Ed.2d 477 (1975); *Curchin v. Missouri Indus. Dev. Board,* 722 S.W.2d 930, 933 (Mo.1987)

("tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state....").

¶ 141 Moreover, our own legislature leaves little question that it views the specific tax credit at issue in this case as a matter involving public funds. It requires that the "director of the department of revenue shall submit a report to the governor, the president of the senate and the speaker of the house of representatives regarding the *fiscal impact* of the tax credit provided for donations to school tuition organizations on July 1, 1999." Laws 1997, Ch. 48, § 4 (emphasis added).

¶ 142 Finally, the judicial wisdom of treating such tax expenditures as public money comports with one of the nation's most reputable experts on the subject:

> The U.S. Constitution and some statutory legislation impose restraints on the spending of government funds. Thus, under constitutional doctrines, the government may in general not engage in activities that are discriminatory in terms of race or sex, for example, or act without due regard for fair procedures and process. Direct government spending programs that involve such practices can be challenged in the courts. Private entities that receive significant support from government funds and engage in such practices are likewise subject to challenge. The question ... is whether these constitutional doctrines also apply to tax expenditure benefits and to private entities receiving them. Given that tax expenditures are government assistance programs, it would seem almost axiomatic that they should.

STANLEY S. SURREY AND PAUL R. MCDANIEL, TAX EXPENDITURES 118 (1985). The authors expressly consider whether "the grant of an income tax credit" to "parents of children who send their children to parochial schools" should be included among the numerous constitutional issues involving tax expenditures. Unsurprisingly, they conclude:

> Judicial cases involving constitutional or interpretative issues with regard to tax expenditures should be decided in the same manner as cases involving direct government ****642** ***309** spending programs. Given the federal government's own assertion that tax expenditures "can be viewed as alternatives to budget outlays, credit assistance or other policy instruments," and the " [tax] expenditures have objectives similar to those programs funded through direct appropriations," it is difficult to see how this position can be denied.

Id. at 154 (quoting U.S. Government, Special Analysis G, 203, 1981).

¶ 143 The majority argues that there is a real debate about whether tax credits constitute public funds. Op. at ¶ 41. This argument resurrects a discredited critique of the tax expenditure concept. The United States Supreme Court spoke on that dead school of thought recently, observing that the "wholesale rejection of tax expenditure analysis was short-lived and attracted few supporters. Rather, *the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies."* *Rosenberger v. Rector & Visitors,* 515 U.S. 819, 861 n. 5, 115 S.Ct. 2510, 2532 n. 5, 132 L.Ed.2d 700 (1995) (Thomas, J., concurring) (quoting Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making,* 28 WAKE FOREST L. REV. 855, 862 n. 30 (1993)) (emphasis added).

¶ 144 The majority in *Rosenberger* also makes it quite clear that the expenditure of funds that have not and will never enter the public treasury is nevertheless the use of public money subject to scrutiny under the federal Establishment Clause, a provision much less specific than our constitutional provisions. *Id.* at 842–43, 115 S.Ct. at 2523–24.

¶ 145 In sum, the majority's narrow interpretation of public money in a religion clause case is without precedential support and is contrary to academic and expert views as well as federal and state cases. Absent the taxing power, the money would not exist. In my estimation, the majority's attempt to support the credit with a comparison to valid tax deductions only makes the matter worse.

2. Deductions versus credits

¶ 146 The majority argues that Arizona's tax credit must be valid because there is no significant difference between it and long-recognized, valid tax deductions and credits. It fears that invalidating the private school tax credit "directly contradicts [Arizona's] decades-long acceptance" of charitable deductions and tax exemptions for churches and other religious institutions. Op. at ¶¶ 38, 43. I disagree.

¶ 147 There are very significant differences between valid tax benefits and the Arizona tax credit. The latter is not an inducement to charitable giving; there is no philanthropy at all because the credit provided is dollar-for-dollar. A taxpayer's $500 donation is rebated as a credit against the tax that otherwise would be paid to the state. It is a bottom-line reduction—money that *would,* in its entirety, go to the treasury.

¶ 148 Most of us do not enjoy paying taxes, and one would suspect that a large number of Arizonans faced with the choice of directing $500 to an STO supporting their favorite religious institution or to the tax collector would prefer the former, especially if there is a chance to make a profit.[17] Unlike a neutral deduction available for all charitable giving, the credit is not governmental encouragement of philanthropy. Instead, it is a direct government subsidy limited to supporting the very causes the state's constitution forbids the government to support.[18] ****643** ***310** Unlike neutral deductions, the credit is not the state's passive approval of taxpayers' general support of charitable institutions. Thus, there is no philanthropy here, no neutrality, and no limitation to secular use.

¶ 149 The majority argues that the Arizona tax credit is just one among many available credits. Op. at ¶ 15. This is true, but unlike valid tax credits, the private school tax credit supports an activity the constitution forbids the state to support. Other Arizona tax credits, such as those provided by §§ 43–1083 and 43–1084 (for installation of solar energy devices and purchase of agricultural water conservation systems), grant tax subsidies for programs the Legislature could support by direct appropriation if it so desired. As with the private school tax credit, the Legislature seeks by partial subsidization to encourage private action by Arizona's citizens. But the state constitution forbids subsidization of religious education, whether full or partial. As article II, § 12 says, "*No* public money ... shall be appropriated for or applied to any religious worship, exercise, or instruction...." (Emphasis added.) That prohibition is reinforced by article IX, § 10, which says, "*No* tax shall be laid or appropriation of public money made in aid of any ... private or sectarian school." (Emphasis added.)

¶ 150 At present, the subsidy is capped at $500, but there is no principled reason under the majority's analysis that the limit could not be increased to whatever sum the Legislature chooses until the state is, in effect, paying the full cost of private, sectarian education. Pragmatically, today's opinion simply writes article II, § 12 out of the state constitution.

¶ 151 There is no need for this. The framers' intent to forbid governmental aid to private or sectarian schools does not require proscription of all deductions or exemptions. We are squarely confronted with two fundamental axioms of constitutional interpretation. On the one hand "we are bound to uphold the Arizona Constitution, and the spirit and purpose of that instrument may not be defeated." *Selective Life Ins. Co. v. Equitable Life Assur. Soc.,* 101 Ariz. 594, 598, 422 P.2d 710, 714 (1967). On the other hand, as the majority recognizes, "in order to fulfill the original intent of the constitution, [its provisions] must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past." *Community Council v. Jordan,* 102 Ariz. 448, 454, 432 P.2d 460, 466 (1967).[19] In balancing these considerations, we need not subscribe to an absolutist position that offends historical practices recognized since statehood or to a position that ignores the obvious and imperative text and intent of the state constitution. There is a middle road that accounts for both considerations.

****644** ***311** ¶ 152 The framers had no specific intent to invalidate generalized charitable tax deductions for grants to private and sectarian schools. As shown by their treatment of Morgan's exemption proposition, they intended to continue the practice of property tax exemptions for charitable institutions, including churches and religious schools. *See* article IX, § 2. At the time our constitution was written there was no income tax, state or federal, and no deductions to worry about. Since the 1913 adoption of the Sixteenth Amendment to the federal constitution and subsequent imposition of federal and state income taxes, a historical acceptance has grown around deductions for generalized charitable giving, much like that recognized for exemptions under the state and federal constitutions. *Walz v. Tax Comm'n,* 397 U.S. 664, 669–70, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).[20] There is no need to fear that invalidation

of the Arizona tax credit will upset the apple cart and invalidate tax exemptions and deductions for charitable giving to churches, private and religious schools, and similar institutions. The historical practice of allowing such benefits as part of the state's encouragement of general philanthropy, combined with a neutral program providing such benefits for contributions to all charitable, nonprofit endeavors, does not offend the constitution. The Arizona tax credit, however, is available only for grants to predominantly religious institutions. General deductions and exemptions are but two of many philanthropic private choices taxpayers may make as an accepted element of contemporary democracy.[21] The tax credit is simply a badly disguised end-run around the state constitution. It is as invalid as a statute limiting charitable deductions only to contributions to religious organizations.

¶ 153 Indeed, it is quite likely that prohibiting deductions for charitable contributions to religious institutions or schools when such deductions are generally permitted for contributions to all types of other charitable institutions would discriminate against religion and thus violate the Free Exercise Clause of the First Amendment. *Rosenberger,* 515 U.S. at 849–51, 115 S.Ct. at 2526–28 (O'Connor, J., concurring); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar,* 454 U.S. at 274, 102 S.Ct. at 277.

****645 *312 D. Article IX, § 10 and the laying of taxes**

¶ 154 In two brief paragraphs, the majority asserts that article IX, § 10, which states that no tax should be "laid ... in aid of any church, or private or sectarian school, ..." is inapplicable because a "tax credit is not an appropriation of public money.... To the contrary, this measure *reduces* the tax liability of those choosing to donate to STOs." Op. at ¶¶ 49, 50 (emphasis in original).

¶ 155 I cannot agree. The majority does not tell us how one can obtain a credit against a tax unless the tax is first laid. The school tax credit is an offset against taxes otherwise due and owing, as the statute itself describes it. *See* § 43–1089(B) (unused tax credits in any particular year may "offset" future taxes). The aid to private schools comes from a tax that was laid and imposed. Absent the state's levy of a tax, there would be nothing to offset and consequently no credit. Article IX, § 10 applies.

CONCLUSION

¶ 156 We are all free to use *our* money to support any religious institution of *our* choice. Under the Free Exercise Clause, the government cannot prevent us from making that choice. It may passively encourage such philanthropy as part of a scheme of using tax benefits to support charitable giving of all types—to religious, nonreligious, educational, social service, and all the other institutions that qualify for deductions. So long as the tax benefits are general and neutral, they may be allowed even though some of the institutions supported are those the government is prohibited from assisting by direct grants or subsidies.

¶ 157 But the Arizona tax credit is quite different. It is directed so that it supports only the specific educational institutions the Arizona Constitution prohibits the state from supporting —predominantly religious schools. By reimbursing its taxpayers on a dollar-for-dollar basis the state excuses them from paying part of their taxes, but only if the taxpayers send their money to schools that are private and predominantly religious, where the money may be used to support religious instruction and observance. If the state and federal religion clauses permit this, what will they prohibit? Evidently the court's answer is that nothing short of direct legislative appropriation for religious institutions is prohibited. If that answer stands, this state and every other will be able to use the taxing power to direct unrestricted aid to support religious instruction and observance, thus destroying any pretense of separation of church and state.

¶ 158 I disagree for the reasons stated and respectfully dissent.

MOELLER, J. (Retired), concurs.

All Citations

193 Ariz. 273, 972 P.2d 606, 132 Ed. Law Rep. 938, 288 Ariz. Adv. Rep. 5

Footnotes

1 *See Board of Educ. v. Grumet,* 512 U.S. 687, 705, 114 S.Ct. 2481, 2492, 129 L.Ed.2d 546 (1994) (finding creation of special school district for religious enclave violated "the requirement of government neutrality"); *Lee v. Weisman,* 505 U.S. 577, 586–87, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) (holding that graduation benedictions in public schools coerce support for religion); *Wallace v. Jaffree,* 472 U.S. 38, 69–70, 105 S.Ct. 2479, 2496–97, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring) (setting forth the "endorsement test").

2 To qualify for § 501(c)(3) status an entity must be "organized and operated exclusively" for certain statutorily defined purposes. 26 U.S.C. § 501(c)(3). These include "religious, charitable [and] scientific" as well as "literary, or educational purposes." *Id.* The Supreme Court has determined that "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." *Davis v. United States,* 495 U.S. 472, 482–83, 110 S.Ct. 2014, 2021, 109 L.Ed.2d 457 (1990) (quoting *Bob Jones Univ. v. United States,* 461 U.S. 574, 588, 103 S.Ct. 2017, 2026, 76 L.Ed.2d 157 (1983)). Consequently, under both federal and state law, organizations unabashedly devoted to promoting religion—churches and other religious institutions—enjoy a number of direct economic tax benefits. These organizations escape income taxes, *see* A.R.S. § 43–1201(4), (11), and are not required to file returns, *see* A.R.S. § 43–1242. Taxpayers who donate to them can deduct the contributions from their federal and state income taxes. *See* 26 U.S.C. § 170; A.R.S. § 43–1042(A). Additionally, many of these organizations are exempt from property taxes, *see* Ariz. Const. art. IX, § 2(2), a direct government benefit which has long been held nonviolative of the Establishment Clause. *See Walz,* 397 U.S. at 672–73, 90 S.Ct. at 1413–14.

3 The dissent believes that limits must be placed on the uses to which schools may put tuition money coming from STOs. *Infra* at ¶ 94. But *Mueller* itself, while disallowing a tax deduction for the cost of textbooks used for religious instruction, placed no restriction on the uses to which the schools could put tuition payments qualifying for the deduction. *See* 463 U.S. at 390 n. 1, 103 S.Ct. at 3064 n. 1. In addition, the statute in *Mueller* contained no "opt out" provision or requirement that schools admit students without regard to religion, features that our dissenting colleague finds so critical in *Jackson. Infra* at ¶ 99. Our tax credit statute is more like the tax deduction in *Mueller* than the voucher program in *Jackson.* Even in *Jackson,* however, no limits were placed on the uses to which the recipient schools could put the state aid. 578 N.W.2d at 609.

4 This statement, like so many others in the dissent, wrongly gives the impression that private schools, rather than scholarship recipients, are the primary beneficiaries of contributions.

5 This occurs at Line 26, Arizona Form 140, Resident Personal Income Tax 1997. But we note that the amount finally owed by the taxpayer does not appear until Line 55.

6 As previously noted, it can be argued that state ownership does not arise until funds actually enter the state's possession. However, we need not make that determination here.

7 Of course, as is true in any area of intellectual discourse, many other competing theories exist. In economics these days, three of the most prominent are the comprehensive tax base approach, optimal tax theory, and fiscal exchange or public choice theory. *See* Livingston, *supra,* at 381–83.

8 Or even legislative decision-making, for that matter. "The grant of dollars through the tax system is not widely perceived in Congress as a disbursement of public funds." Allen Schick, *Congress and Money: Budgeting, Spending and Taxing* 550 (1980).

9 The dissent relies on a one-justice concurring opinion in arguing that a contrary view has been adopted by the Supreme Court. *Infra* at ¶ 143.

10 *See* Alaska Const. art. VII, § 1; Cal. Const. art. XVI, § 5; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, para. 7; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Ind. Const. art. I, § 6; Mass. Const. amend. art. XVIII, § 2; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; Miss. Const. art. VIII, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; N.H. Const. Pt. II, art. 83; N.Y. Const. art. XI, § 3; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 29; S.C. Const. art. XI, § 4; S.D. Const. art. VI, § 3; Tex. Const. art. I, § 7; Utah Const. arts. I, § 4 and X, § 9; Va. Const. art. IV, § 16; Wash. Const. art. I, § 11; Wis. Const. art. I, § 18; Wyo. Const. art. I, § 19.

11 Several congressmen continued to propose similar constitutional amendments through 1888. *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution: A Proposal to the Supreme Court,* 8 U. PUGET SOUND L. REV. 411, 433 n. 115 (1985). From 1889 on, the Blaine agenda was advanced in Congress by inserting requirements in the enabling acts for prospective states that church/state separation clauses be included in the constitutions of newly admitted states. *See id.* at 433.

12 In 1871, St. Joseph's Academy, a private girls' school, was the only school operating in Tucson. The first public school did not open until 1872. WAGONER, *supra,* at 70, 107.

13 According to McCrea, when Arizona decided against public support of private sectarian education it "then and there parted from New Mexico in educational policy." McCrea, *supra, in* BIENNIAL REPORT, at 96. The contrast with New Mexico is as striking as it is illuminating. In New Mexico, the Catholic Church dominated education, and attempts to secularize the schools via the 1889 draft constitution were in large part responsible for the failure to ratify that constitution. *See* ROBERT W. LARSON , NEW MEXICO'S QUEST FOR STATEHOOD 1846–1912, at 125, 159–68 (1968).

14 Utter & Larson, *supra,* 15 HASTINGS CONST. L.QQ. at 468–69. The majority argues that we should give little heed to Washington's constitutional provisions, even though they are identical to ours, and less to Washington's decisions on this subject, even though we have many times indicated that decisions from Washington's courts with respect to our constitutional provisions will be given great weight. Op. at ¶¶ 68, 70. But Washington's clauses, like Arizona's, came from the national debate described above and reflect a common view of the prohibition on using public funds to promote any sectarian instruction. *Id.*

15 *See Roosevelt Elem. Sch. Dist. v. Bishop,* 179 Ariz. 233, 247 & n. 4, 877 P.2d 806, 820 & n. 4 (1994) (Feldman, J., concurring) ("our delegates routinely borrowed provisions from the Washington Constitution,") (citing *Mohave County v. Stephens,* 17 Ariz. 165, 170–71, 149 P. 670, 672 (1915) ("section 4, art. 6 of our Constitution is taken almost word for word from the Washington Constitution"); *Faires v. Frohmiller,* 49 Ariz. 366, 371, 67 P.2d 470, 472 (1937) (as "far as its judicial features were concerned," the Arizona Constitution was evidently modeled on similar provisions" in the Washington Constitution); *Desert Waters, Inc. v. Superior Court,* 91 Ariz. 163, 166, 370 P.2d 652, 654 (1962) (Arizona constitutional clause against uncompensated taking of private property "was adopted from the constitution of Washington")).

16 Note, however, that there is a difference between deductions and credits. A progressive income tax "must tax only net income if its taxable base is to have some relationship to a taxpayer's ability to pay, a goal we [seek]. The income tax system requires a particular class of deductions or exclusions to prevent its taxing gross receipts (a base that is unrelated to the taxpayer's ability to pay). For example, exclusions for capital recoveries and deductions for costs of production are needed to secure an accurate measure of net income. Such deductions and exclusions, properly timed, help refine the net income concept and are called 'normative'

provisions, not tax expenditures." Bernard Wolfman, *Tax Expenditures: From Idea to Ideology,* 99 HARV. L. REVV. 491, 491–92 (1985).

17 Arizonans may well make a profit on the tax credit. After a taxpayer has contributed to the STO and received a dollar-for-dollar refund from the Arizona Department of Revenue, nothing in the Internal Revenue Code prevents him or her from reporting the contribution as a charitable deduction on the federal income tax return. The taxpayer cannot do so on the state return because § 43–1089(C) states that the credit is "in lieu of any deduction pursuant to section 170 of the Internal Revenue Code and taken for state tax purpose." However, the Internal Revenue Code has no similar provision.

18 It is interesting to note the degree of governmental encouragement provided by deductions compared to that provided by credits. Under § 43–1089, a couple with an income of $60,000 per year sending $500 to an STO would receive a tax credit of $500 and would thus save $500 in taxes. The "contribution" would cost them nothing. The same couple contributing to almost any other qualified philanthropic cause would receive a deduction from gross income. To reduce their state taxes by $500, that couple would need to contribute approximately $13,000. *See* Tax Tables, Arizona Department of Revenue, 1998.

19 The majority finds specific support in *Community Council.* Op. at ¶¶ 45, 57–58. *Community Council* is not on point. It holds that the state may reimburse a community council for its "direct financial aid [to the indigent] in emergency situations" without violating the Arizona Constitution, even though the Salvation Army, a religious organization, was the central agency through which the aid was disbursed and the Phoenix Council of Churches participated in choosing the disbursement agency. 102 Ariz. at 450–51, 432 P.2d at 462–63. But in *Community Council* the ultimate recipients of aid were the impoverished persons, not religious organizations, as is the situation in the case before us. In *Community Council* neither the Council's initial contributions nor the state's reimbursements were used to further sectarian observance or instruction but, rather, to provide a form of welfare assistance. This, of course, is something for which the Legislature could have made a direct appropriation. I have no quarrel with *Community Council.* It would be a strange rule indeed that would prevent the state from utilizing the beneficial services of religious organizations to help the needy or to accomplish any other goal perceived as worthwhile and not prohibited by the constitution. The constitution does not require government to sever contact with religious institutions or to dispense with their help. It does prohibit providing them with the money with which to instruct in and inculcate their religious beliefs. In the present case, unlike *Community Council,* the money does not pass through the religious institution to help the needy. Instead, it stays in the religious organizations, where it may be used for religious instruction and observance for all, rich and poor.

20 *Walz* speaks to the historical acceptance of exemptions for religious institutions:

> All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax.... Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally *so long as none was favored* over others and none suffered interference.

Id. at 676–77, 90 S.Ct. at 1415 (emphasis added) (footnote omitted).

> [A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: 'If a thing has been practised for two hundred years by common consent, it will need a

> strong case for the Fourteenth Amendment to affect it....' Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S.Ct. 9, 10, 67 L.Ed. 107 (1922).

Id. at 678, 90 S.Ct. at 1416.

21 Again, the analogy to exemptions is useful. *Walz* establishes the constitutionality of exemptions due to their neutrality toward religion, using words quite applicable to deductions, credits, and other tax benefits:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship *within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.* The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.

397 U.S. at 672–73, 90 S.Ct. at 1413.

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228 F.3d 729
United States Court of Appeals,
Sixth Circuit.

Mary Elizabeth LEARY; Glenda H. Williams,
Plaintiffs–Appellants/Cross–Appellees,
v.
Stephen W. DAESCHNER, Superintendent
of the Jefferson County Board of Education,
Defendant–Appellee/Cross–Appellant.

Nos. 99–6267, 99–6266.
|
Argued: Aug. 1, 2000
|
Decided and Filed: Sept. 20, 2000

Synopsis

Elementary school teachers brought civil rights action against superintendent of the county board of education, alleging that they were transferred to another school in retaliation for exercising their First Amendment rights, and that they were not afforded due process in connection with the transfer. The United States District Court for the Western District of Kentucky, Charles R. Simpson III, Chief Judge, denied preliminary injunction based on teachers' First Amendment claim, and, after initially enjoining superintendent from transferring teachers until they had received due process, the District Court then found that school had provided sufficient process and it dissolved the injunction. Teachers appealed, and superintendent cross-appealed. The Court of Appeals, Moore, Circuit Judge, held that: (1) district court did not clearly err in its finding that, for purposes of preliminary injunction, teachers failed to make sufficient showing that their transfer was motivated by their protected speech, and therefore that teachers had not shown a strong likelihood of success on the merits; (2) collective bargaining agreement (CBA) between school board and teachers' union created property interest for teachers in their positions at elementary school, for due process purposes; (3) teachers were entitled to predeprivation hearing before being transferred; and (4) predeprivation hearing ultimately provided by school board was sufficient to satisfy dictates of due process, and district court did not abuse its discretion in refusing to require further predeprivation process by extending its preliminary injunction.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

***733** Daniel T. Taylor III (argued and briefed), Louisville, Kentucky, for Appellants.

Michael Keith Kirk (argued and briefed), Denise L. St. Clair (briefed), Wyatt, Tarrant & Combs, Louisville, Kentucky, for Appellee.

Before: MOORE and CLAY, Circuit Judges; HOOD,* District Judge.

OPINION

MOORE, Circuit Judge.

Plaintiffs-appellants and cross-appellees Mary Elizabeth Leary and Glenda H. Williams ("plaintiffs") were teachers at the Atkinson Elementary School ("Atkinson"), a public school in Jefferson County, Kentucky. At the end of the 1998–99 school year, they were involuntarily transferred to another school within the school district. Alleging that they were transferred in retaliation for exercising their First Amendment rights and that they were not afforded due process in connection with the transfer, the plaintiffs brought the instant suit under 42 U.S.C. § 1983 against defendant-appellee and cross-appellant Stephen W. Daeschner, the Superintendent of the Jefferson County Board of Education, seeking a preliminary injunction preventing ***734** the school district from completing the transfer. The district court denied the plaintiffs' motion for preliminary injunction based on their First Amendment claim but enjoined Daeschner from transferring the plaintiffs until they had received due process. Three days later, the district court dissolved the injunction, finding that the school had provided sufficient process to the plaintiffs in the time since the court's original order. The plaintiffs then brought this appeal, claiming that the district court abused its discretion in denying a preliminary injunction on their First Amendment claims and in finding that the plaintiffs had been afforded due process. Daeschner cross-appealed, claiming that the district court's original determination that the plaintiffs were entitled to due process was in error. For the reasons discussed below, we **AFFIRM** all of the district court's rulings.

I. BACKGROUND

Mary Elizabeth Leary and Glenda H. Williams were long-time special education teachers at the Atkinson Elementary School, a public school in Jefferson County, Kentucky.[1] Atkinson, the undisputed evidence shows, is a highly troubled elementary school, producing some of the lowest student test scores in the state of Kentucky. In fact, Atkinson was identified by the state as a school "in decline." Moreover, the school has a reputation for being an unpleasant place to work: testimony presented to the district court suggested that Atkinson has had great difficulty in getting qualified individuals to accept and keep the job of principal, due in part to the tense relationship between Atkinson faculty and administration. In addition, several teachers testified that student discipline was a significant problem.

Due to Atkinson's poor academic achievement level, the school qualified under the Kentucky Education Reform Act to receive the assistance of a Distinguished Educator, or "Highly Skilled Educator," an employee of the school district who specializes in aiding troubled schools. Atkinson's Distinguished Educator was Nancy Bowlds, who arrived at the school in August 1998. Bowlds conducted a number of meetings, communicated with teachers and administrators, and worked closely with the then-principal of Atkinson, LeDita Howard, in order to devise an improvement plan for the school. Ultimately, it was decided that a "collaborative model" of education was the preferable one, and Howard formally presented the idea to the Atkinson faculty, where it met with some resistance. Shortly thereafter, in approximately May of 1999, the decision was made to transfer some of the teachers from Atkinson to another school, purportedly in order to ensure that the faculty would primarily consist of teachers who were in favor of implementing the proposed changes, and partly also in hopes of changing the overall climate at the school through a change of personnel. The unrefuted testimony of the defendant's witnesses indicates that the idea of transferring personnel was initiated by district-level administrators William Eckels, the Executive Director of Human Resources, and Dr. Freda Meriweather, the Assistant Superintendent for District–Wide Instruction, with the approval of Superintendent Stephen Daeschner.

Once the decision was taken to transfer some teachers, Meriweather asked Howard and Bowlds to suggest the names of teachers who would be most likely to resist or impede the impending changes at Atkinson. Bowlds's list contained both Leary's and Williams's names, but Howard's did not contain either. Meriweather compared the lists and asked Howard whether she would agree with Bowlds's identification of Leary and Williams as ***735** prospects for transfer. Howard agreed. Neither Meriweather nor Eckels personally knew very much about the plaintiffs, but rather relied entirely on the advice of Howard and Bowlds. Ultimately, five teachers and one security monitor were given notice that they would be transferred out of the Atkinson school. Williams and Leary received letters on May 29, 1999, and June 1, 1999, respectively—the last days of the school year—informing them that they would be transferred pursuant to section D of the collective bargaining agreement (CBA) between the Jefferson County Board of Education and the Jefferson County Teachers' Association (JCTA). It is undisputed that the plaintiffs were given no prior notice of the decision and no reason for the transfer, except that it was "for good cause and extenuating circumstances" and "necessary for the efficient operation of the school district," which is the language of Section D.[2] Nor were the plaintiffs given an opportunity to be heard, except that they had the opportunity to grieve the decision through the process set out in the CBA.

Leary and Williams presented substantial evidence to the district court showing that they had been highly vocal on a number of occasions in criticizing various aspects of the management of the Atkinson school and that they were considered "leaders" among the faculty in this respect. In early 1997, Leary was involved in presenting complaints —and ultimately a petition—to the School–Based Decision Making Committee, a sort of mini-school board that consisted of Atkinson employees and governed Atkinson alone, regarding the school's handling of student discipline. Leary had also been particularly critical of the changes to the ECE program proposed by Bowlds and the rest of the administration in the spring of 1999, suggesting that the changes could put the school in violation of the law. Furthermore, Williams was a teachers' union (JCTA) representative and therefore had voiced a number of concerns over the years to Howard on behalf of other teachers—as often as every two weeks, according to Howard.

The defense witnesses gave reasons for transferring the plaintiffs that were unrelated to the plaintiffs' vocal criticism of school policy, however. Bowlds testified that she believed that Leary and Williams had leadership problems and were not "team players." She claimed that both plaintiffs had failed to attend the meetings of certain committees that they were involved with. Bowlds also noted that Leary had a propensity

for yelling at students and colleagues alike. Bowlds admitted that her problems with the plaintiffs were not related to the plaintiffs' competence in the classroom, and in fact, that she had not even reviewed the plaintiffs' (uncontrovertedly positive) job evaluations before designating them for transfer. Howards testified that Leary had explicitly indicated her unwillingness to adopt the "collaborative model" in her classroom and agreed that Leary was not a "team player." J.A. at 199–200 (Howard Test.). Howard had similar things to say about Williams, and further complained that Williams had continually questioned Howard's authority. At one point during her deposition, Howard conceded that Leary was probably transferred because of her speaking out on various issues and because of "other things," but then immediately backtracked from this testimony. J.A. at 199–202.

The plaintiffs filed suit on July 16, 1999, in the U.S. District Court for the Western District of Kentucky, alleging that school board superintendent Stephen Daeschner had violated their rights to free speech in violation of the First and Fourteenth Amendments to the U.S. Constitution and their rights to procedural due process, in ***736** violation of the Fourteenth Amendment. They requested preliminary and permanent injunctive relief as well as declaratory relief. The district court held hearings on August 5, 6, 12, and 13, in order to attempt to resolve the matter of the preliminary injunction before the Atkinson students were scheduled to return to school on August 17, 1999. On August 13, 1999, the district court orally ruled against the plaintiffs on their First Amendment claim but found that they were entitled to more process than they had received before their transfer was effected. Therefore, the district court enjoined the school board from transferring Leary and Williams until they had been afforded "notice of the proposed transfer, a statement of the reasons [therefor], and an opportunity to be heard." J.A. at 379–81 (Tr. of Hr'g).

On the morning of August 16, 1999, Leary and Williams were given written notice of their transfer, which listed several reasons for the transfer and gave them the opportunity to respond to those reasons at hearings scheduled for 12:00 p.m. and 1:00 p.m. that day, respectively. On the advice of counsel, the plaintiffs declined to participate in those hearings. Instead, the plaintiffs filed a "Motion in Furtherance of Preliminary Injunction; and for Order of Contempt in Regard to Superintendent Stephen W. Daeschner," arguing that the school board had acted in violation of the court's order by refusing to reinstate the plaintiffs to their previous positions. J.A. at 38 (Pls.' Mot. in Furtherance of Prelim. Inj. and for Order of Contempt). The district court held a telephonic hearing that day with two counsel for the defendant and one of the plaintiffs' counsel, since the other plaintiffs' counsel could not be reached. The district court determined that the plaintiffs had been afforded all the process that they were due and had waived their due process rights by refusing to attend the hearing. The court found no problem with the manner in which the hearing was provided to the plaintiffs by the school board, given the exigent circumstances created by the imminent start of the school year. The district court thereby, in effect, dissolved its prior injunction. This timely appeal followed. The defendants also cross-appealed the district court's original ruling in favor of the plaintiffs on their due process claim.

II. ANALYSIS

A. Preliminary Injunction Standard

When deciding whether to issue a preliminary injunction, the district court considers the following four factors:

> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir.1997) (en banc) (quoting *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1030 (6th Cir.1995)). These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir.1998); *McPherson,* 119 F.3d at 459.

This court reviews the district court's decision for an abuse of discretion. *See McPherson,* 119 F.3d at 459. Thus, "the district court's 'weighing and balancing of the equities of a particular case is overruled only in the rarest of cases.' " *Id.* (quoting *Sandison,* 64 F.3d at 1030). Moreover, the district court's

factual findings must be clearly erroneous in order for this court to find that it abused its discretion. *See UFCW,* 163 F.3d at 347. If pure legal conclusions are involved in the district court's determination, however, those ***737** conclusions are subject to de novo review. *See McPherson,* 119 F.3d at 459.

B. First Amendment Retaliation Claim

A public employee who would succeed on a claim of retaliation in violation of the First Amendment must demonstrate

> (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir.1998); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). If the plaintiff makes this showing, the burden then shifts to the defendant to show by a preponderance of the evidence "that it would have taken the same action even in the absence of the protected conduct." *Jackson v. Leighton,* 168 F.3d 903, 909 (6th Cir.1999) (quotation omitted); *see also Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. 568.

When the plaintiff is a public employee, she must make additional showings to demonstrate that her conduct was protected. First, the employee must show that her speech touched on matters of public concern. *See Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Second, the employee's interest "in commenting upon matters of public concern" must be found to outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *see Connick,* 461 U.S. at 149–52, 103 S.Ct. 1684; *Boger v. Wayne County,* 950 F.2d 316, 322 (6th Cir.1991). Whether the plaintiff's speech constituted protected conduct is a question of law, reviewed by this court de novo. *See Connick,* 461 U.S. at 148 n. 7, 103 S.Ct. 1684; *Langford v. Lane,* 921 F.2d 677, 680 (6th Cir.1991).

The district court found that, although the plaintiffs' speech was largely on matters of public concern and therefore constituted protected speech under the First Amendment, the plaintiffs had failed to show that their speech was a substantial or motivating factor in the decision to transfer them. Concluding that the plaintiffs did not show a likelihood of success on the merits, the district court refused to grant a preliminary injunction on this basis.

1. Protected Activity

As the district court found, the vast majority of the plaintiffs' speech involved matters of public concern. The subjects of student discipline and the appropriate educational program to be implemented are undoubtedly matters of concern to the community at large. *See Jackson,* 168 F.3d at 910 (describing matters of public concern as matters of "political, social, or other concern to the community" (quoting *Connick,* 461 U.S. at 146, 103 S.Ct. 1684)). Leary's comments suggesting that the proposed educational changes would result in violations of the law, moreover, are undoubtedly of the highest public concern, since they hint at possible wrongdoing by public officials. *Cf. Bloch,* 156 F.3d at 678 ("The First Amendment clearly protects the Blochs' right to criticize Ribar in his role as a public official."); *Barnes v. McDowell,* 848 F.2d 725, 734 (6th Cir.1988) (noting that charges of public corruption are entitled to constitutional protection), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 780 (1989).

Determining whether the plaintiffs' interest in speaking outweighed the school district's interest in performing its function efficiently requires a "particularized balancing" of the various interests at stake, and if an employee's speech "substantially involved matters of public concern," an employer may be required to ***738** make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action. *Connick,* 461 U.S. at 150–52, 103 S.Ct. 1684. In the plaintiffs' favor, as noted above, is the fact that most of their speech unquestionably involved important matters of great public concern. In Daeschner's favor, however, is the fact that the Atkinson school was undoubtedly in a state of near-crisis, and radical and decisive action appeared to be required in order to improve the school's functioning; thus, the school board's interest in performing its function efficiently was particularly strong. Adding to the strength of Daeschner's case is evidence suggesting that the plaintiffs' speech was often

conducted in a disruptive manner. For example, Leary was known to "yell" at her colleagues, and Williams apparently visited Howard quite often and consistently questioned her authority as principal. *See Connick,* 461 U.S. at 154, 103 S.Ct. 1684 (holding that the First Amendment does not require an employer to "tolerate action which he reasonably believed would disrupt the office, *undermine his authority,* and destroy close working relationships" (emphasis added)); *McGill v. Board of Educ.,* 602 F.2d 774, 777 (7th Cir.1979); *cf. Pickering,* 391 U.S. at 572–73, 88 S.Ct. 1731 (noting that the employer school's interest in limiting a teacher's speech is not great when those public statements "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally") (footnote omitted). Finally, to the extent that the plaintiffs' speech occurred in private—such as in the principal's office, or informally within the walls of the school—the potentially disruptive manner of that speech again weighs in favor of the school board's interest in limiting it. *See Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410, 415 n. 4, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) (noting that the time, manner, and place in which private speech is delivered may be a significant factor in the determination whether the employer's efficiency is threatened by that speech).

On balance, however, the plaintiffs' speaking out on discipline, choice of educational approaches, and potential violations of the law by the school district is of sufficient public importance to outweigh the employer's interest in limiting that speech. Moreover, the school board has essentially conceded the point. *See* Appellee's Br. at 26. Thus, we hold that the plaintiffs' speech was protected by the First Amendment.

2. Adverse Action

The school board does not dispute that the involuntary transfer of the plaintiffs would have a sufficient chilling effect to qualify as an adverse action under the First Amendment retaliation analysis. *See* Appellee's Br. at 26. This position is supported by our case law. *See, e.g., Boger,* 950 F.2d at 321–23.

3. Motivating Factor

The most problematic aspect of the plaintiffs' First Amendment claim is showing that their speech was a substantial or motivating factor in the decision to transfer them. The district court found that the plaintiffs did not make a sufficient showing that their transfer was so motivated for two reasons. First, the court noted that Howard had decided to leave her position as principal of Atkinson shortly before the transfers were arranged; therefore, the court concluded, Howard would have little incentive to get the plaintiffs out of her way if she was not staying at Atkinson. Second, the court noted that the various incidents of protected speech occurred over a period of several years, which weakened the inference of retaliation or causation. Furthermore, it appears that the district court credited the testimony of Bowlds and Howard as to the reasons for the plaintiffs' transfer. The district court's conclusion regarding causation concerns ***739** a question of fact and is therefore reviewed by this court for clear error. *See Langford,* 921 F.2d at 680.

The plaintiffs advance numerous reasons why the district court's conclusion is faulty. Primarily, they take issue with the district court's interpretation of the facts, arguing, for example, that the remoteness in time between the plaintiffs' speech and the alleged retaliation is due to the fact that Howard and Bowlds had no real opportunity to retaliate against the plaintiffs before then. Moreover, they question the speculative logic of the district court's finding that Howard had no motive to retaliate against the plaintiffs because she was leaving. Finally, the plaintiffs point to copious evidence that could suggest that Bowlds's and Howard's asserted reasons for marking them for transfer were pretextual, including, *inter alia,* the plaintiffs' consistently high performance evaluations.

The question whether the plaintiffs' speech was a motivating factor in Bowlds's and Howard's decision to recommend them for transfer is a close one. We note that the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, for example, and we therefore express no opinion as to the ultimate merits of the plaintiffs' case. *See generally Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 818–19 (4th Cir.1991) (observing that the standard for obtaining a preliminary injunction is higher than the standard for surviving summary judgment); *William G. Wilcox, D.O., P.C. Employees' Defined Benefit Pension Trust v. United States,* 888 F.2d 1111, 1114 (6th Cir.1989) (noting that "a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits"); *National Wildlife Fed'n v. Burford,* 878 F.2d 422, 432 (D.C.Cir.1989) ("To obtain a preliminary injunction, [the plaintiff] not only had to demonstrate specific harm, but also carry the *burden of*

persuasion, showing a likelihood of success on the merits. On a motion for summary judgment, a plaintiff need only create a jury issue."), *rev'd on other grounds sub nom. Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). This is because the preliminary injunction is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel,* 952 F.2d at 811 (quotation omitted) (alteration in original); *see also Stenberg v. Cheker Oil Co.,* 573 F.2d 921, 925 (6th Cir.1978). Moreover, the standard of review that this court must apply to the district court's findings on a preliminary injunction motion is highly deferential. *See UFCW,* 163 F.3d at 347; *McPherson,* 119 F.3d at 459. Thus, we do not decide whether we would grant a preliminary injunction if we were acting in the place of the district court, nor do we decide whether summary judgment is appropriate. Rather, given the closeness of the question, and the fact that the plaintiffs' arguments, while shedding some doubt on the district court's interpretation of the facts, do not show the district court's factual findings to be clearly erroneous, we affirm the district court's conclusion that the plaintiffs have not, for the purpose of the preliminary injunction, shown that the plaintiffs' transfer was motivated by their protected speech, and therefore that the plaintiffs have not shown a strong likelihood of success on the merits. [3]

***740** Because we hold that the district court's conclusion regarding the causal relationship between the plaintiffs' speech and their transfer is not clearly erroneous, we need not express an opinion about Daeschner's argument that he cannot be found liable because the plaintiffs cannot show that Daeschner himself, who undisputedly did not know the plaintiffs personally, had a retaliatory motive in approving the transfer. However, we note our doubts as to the validity of this contention. As a supervisor, Daeschner can be held liable under § 1983 only if he "encouraged the specific incident of misconduct or in some other way directly participated in it," or "at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." [4] *Bellamy v. Bradley,* 729 F.2d 416, 421 (6th Cir.), *cert. denied,* 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984). Merely having the right to control employees is not enough, *see Monell,* 436 U.S. at 694, 98 S.Ct. 2018, nor is merely being aware of the misconduct, *see Lillard v. Shelby County Bd. of Educ.,* 76 F.3d 716, 728 (6th Cir.1996). We do not believe, however, that Daeschner can insulate himself from liability for violating the plaintiffs' First Amendment rights merely by showing that he did not know the plaintiffs personally. *See Taylor v. Michigan Dep't of Corrections,* 69 F.3d 76, 81–82 (6th Cir.1995) (noting that a supervisor need not know the injured party personally to be held liable for that party's injuries; rather, "the correct inquiry is whether he had knowledge about the substantial risk of serious harm to a particular class of persons"). Moreover, because Daeschner was primarily responsible for approving the transfer of teachers, he could possibly be held responsible for failing to perform his job properly or for acquiescing in the constitutional violations resulting from his delegation of this responsibility. *See id.* at 81; *see generally Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir.1988) (noting the "more generalized" approach to causation in suits seeking injunctive relief, as opposed to damages); *Williams v. Bennett,* 689 F.2d 1370, 1383–84 (11th Cir.1982) (same). In particular, Daeschner might be liable if the plaintiffs can show that he encouraged his subordinates to transfer teachers who were particularly vocal in speaking out against school policy through his mandate to transfer those teachers who were not "team players."

***741 C. Due Process Claim**

The district court found for the plaintiffs on their due process claim, concluding that the CBA between the JCTA and the Board of Education, which provided that a teacher could be transferred only "for good cause and extenuating circumstances ... as may be necessary for the efficient operation of the school district," J.A. at 26 (CBA § D), gave the plaintiffs a property interest in their particular positions within the school district. [5] The district court found that the plaintiffs were therefore entitled to some minimal degree of predeprivation due process, including notice, a statement of reasons for the transfer, and an opportunity to be heard, and that they had not received this process. The district court noted that the postdeprivation grievance procedure outlined in the CBA was not sufficient. Thus, the district court enjoined the transfer until the plaintiffs were afforded due process. That court subsequently found, however, that the school board had afforded sufficient process to them when it notified them one morning that they would have a hearing a few hours later, and that the plaintiffs waived this process by not attending the hearing.

The plaintiffs now argue that the process afforded by the school board was insufficient. Specifically, the plaintiffs claim that they were given insufficient time—a few hours—to prepare adequately for the hearing and that the school board indicated that it would proceed to transfer the plaintiffs

regardless of the outcome of the hearing. They thus appeal the district court's denial of their "Motion in Furtherance of Preliminary Injunction." [6] Daeschner argues, in response, that the process afforded the plaintiffs was constitutionally sufficient, given the particular circumstances of this case. In his cross-appeal, Daeschner also argues that the plaintiffs had no property interest in their positions at Atkinson in the first place, and therefore that they were not entitled to any due process before being transferred. [7]

In considering the plaintiffs' claims for violation of their due process rights, this court undertakes a two-step analysis. First, we determine whether the plaintiffs have a property interest that entitles them to due process protection. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A contract, such as a collective bargaining agreement, may create a property interest. *See, e.g., id.* at 577–78, 92 S.Ct. 2701; ***742** *Johnston–Taylor v. Gannon,* 907 F.2d 1577, 1581 (6th Cir.1990). Second, if the plaintiffs have such an interest, this court must then determine "what process is due." *Loudermill,* 470 U.S. at 541, 105 S.Ct. 1487 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). This determination is one of federal law and thus is not limited by the procedures that the state may have deemed to be adequate when it created the property right. *See id.*

1. Existence of a Property Interest

The district court correctly decided that the CBA between the school board and the JCTA created for the plaintiffs a property interest in their positions at Atkinson. Section D of that CBA apparently provides that teachers may not be transferred within the school district except on a showing of "good cause" *and* "extenuating circumstances." J.A. at 26 (Section D). This requirement is at least as stringent as those found in other cases, in the Supreme Court and this court, to create a property interest in continued employment, such as the requirement that employees may be dismissed only for cause. *See, e.g., Loudermill,* 470 U.S. at 538–39, 105 S.Ct. 1487 (holding that a property interest in continued employment was created by a state statute permitting dismissal only for "misfeasance, malfeasance, or nonfeasance"); *Johnston–Taylor,* 907 F.2d at 1581 (holding that tenured professors have a property interest in continued employment); *Ramsey v. Board of Educ.,* 844 F.2d 1268, 1272 (6th Cir.1988) (holding that a state statute and a school board policy providing for accumulation of sick days by public employees created a property interest in those sick days). Thus, the defendants' argument that, under Kentucky law, teachers have an entitlement to employment in a particular district, not in a particular position, is possibly correct but irrelevant. *See, e.g., Banks v. Burkich,* 788 F.2d 1161, 1164 (6th Cir.1986). The plaintiffs rely on the CBA, not Kentucky statutory law, for their entitlement to continued employment in a particular position, and it is clear that such an entitlement may be created by "either explicit or implied contractual terms." *Ramsey,* 844 F.2d at 1271. In none of the cases cited by Daeschner for the proposition that a teacher does not have a property right in a particular position within the school district under Kentucky law had the parties executed a contract that explicitly purported to limit the authority of the superintendent to effect such transfers to cases in which there was good cause. *See generally Banks,* 788 F.2d at 1161; *Board of Educ. v. Jayne,* 812 S.W.2d 129 (Ky.1991); *Snapp v. Deskins,* 450 S.W.2d 246, 251 (Ky.1970); *cf. Huff v. Harlan County Bd. of Educ.,* 408 S.W.2d 457, 458 (Ky.1966) ("The rule concerning employment under a continuing service contract is that such contract does not prevent the Board of Education from transferring the employee from one school to another or from one class of teaching position to another unless the contract specifies the school or class of position in which the teacher is to be employed. Neither was specified here."). The district court therefore correctly concluded that Section D of the CBA created a property interest in continued employment at Atkinson.

2. What Process Is Due

When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process. *See Loudermill,* 470 U.S. at 542, 105 S.Ct. 1487; *Roth,* 408 U.S. at 569–70, 92 S.Ct. 2701 ("When protected interests are implicated, the right to some kind of prior hearing is paramount."). The predeprivation process need not always be elaborate, however; the amount of process required depends, in part, on the importance of the interests at stake. *See Loudermill,* 470 U.S. at 542, 105 S.Ct. 1487; *Winegar v. Des Moines Indep. Community Sch. Dist.,* 20 F.3d 895, 899–901 (8th Cir.), *cert. denied,* 513 U.S. 964, 115 S.Ct. 426, 130 L.Ed.2d 340 (1994). Thus, when deciding ***743** on the necessary process,

this court must balance "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous" decision. *Loudermill,* 470 U.S. at 542–43, 105 S.Ct. 1487 (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Moreover, the sufficiency of predeprivation procedures must be considered in conjunction with the options for postdeprivation review; if elaborate procedures for postdeprivation review are in place, less elaborate predeprivation process may be required. *See, e.g., Sutton v. Cleveland Bd. of Educ.,* 958 F.2d 1339, 1349 (6th Cir.1992). In some cases, postdeprivation review may possibly be sufficient, and no predeprivation process is required. *See Ramsey,* 844 F.2d at 1272–74.

In this case, a predeprivation hearing was required. Admittedly, the plaintiffs' interest in not being transferred is not as great as that of the plaintiff in *Loudermill* in not losing his job altogether. *See Loudermill,* 470 U.S. at 543, 105 S.Ct. 1487 (emphasizing the "severity of depriving a person of the means of livelihood"). However, there is sufficient reason to believe, based on the record evidence adduced by the plaintiffs, that an involuntary transfer carries with it significant costs for the transferee, including stigma, loss of professional esteem, and the difficulty of rebuilding relationships and professional status within the new school. *See* J.A. at 101–03 (Drescher Test.) (describing the stigma associated with Section D transfers), 354 (Williams Test.) (same); *see generally Boger,* 950 F.2d at 321.

The plaintiffs' case does not fall within the exception laid out in *Ramsey v. Board of Education,* 844 F.2d 1268 (6th Cir.1988). In *Ramsey,* this court noted that state postdeprivation procedures are sufficient, and neither a predeprivation hearing nor a federal cause of action is necessary, when the property interest at stake is a "specific benefit, term, or condition of employment," the loss of which is easily quantified, rather than the "tenured nature of the employment itself." *Ramsey,* 844 F.2d at 1274. The benefit lost in *Ramsey* was the right to compensation for a number of unused accumulated sick-leave days provided for by the plaintiff's employment contract. Since the plaintiff could sue under her employment contract, and the value of the property interest lost was clearly definable and quantifiable, this court held that a state-law breach of contract action would provide the plaintiff with sufficient due process. *See id.* at 1274. In the instant case, by contrast, the CBA has created for Williams and Leary a right to tenure in a particular position within the school district. We believe that the plaintiffs' loss of this tenure is more analogous to the complete termination from a post in *Loudermill* than the loss of a specific and primarily economic benefit in *Ramsey. Cf. Johnston–Taylor,* 907 F.2d at 1581–82 (holding that post–termination grievance procedures are not sufficient in the case of the discharge of tenured professors, where the professors were not given reasons for the discharge or an opportunity to be heard beforehand). The original determination by the district court that the plaintiffs were entitled to due process was not in error.

In the circumstances of this particular case, the predeprivation hearing ultimately provided by the school board was sufficient to satisfy the dictates of due process. Due process is a flexible principle whose requirements depend on the facts of the individual case. *See Macene v. MJW, Inc.,* 951 F.2d 700, 706 (6th Cir.1991). "The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Loudermill,* 470 U.S. at 546, 105 S.Ct. 1487. Although the school board gave the plaintiffs very little time to prepare for the August 16 hearing, the district court did ***744** not abuse its discretion in refusing to require further predeprivation process by extending its preliminary injunction. First, as Daeschner points out, the plaintiffs and their counsel had just finished gathering discovery and arguing about the reasons for the plaintiffs' transfer during the litigation of the preliminary injunction motion; they were thus undoubtedly prepared to respond to the reasons given for their transfer. Second, the plaintiffs' counsel appeared to indicate, at the preliminary injunction hearing, that they would be ready for a due process hearing as soon as August 16. *See* J.A. at 383–85 (Tr. of Hr'g 8/13/99). Third, there has been no allegation that the plaintiffs' counsel would have been unable to attend the hearing at the designated time; rather, counsel chose to spend the morning of August 16 preparing a contempt motion rather than attending the hearing. Fourth, it is undisputed that the plaintiffs can take advantage of a postdeprivation grievance procedure provided by the CBA, although the record contains very little information about this procedure. The plaintiffs have not alleged that this procedure is in any way unavailable to them. Finally, the entitlement to due process is an entitlement to "a meaningful hearing at a meaningful time." *Toney–El v. Franzen,* 777 F.2d 1224, 1228 (7th Cir.1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2909, 90 L.Ed.2d 994 (1986). All parties understood that there was some urgency associated with the pretransfer hearing, because the school year was scheduled to start on August 17.

See J.A. at 384–85. In sum, the plaintiffs were afforded due process and waived their right to it by refusing to participate in the hearing offered to them by the school board. *See Collyer v. Darling,* 98 F.3d 211, 226–27 (6th Cir.1996), *cert. denied,* 520 U.S. 1267, 117 S.Ct. 2439, 138 L.Ed.2d 199 (1997).

Moreover, the plaintiffs have not sufficiently shown that the hearing offered to them was not truly meaningful. The plaintiffs claim that the letter informing them of their right to a hearing also informed them that the transfer would be effective at 5:00 p.m. that day, regardless of the outcome of the hearing. This argument is one of semantics. It is clear from the context of the letter that the termination would be effective that day, barring a successful challenge to the reasons given for the transfer. In addition, to the extent that the plaintiffs make claims regarding the alleged bad faith or bias of the school administrators in connection with the hearing—such as purported statements by the new principal of Atkinson that he did not want the plaintiffs to return to the school and had no intention of reinstating them—we note that predeprivation hearings are intended only to be an "initial check" on the employer's decision, and "need not definitively resolve the propriety of" the action. *Loudermill,* 470 U.S. at 545, 105 S.Ct. 1487. In contrast to the predeprivation hearing, one purpose of more elaborate postdeprivation process is "to ferret out bias, pretext, deception and corruption by the employer." *Duchesne v. Williams,* 849 F.2d 1004, 1008 (6th Cir.1988) (en banc), *cert. denied,* 489 U.S. 1081, 109 S.Ct. 1535, 103 L.Ed.2d 840 (1989). Therefore, the plaintiffs have received all the predeprivation process that they are due, and the district court correctly lifted the preliminary injunction.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in its entirety.

All Citations

228 F.3d 729, 142 Lab.Cas. P 59,062, 147 Ed. Law Rep. 824, 16 IER Cases 1249, 2000 Fed.App. 0331P

Footnotes

* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

1 A third plaintiff, Donna J. Grant, was originally involved in the case but dropped out of the litigation after deciding to accept a voluntary transfer to another school in August 1999.

2 Section D of the CBA provides:

> The Superintendent or designee for good cause and extenuating circumstances will execute transfers as may be necessary for the efficient operation of the school district.

J.A. at 26 (CBA § D).

3 Because the district court found that the plaintiffs' transfer was not motivated by their speech, it found that the plaintiffs did not have a substantial likelihood of success on the merits, and therefore the district court did not make findings on the record with respect to the remaining three factors to be considered when determining whether a preliminary injunction should issue. Since the district court apparently considered that the failure of the plaintiffs to show a likelihood of success on the merits was significant enough to prevent the injunction from issuing, such additional findings were not necessary. *See generally American Imaging Servs., Inc. v. Eagle–Picher Indus., Inc. (In re Eagle–Picher Indus., Inc.),* 963 F.2d 855, 862 (6th Cir.1992) (stating that the district court is not required to make findings on factors that are not dispositive with respect to the issuance of a preliminary injunction); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2948.3, at 184–188 (2d ed. 1995) (noting that the plaintiff generally must show at least some probability of success on the merits in order to obtain a preliminary injunction). We

nonetheless note that it is generally useful for the district court to analyze all four of the preliminary injunction factors, especially since our analysis of one of the factors may differ somewhat from the district court's. In the instant case, however, the district court's decision depended entirely on its resolution of a factual dispute as to whether the plaintiffs had shown that their protected conduct motivated their transfer, and we are required to defer to that resolution. Therefore, we are bound, in this case, on review of the denial of the preliminary injunction, to accept the district court's conclusion that the plaintiffs had no likelihood of success on the merits, and it is not necessary for us to remand in order for the district court to analyze the likelihood of irreparable harm to the plaintiffs, the potential for harm to others, and the public interest in the issuance of the injunction.

4 We assume, without deciding, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages. *See Rizzo v. Goode,* 423 U.S. 362, 375–77, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Bannum, Inc. v. City of Fort Lauderdale,* 901 F.2d 989, 990, 997 (11th Cir.1990). *But see Chaloux v. Killeen,* 886 F.2d 247, 250–51 (9th Cir.1989) (holding that plaintiffs need not show an "official policy or custom" in order to hold a municipality liable for injunctive relief under § 1983).

5 In fact, Section D does not say that the Superintendent may effect transfers "only" for the reasons suggested by the appellant; however, both parties appear to understand the language of Section D as permitting transfers only for those reasons. We do not, therefore, question that interpretation.

6 The plaintiffs do not, however, discuss the district court's denial of their motion to hold Daeschner in contempt for refusing to reinstate the plaintiffs to their original positions; therefore, we deem that issue waived on appeal.

7 Daeschner also argues that the plaintiffs have "waived" the issue of whether they had a property interest in their employment by not responding to Daeschner's cross-appeal on this basis in their reply brief. This court cannot be forced to reverse the district court due merely to the cross-appellees' failure to respond to the cross-appellant's arguments. Daeschner cites cases for the proposition that appellants who do not raise an argument on appeal waive that argument, but he cites no such cases suggesting the same is true for appellees. Indeed, this court can affirm the district court on any basis supported by the record. *See Warda v. Commissioner,* 15 F.3d 533, 539 n. 6 (6th Cir.), *cert. denied,* 513 U.S. 808, 115 S.Ct. 55, 130 L.Ed.2d 14 (1994).

984 N.E.2d 1213

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Indiana.

Teresa MEREDITH, Dr. Edward E. Eiler, Richard E. Hamilton, Sheila Kennedy, Rev. Michael Jones, Dr. Robert M. Stwalley III, Karen J. Combs, Rev. Kevin Armstrong, Deborah J. Patterson, Keith Gambill, and Judith Lynn Failer, Appellants (Plaintiffs),

v.

Mike PENCE, * in his official capacity as Governor of Indiana, and Glenda Ritz, * in her official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education, Appellees (Defendants),

and

Heather Coffy and Monica Poindexter, Appellees (Defendant–Intervenors).

No. 49S00–1203–PL–172.

|

March 26, 2013.

Synopsis

Background: Taxpayers brought action against the Governor, the Superintendent of Public Instruction, and the Director of the Department of Education challenging the constitutionality of the State's statutory school voucher program. The Marion Superior Court, Michael D. Keele, J., granted defendants summary judgment, and taxpayers appealed.

Holdings: After granting motion to transfer jurisdiction, the Supreme Court, Dickson, C.J., held that:

statutory school voucher program did not conflict with the Education Clause of the Indiana Constitution;

program did not violate clause in Indiana Constitution prohibiting government compulsion to engage in religious practices absent consent; and

program did not run afoul of the clause in the Indiana Constitution prohibiting expenditures to benefit religious or theological institutions.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

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On Transfer Pursuant to Indiana Appellate Rule 56(A)

DICKSON, Chief Justice.

Asserting violation of three provisions of the Indiana Constitution, the plaintiffs challenge Indiana's statutory program for providing vouchers to eligible parents for their use in sending their children to private schools. Finding that the challengers have not satisfied the high burden required to invalidate a statute on constitutional grounds, we affirm the trial court's judgment upholding the constitutionality of the statutory voucher program.

As a preliminary matter, we emphasize that the issues before this Court do not include the public policy merits of the school voucher program. Whether the Indiana program is wise educational or public policy is not a consideration germane to the narrow issues of Indiana constitutional law that are before us. Our individual policy preferences are not relevant. In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process.

This is an appeal from a summary judgment denying relief in an action brought by several Indiana taxpayers (collectively "plaintiffs") against the Governor, ***1217** the Superintendent of Public Instruction, and the Director of the Department of Education of the State of Indiana who were joined by defendant-intervenors, two parents intending to use the program at issue to send their children to private elementary and high schools (collectively "defendants"). The plaintiffs' lawsuit challenges the Choice Scholarship Program, a program enacted by the Indiana General Assembly, Ind.Code §§ 20–51–4–1 to –11, through which "the State provides vouchers called 'choice scholarships' to eligible students to attend private schools instead of the public schools they otherwise would attend." Appellants' Br. at 3. The plaintiffs contend that the school voucher program violates Article 8, Section 1,[1] and Article 1, Sections 4[2] and 6,[3] of the Indiana Constitution "both because it uses taxpayer funds to pay for the teaching of religion to Indiana schoolchildren and 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."[4] *Id.* at 12. At the trial court, the plaintiffs and defendant-intervenors each moved for summary judgment, and the trial court denied the plaintiffs' motion and granted the defendant-intervenors' motion. The plaintiffs appealed and the defendants filed a verified joint motion to transfer jurisdiction to this Court under Appellate Rule 56(A).[5] After consideration, we granted the motion and assumed jurisdiction over the case. For reasons expressed below, we now find that the school voucher program does not violate Article 8, Section 1; Article 1, Section 4; or Article 1, Section 6. Accordingly, we affirm the judgment of the trial court.

1. Burden of Proof and Standard of Review

The plaintiffs contend that the voucher-program statute is unconstitutional ***1218** on its face[6] and thus embrace a heavy burden of proof. "When a party claims that a statute is unconstitutional on its face, the claimant assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied." *Baldwin v. Reagan,* 715 N.E.2d 332, 337 (Ind.1999). Moreover, in reviewing the constitutionality of a statute, "every statute stands before us clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Id.* at 338; *see also State v. Rendleman,* 603 N.E.2d 1333, 1334 (Ind.1992) ("The burden is on the party challenging the constitutionality of the statute, and all doubts are resolved against that party."). Our method of interpreting and applying provisions of the Indiana Constitution is well-established, requiring

> a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.
>
> *Embry v. O'Bannon,* 798 N.E.2d 157, 160 (Ind.2003) (quoting *City Chapel Evangelical Free Inc. v. City of South Bend,* 744 N.E.2d 443, 447 (Ind.2001)); *accord Nagy v. Evansville–Vanderburgh Sch. Corp.,* 844 N.E.2d 481, 484 (2006).

"In reviewing an appeal of a motion for summary judgment ruling, we apply the same standard applicable to the trial court." *Presbytery of Ohio Valley, Inc. v. OPC, Inc.,* 973 N.E.2d 1099, 1110 (Ind.2012) (citing *Wilson v. Isaacs,* 929 N.E.2d 200, 202 (Ind.2010)). Review is limited to those facts designated to the trial court, Ind. Trial Rule 56(H), and summary judgment shall be granted where the designated evidence "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R. 56(C). "All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party." *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.,* 756 N.E.2d 970, 973 (Ind.2001). When faced with competing motions for summary judgment, our analysis is unchanged and "we consider each motion separately construing the facts most favorably to the non-moving party in each instance." *Presbytery of Ohio Valley,* 973 N.E.2d at 1110 (quoting *Sees v. Bank One, Ind., N.A.,* 839 N.E.2d 154, 160 (Ind.2005)) (internal quotation marks omitted). The issues presented by the parties' motions are issues of law, not fact, and our review is limited accordingly.

2. The Challenged Legislation

The parties' designated evidence reveals the following relevant facts. The school ***1219** voucher program (denominated by the legislature as the "Choice Scholarship Program") was enacted by the General Assembly in 2011, Pub. L. No. 92–2011, § 10, 2011 Ind. Acts 1024, and permits eligible students to obtain scholarships (also called "vouchers") that may be used toward tuition at participating nonpublic schools in Indiana. *See* Ind.Code § 20–51–1–4.5 (defining "Eligible individual"); *id.* § 20–51–1–4.7 (defining "Eligible school"). To be eligible for the voucher program, a student must live in a "household with an annual income of not more than one hundred fifty percent (150%) of the amount required for the individual to qualify for the federal free or reduced price lunch program." *Id.* § 20–51–1–4.5. The voucher amount is determined from statutorily defined criteria pegged to the federal free or reduced price lunch program with the maximum [7] voucher being "ninety percent (90%) of the state tuition support amount," *id.* § 20–51–4–4, designated for the student in the public "school corporation in which the eligible individual has legal settlement." *Id.* § 20–51–4–5. To be eligible to receive program students, a nonpublic school must meet several criteria, including accreditation from the Indiana State Board of Education ("Board of Education") or other recognized accreditation agency, administration of the Indiana statewide testing for educational progress (ISTEP), and participation in the Board of Education's school improvement program under Indiana Code Section 20–31–8–3. *Id.* § 20–51–1–4.7. Participation in the program does not subject participating schools to "regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school," *id.* § 20–51–4–1(a)(1), except that the school must meet certain minimum instructional requirements which correspond to the mandatory curriculum in Indiana public schools and nonpublic schools accredited by the Board of Education. *Compare id.* § 20–51–4–1(b) to (h) (providing the instructional requirements for voucher-program schools), *with id.* § 20–30–5–0.5 to –19 (providing the mandatory curriculum for Indiana public schools and nonpublic schools accredited by the Board of Education). ***1220** The requirements include instruction in Indiana and United States history and government, social studies, language arts, mathematics, sciences, fine arts, and health. *Id.* § 20–51–4–1(b) to (h).

Participation in the school voucher program is entirely voluntary with respect to eligible students and their families. In order to participate, in addition to the eligibility requirements, students and schools must submit an application to the Indiana Department of Education ("Department"). *See* 512 Ind. Admin. Code 4–1–2,

–3, *available at* http://www.in.gov/legislative/iac/T 05120/A00040.PDF; *see also* Ind.Code § 20–51–4–7 (requiring the Department to adopt rules to implement the voucher program). The fact that a student's family might meet the statutory eligibility qualifications does not require them to participate in the voucher program and to select a program-eligible school. The parents of an eligible student are thus free to select any program-eligible school[8] or none at all. The voucher program does not alter the makeup or availability of Indiana public or charter schools. In accepting program students, eligible schools are free to maintain and apply their preexisting admissions standards except that "[a]n eligible school may not discriminate on the basis of race, color, or national origin." Ind.Code § 20–51–4–3(a), (b). The program statute is silent with respect to religion, imposing no religious requirement or restriction upon student or school eligibility, *see generally id.* § 20–51–4–1 to –11; § 20–51–1–4.5, –4.7, and as of October 2011, most of the schools that had sought and received approval from the Department to participate in the voucher program were religiously affiliated, Appellants' App'x at 209–14. When a voucher is awarded, the Department distributes the funds, provided that the distribution is endorsed by both the parent[9] and the eligible school. *Id.* § 20–51–4–10; 512 I.A.C. 4–1–4(b). Once distributed, the voucher program places no specific restrictions on the use of the funds.

3. Article 8, Section 1

The plaintiffs contend that Article 8, Section 1, by directing the General Assembly "to provide, by law, for a general and uniform system of Common Schools," prohibits the legislature from providing for the education of Indiana schoolchildren by any other means. In this respect, the plaintiffs argue that the specific directive for a system of public schools supersedes the other directive of Article 8, Section 1.

As we have previously stated, Article 8, Section 1 ("Education Clause"), articulates two distinct duties of the General Assembly with respect to education in Indiana.

> After its precatory introduction stressing the importance of knowledge and learning to the preservation of a free government, the text of the Education Clause expresses two duties of the General Assembly. The first is the duty to ***1221** *encourage* moral, intellectual, scientific, and agricultural improvement. The second is the duty to *provide* for a general and uniform system of open common schools without tuition.

Bonner ex rel Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind.2009) (footnote omitted). We find this evident from the text of the Education Clause, which "is particularly valuable because it 'tells us how the voters who approved the Constitution understood it, whatever the expressed intent of the framers in debates or other clues.' " *Id.* at 519–20 (quoting *McIntosh v. Melroe Co.,* 729 N.E.2d 972, 983 (Ind.2000)). That clause states:

> 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.

Ind. Const. art. 8, § 1 (emphasis added). The framers use of the conjunction "and" plainly suggests that the phrases are separate and distinct. That is, the Education Clause is logically read in this way: "it shall be the duty of the General Assembly to encourage ...; and [it shall be the duty of the General Assembly] to provide...."[10] *Id.*

This view is reinforced by a comparison of the present language to that used in Indiana's first Constitution from 1816. The first section of the education provision of the 1816 Constitution ends with the following directive:

> The General Assembly shall from, [sic] time to time, pass such laws as shall be calculated to encourage intellectual, Scientifical, and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures, and natural history; and to countenance and encourage the principles of humanity, honesty, industry, and morality.

Ind. Const. of 1816, art. IX, § 1. This language bears a substantial similarity to the first duty articulated in the Education Clause of the 1851 Constitution [11] and clearly expresses that the legislature "*shall ... pass ... laws* " to carry out the directive. *Id.* (emphasis added). As we have previously noted, the second duty, the directive to the legislature to establish the system of common schools, was also adapted from the 1816 Constitution. *Bonner,* 907 N.E.2d at 520–21; ***1222** *Nagy,* 844 N.E.2d at 487–88. However, that duty, in its 1816 form, was located in a different section. *See* Ind. Const. of 1816, art. IX, § 2. [12] Additionally, this section contained discretionary language directing the legislature, "*as soon as circumstances will permit,* to provide, by law, for a general system of education." *Id.* (emphasis added); *see also Nagy,* 844 N.E.2d at 488 (discussing the removal of the phrase "as soon as circumstances will permit" from the 1851 education provision). Hence, the first duty ("to encourage") could be fulfilled without simultaneously fulfilling the second duty ("to provide"). Accordingly, the framers and ratifiers of the 1816 Constitution could only have viewed these two duties as separate and distinct imperatives. The use of the conjunction "and" in the 1851 Constitution is a strong indication that this view, separate and distinct duties, was also intended by the framers and ratifiers of the current Education Clause. This distinction suggests that the General Assembly's duty "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement" is to be carried out *in addition to* provision for the common school system. Though we have observed that this duty is "general and aspirational" and not well suited to judicial enforceability, *Bonner,* 907 N.E.2d at 520, this by no means lessens the efficacy of the imperative. In fact, broad legislative discretion appears to have been the framers' intent through the inclusion of the phrase "by all suitable means." The method and means of fulfilling this duty is thus delegated to the sound legislative discretion of the General Assembly, and where, as here, the exercise of that discretion does not run afoul of the Constitution, it is not for the judiciary to evaluate the prudence of the chosen policy.

As to the history and purpose of Article 8, we are guided by our previous reviews of the topic in *Nagy,* 844 N.E.2d at 485–89, and *Bonner,* 907 N.E.2d at 521–22. The history leading up to the 1850–1851 Constitutional Convention and the debates at the Convention itself reveal that the framers sought to establish "a uniform statewide system of public schools that would be supported by taxation." *Nagy,* 844 N.E.2d at 489; *see also* Martha McCarthy and Ran Zhang, *The Uncertain Promise of Free Public Schooling, in The History of Indiana Law* 213, 215 (David J. Bodenhamer and Hon. Randall T. Shepard eds., 2006) ("The [1816] constitutional directive that the General Assembly provide for a general system of education 'as soon as circumstances will permit' was so flexible that there was little significant progress toward providing for such a system."). The General Assembly has carried out this mandate by enacting "a body of law directed at providing a general and uniform system of public schools. It is detailed, comprehensive, and includes among other things provisions for revenue and funding sources, curriculum requirements, and an assortment of special programs and projects." *Nagy,* 844 N.E.2d at 491 (citing Indiana Code Titles 20 and 21). Under the school voucher program, this public school system remains in place.

The plaintiffs nevertheless contend that by "enacting a program that could divert to private schools as many as 60% of Indiana's schoolchildren ... the General Assembly has departed from the mandate of a 'general and uniform system of Common Schools.' " Appellants' Br. at 31. However, that a significant number of students *may* be eligible for the voucher program ***1223** does not mean that there is "no set of circumstances under which the statute can be constitutionally applied." *Baldwin,* 715 N.E.2d at 337. Even if we were to apply the plaintiffs' 60% hypothesis and assume that the families of all such program-eligible students utilize the program, so long as a "uniform" public school system, "equally open to all" and "without charge," is maintained, the General Assembly has fulfilled the duty imposed by the Education Clause. The plaintiffs proffer no evidence that maximum participation in the voucher program will *necessarily* result in the elimination of the Indiana public

school system. [13] The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause.

In challenging the voucher program under Article 8, Section 1, the plaintiffs rely heavily on the Florida Supreme Court's decision in *Bush v. Holmes,* 919 So.2d 392 (Fla.2006), in which the court found that the Florida Opportunity Scholarship Program, a program similar to Indiana's school voucher program, violated Article IX, Section 1(a), of the Florida Constitution. [14] *Id.* at 412. In its textual analysis of the constitutional provision at issue, the court focused on the second and third sentences of section 1(a), reading them *in pari materia.* [15] *Id.* at 406–07. The court found that the second sentence, which states that it is the "paramount duty of the state to make adequate provision for the education of all children residing within its borders," expressed a mandate to the legislature to provide education for Florida schoolchildren, while the third sentence, "[a]dequate 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," represented a restriction on the execution of that mandate by defining what was meant by "adequate provision." *Id.* at 407. The court therefore held that the Florida program violated section 1(a) by "devoting the state's resources to the education of children within [Florida] through means other than a system of free public schools." *Id.*

The Florida Supreme Court distinguished its education article from the education article found in the Wisconsin Constitution, under which a similar challenge to a similar program had been brought. ***1224** See *id.* at 407 n. 10. The Wisconsin Supreme Court had upheld the constitutionality of the Milwaukee Parental Choice Program against a challenge under Article X, Section 3, of the Wisconsin Constitution. [16] *Davis v. Grover,* 166 Wis.2d 501, 480 N.W.2d 460 (1992); *see also Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602 (1998) (upholding expansion of the Wisconsin program). While acknowledging that the education article in *Davis* was similar to the third sentence of section 1(a) of the Florida Constitution, the Florida court emphasized the fact that the Wisconsin education article did not "contain language analogous to the statement in article IX, section 1(a) that it is 'a paramount duty of the state to make adequate provision for the education of children residing within its borders.' " *Holmes,* 919 So.2d at 407 n. 10.

Like the Wisconsin Constitution, the Indiana Constitution contains no analogous "adequate provision" clause. And while the *in pari materia* reading of the second and third sentences of Florida's education article led the Florida Supreme Court to determine that the second sentence acted as a mandate and the third acted as a restriction, as noted above, we understand the imperatives of Article 8, Section 1, of the Indiana Constitution as imposing *two distinct duties* on the General Assembly. *See Bonner,* 907 N.E.2d at 520. Thus, the second duty of Article 8, Section 1, "to provide, by law, for a general and uniform system of Common Schools," even when applied *in pari materia,* cannot be read as a restriction on the first duty of the General Assembly to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement." Because both the language and the method of analysis of Florida's constitution differ from those of Indiana, we are not persuaded by any attempt to analogize the two education articles. [17]

The plaintiffs further argue that the voucher program does not "comply with the additional mandates of [the Education Clause] that the schools be 'uniform,' 'equally open to all,' and 'without charge.' " Appellants' Br. at 34. However, as discussed above, the Education Clause directs the legislature generally to encourage improvement in education in Indiana, and this imperative is broader than and in addition to the duty to provide for a system of common schools. Each may be accomplished without reference to the other. Considering that the voucher-program statute does not alter the structure or components of the public school system, *see generally* Ind.Code §§ 20–51–4–1 to –11, it appears to fall under the first imperative ("to encourage") and not the second ("to provide"). The General Assembly's "specific task with performance ***1225** standards ('general and uniform,' 'tuition without charge,' and 'equally open to all')," *Bonner,* 907 N.E.2d at 520, falls under the second imperative, "to provide, by law, for a general and uniform system of Common Schools," Ind. Const. art. 8, § 1, and is not implicated by the school voucher program. [18]

We conclude that plaintiffs have not established that the school voucher program conflicts with Article 8, Section 1, of the Indiana Constitution, and summary judgment for the defendants was thus proper as to this issue.

4. Article 1, Section 4

The plaintiffs assert that the school voucher program violates Article 1, Section 4, [19] of the Indiana Constitution. Specifically, the plaintiffs argue that the voucher program is contrary to the decree that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." Ind. Const. art. 1, § 4.

We have previously held that the religious liberty protections in the Indiana Constitution "were not intended merely to mirror the federal First Amendment." *City Chapel,* 744 N.E.2d at 446.

> When Indiana's present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead, they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion.

Id. at 445–46 (footnote omitted). For the most part, these separate provisions, including Section 4, were adapted from the 1816 Constitution. With respect to Section 4, we are guided by our examination in *City Chapel,* where we found that "there is little from the convention debates to amplify our understanding of the language of Section 4." *Id.* at 448. And thus the text of Section 4 is "our primary source for discerning the common understanding of the framers and ratifiers." *Id.*

The plaintiffs' argument under Section 4 focuses on the framers' text declaring that "no person shall be compelled to ... *support,* any place of worship, or to maintain any ministry, against his consent." Ind. Const. art. 1, § 4 (emphasis added). The word "support," the plaintiffs contend, "includes the compelled payment of taxes that are used for religious purposes," whether the tax is a specific directive (e.g., forced contributions to a religious entity or a direct tax specifically earmarked for religious purposes), or general tax revenues used to "support" religious entities. Appellants' Br. at 16; *see also id.* at 16–17 n. 14 (responding to the trial court's ruling).

This argument improperly expands the language of Section 4 and conflates it with that of Section 6. The former explicitly prohibits a person from being "compelled to attend, erect, or support" a place of worship or a ministry against his consent. ***1226** This clause is a restraint upon government compulsion of individuals to engage in religious practices absent their consent. To limit the government's taxing and spending related to religious matters, the framers crafted Section 6, which restrains government not as to its compulsion of individuals, but rather its expenditure of funds for certain prohibited purposes. ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. art. 1, § 6.) The two clauses were drafted to specify separate and distinct objectives in their respective restraints upon government: Section 6 prohibiting expenditures to benefit religious or theological institutions, and Section 4 prohibiting compulsion of individuals related to attendance, erection, or support of places of worship or ministry. "Worship" is a distinctively ecclesiastical function, and "[t]here is evidence that the noun 'ministry,' aside from its secular meanings, was understood at the time to mean '[e]cclesiastical function or profession; agency or service of a minister of the gospel or clergymen in the modern church, or priests, apostles, and evangelists in the ancient.' " *Embry,* 798 N.E.2d at 161 (plurality) (quoting Noah Webster, *An American Dictionary of the English Language* 716 (1856)). We view these language distinctions between Sections 4 and 6 to be purposeful. [20] *See Warren v. Ind. Tel. Co.,* 217 Ind. 93, 101–02, 26 N.E.2d 399, 403 (1940) (citing *State ex. rel. Hovey v. Noble,* 118 Ind. 350, 353, 21 N.E. 244, 245 (1889)) ("It has been said that the language of each provision of the Constitution is to be considered as though every word had been hammered into place."); *Noble,* 118 Ind. at 353, 21 N.E. at 245 ("But written constitutions are the product of deliberate thought. Words are hammered and crystallized into strength, and if ever there is power in words, it is in the words of a written constitution."); *accord Nagy,* 844 N.E.2d at 484; *Embry,* 798 N.E.2d at 160; *City Chapel,* 744 N.E.2d at 447. The religious liberty protections addressed by Section 4 prohibited government compulsion of individuals and was neither intended nor understood to limit government expenditures, which is addressed by Section 6.

We hold that Indiana's school voucher program does not violate Article 1, Section 4, of the Indiana Constitution, and that summary judgment for the defendants was thus proper as to this issue.

***1227 5. Article 1, Section 6**

The plaintiffs also assert that the school voucher program violates Article 1, Section 6, of the Indiana Constitution,

which provides: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. art. 1, § 6. In assessing whether the program violates this clause, two issues are potentially implicated: (A) whether the program involves government expenditures for benefits of the type prohibited by Section 6, and (B) whether the eligible schools at which the parents can use the vouchers are "religious or theological institution[s]" as envisioned by Section 6. For the reasons set forth below, we hold that the school voucher program independently satisfies each of these two concerns, and thus for each reason does not run afoul of Section 6.

A. Permissibility of Expenditures for Benefits

We first find it inconceivable that the framers and ratifiers intended to expansively prohibit any and all government expenditures from which a religious or theological institution derives a benefit—for example, fire and police protection, municipal water and sewage service, sidewalks and streets, and the like. Certainly religious or theological institutions may derive relatively substantial benefits from such municipal services. But the primary beneficiary is the public, both the public affiliated with the religious or theological institution, and the general public. Any benefit to religious or theological institutions in the above examples, though potentially substantial, is ancillary and indirect. We hold today that the proper test for examining whether a government expenditure violates Article 1, Section 6, is not whether a religious or theological institution *substantially* benefits from the expenditure, but whether the expenditure *directly* benefits such an institution. To hold otherwise would put at constitutional risk every government expenditure incidentally, albeit substantially, benefiting any religious or theological institution. Such interpretation would be inconsistent with our obligation to presume that legislative enactments are constitutional and, if possible, to construe statutes in a manner that renders them constitutional. Section 6 prohibits government expenditures that directly benefit any religious or theological institution. Ancillary indirect benefits to such institutions do not render improper those government expenditures that are otherwise permissible.

As to this "benefits" issue, the plaintiffs contend that the program is unconstitutional under the reasoning of *Embry v. O'Bannon,* 798 N.E.2d at 160–67 (plurality), in which we reviewed a Section 6 challenge to the use of public funds for programs in parochial schools. In *Embry,* four Indiana taxpayers brought suit challenging the Indiana dual-enrollment program. *Id.* at 158. The dual-enrollment program permitted "nonpublic school students enrolled in at least one specific class in the public school corporation to be counted in the [public school] corporation's ADM [(Average Daily Membership)]." *Id.* at 159. This provided the participating public school corporations with additional funding (proportional to the increase in ADM) and provided "various secular instructional services to private school students, on the premises of the private school, ... [including] fitness and health, art, foreign language, study skills, verbal skills, music, and computer technology (including internet services)." *Id.* at 158–59. The plaintiffs in *Embry* contended that the dual-enrollment program "results in money being drawn from the state treasury to benefit parochial schools" in contravention of ***1228** Article 1, Section 6, of the Indiana Constitution. *Id.* at 160. Specifically, the plaintiffs in *Embry* asserted that "the dual-enrollment agreements provide specific benefits to parochial schools because they make it unnecessary for the schools to hire and pay as many teachers, and because the schools may use the resources thus saved to expand curriculum and attract students." *Id.* at 166–67.

The holding in *Embry* was unanimous in concluding that the dual-enrollment program did not violate Section 6. *Id.* at 167 (three justices concurred in result). [21] We noted that, in determining compliance with this clause, Indiana case law "has interpreted Section 6 to permit the State to contract with religious institutions for goods or services, notwithstanding possible incidental benefit to the institutions, and to prohibit the use of public funds only when directly used for such institutions' activities of a religious nature." *Embry,* 798 N.E.2d at 167 (plurality); *see State ex rel. Johnson v. Boyd,* 217 Ind. 348, 28 N.E.2d 256 (1940); *Ctr. Twp. of Marion Cnty. v. Coe,* 572 N.E.2d 1350 (Ind.Ct.App.1991). It was this rubric that we applied in *Embry,* 798 N.E.2d at 166–67 (plurality).

We now recognize, however, that our language and holding in *Embry* was less than plain, and the division of our votes and separate opinions somewhat inconclusive. We thus take this opportunity to revisit and resolve the issue. Our use of the phrase "substantial benefits" in *Embry* was not intended, as the plaintiffs here appear to have understood it, to denote a measurable line after which any benefit to a religious or theological institution becomes unconstitutional. *See id.* at 167 (plurality) ("[T]he dual-enrollment programs permitted in Indiana do not confer substantial benefits upon any religious or theological institution...."). Such is neither conducive to judicial application nor a workable guide for the legislature. Rather than a quantifiable sum, "substantial

benefit" was used in the context of determining the primary or direct beneficiary under the program at issue.

The plaintiffs assert that "the absence of any requirement that participating schools segregate the public funds they receive... necessarily will *directly* fund the religious activities that take place in these schools," and that the voucher program "substantially" benefits these schools financially and by "promot[ing] these schools' religious mission" by adding to their enrollment students who otherwise would not be able to afford the tuition. Appellants' Br. at 20–21. We disagree because the principal actors and direct beneficiaries under the voucher program are neither the State nor program-eligible schools, but lower-income Indiana families with school-age children.

The direct beneficiaries under the voucher program are the families of eligible ***1229** students and not the schools selected by the parents for their children to attend. The voucher program does not directly fund religious activities because *no* funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student.* Participation in the voucher program is entirely voluntary for parents of eligible students. Beyond the requirement that the non-public schools meet the benchmark curriculum requirements in order to be eligible to receive program students—eligibility which is in no way limited to religious schools—the State plays no role in the selection of program schools. The funds are provided for the eligible students' education, and the parents determine where that education will be received. Thus, any benefits that may be derived by program-eligible schools are ancillary to the benefit conferred on families with program-eligible children. As the plaintiffs acknowledge, the tuition costs required to attend a non-public school generally foreclose the option for lower-income families. *Id.* at 21 ("[E]ducation to children who otherwise would not have received it.... [C]hildren who otherwise would not be exposed to it."). The voucher program helps alleviate this barrier by providing lower-income Indiana families with the educational options generally available primarily to higher-income Indiana families. The result is a direct benefit to these lower-income families—the provision of a wider array of education options, a valid secular purpose. Any benefit to program-eligible schools, religious or non-religious, derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families.

The plaintiffs respond that the notion that the "State is simply giving away tax revenues to citizens who are free to make their own decisions about how to use those funds" is a "pretense" and "grossly misleading." *Id.* at 27. They contend that the parents of program-eligible students "have no discretion" because the funds may only be used for tuition at program-eligible schools. *Id.* But the schools eligible under the program are not limited to religious schools. The parents are not limited to choosing religious schools. Nor are the parents required to participate in the voucher program, but may keep their children in a public or charter school. We find that the only direct beneficiaries of the school voucher program are the participating parents and their children, and not religious schools. The program does not contravene Section 6 by impermissibly providing direct benefits to religious institutions.

B. Schools As "Religious or Theological Institution[s]" Under Section 6

In *Embry,* the lead opinion began to explore whether the framers and ratifiers of Indiana's 1851 Constitution intended the phrase "religious or theological institution[s]" to include schools and educational institutions. *See Embry,* 798 N.E.2d at 161–64 (plurality). In reviewing the proceedings at the Constitutional Convention and the context of its contemporaneous history, however, we did find that to the extent that primary and secondary education was available to Indiana children, it was predominantly provided by private or religious entities. *Id.* at 162 (quoting Donald F. Carmony, *Indiana 1816–1850: The Pioneer Era* 393 (1998)) ("By 1845–50, it is estimated that 'less than half of the youth between ages five and twenty-one attended such schools for as much as three months in a year' and '[n]umerous of these schools were private or denominational schools, recognized and in part financed from taxes ***1230** and proceeds from public school funds.' "). It was generally accepted that the teaching of religious subject matter was an essential component of such general education. *See, e.g.,* An Act to Provide for a General System of Common Schools, [etc.], 1865 Ind. Acts 1, § 167, *reprinted in* 1 Edwin A. Davis, *Statutes of the State of Indiana* 815 (1876) ("The bible shall not be excluded from the public schools of the state."); Richard G. Boone, *A History of Education in Indiana* 267 (1892) (noting the Board of Education's recommended textbooks in the 1850's and 1860's, which included *The American School Hymn Book* and *The Bible*); McCarthy & Zhang, *supra,* at 226–27. While certainly favorable to advancing the role of government in providing education

through common schools, the framers did not manifest an intent to exclude religious teaching from such publicly financed schools. *See, e.g., Embry,* 798 N.E.2d at 163 n. 5.

We are also mindful that in 1851, when Indiana's framers and ratifiers adopted Section 6, they were crafting the sole limits upon state government with respect to religion. The U.S. Constitution was not a factor. The First Amendment had not yet been extended to apply to state government. *See Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243, 250, 8 L.Ed. 672, 675 (1833) ("These amendments demanded security against the apprehended encroachments of the general government —not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.").

In light of the prevailing social, cultural, and legal circumstances when Indiana's Constitution was enacted, we understand Section 6 as not intended to prohibit government support of primary and secondary education which at the time included a substantial religious component. This interpretation is consistent with the presumption of constitutionality which we apply when reviewing a claim of statutory unconstitutionality.

For these reasons, we hold that the phrase "religious or theological institution[s]" in Section 6 of the Indiana Constitution was not intended to, nor does it now, apply to preclude government expenditures for functions, programs, and institutions providing primary and secondary education.

Thus, we separately and independently find as to each of the two issues that the school voucher program does not contravene Section 6. First, the voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families with school-children by providing an opportunity for such children to attend non-public schools if desired. Second, the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education. Summary judgment for the defendants was thus proper as to the plaintiffs' Section 6 claims.

Conclusion

We hold that the Indiana school voucher program, the Choice Scholarship Program, is within the legislature's power under Article 8, Section 1, and that the enacted program does not violate either Section 4 or ***1231** Section 6 of Article 1 of the Indiana Constitution. We affirm the grant of summary judgment to the defendants.

RUCKER, DAVID, MASSA, RUSH, JJ., concur.

All Citations

984 N.E.2d 1213, 290 Ed. Law Rep. 998

Footnotes

* Glenda Ritz was one of the original plaintiffs in this action. In the ensuing general election of November 2012, she defeated Tony Bennett, the incumbent Superintendent of Public Instruction, and thus Superintendent Ritz has been substituted for Superintendent Bennett as a defendant-appellee pursuant to Indiana Appellate Rule 17(C)(1) ("When a public officer who is sued in an official capacity dies, resigns or otherwise no longer holds public office, the officer's successor is automatically substituted as a party."). By function of the same rule, Governor Mike Pence was substituted for Governor Mitch Daniels. Following her taking office, Superintendent Ritz moved to withdraw from this appeal as a plaintiff-appellant, which motion we grant.

1 [Article 8,] Section 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.

2 [Article 1,] Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

3 [Article 1,] Section 6. No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

4 As taxpayers challenging allegedly unconstitutional use of public funds, the plaintiffs have standing "under Indiana's public standing doctrine, an exception to the general requirement that a plaintiff must have an interest in the outcome of the litigation different from that of the general public." *Embry v. O'Bannon,* 798 N.E.2d 157, 159–60 (Ind.2003) (citing *Cittadine v. Ind. Dep't of Transp.,* 790 N.E.2d 978, 980 (Ind.2003); *Schloss v. City of Indianapolis,* 553 N.E.2d 1204, 1206 n. 3 (Ind.1990); *Higgins v. Hale,* 476 N.E.2d 95, 101 (Ind.1985)).

5 Appellate Rule 56(A) provides:

> A. Motion Before Consideration by the Court of Appeals. In rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination. If the Supreme Court grants the motion, it will transfer the case to the Supreme Court, where the case shall proceed as if it had been originally filed there. If a filing fee has already been paid in the Court of Appeals, no additional filing fee is required.

Ind. Appellate Rule 56(A) (emphasis omitted).

6 A "facial challenge" is a claim that a statute, as written (i.e. "on its face"), cannot be constitutionally implemented. *See Black's Law Dictionary* 261 (9th ed. 2009) ("A [facial challenge is a] claim that a statute ... always operates unconstitutionally."). A statute may also be challenged "as applied," that is, that the "statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Id.*

7 Section 5 of the voucher-program statute specifies the baseline state tuition amount which is the total tuition support for the school corporation in which the eligible student lives (less some specific grants) divided by the average daily membership of the school corporation. Ind.Code § 20–51–4–5. Section 4 specifies how that baseline amount is applied to determine the voucher amount.

> Sec. 4. The maximum amount to which an eligible individual is entitled under this chapter for a school year is equal to the least of the following:
>
> (1) The sum of the tuition, transfer tuition, and fees required for enrollment or attendance of the eligible student at the eligible school selected by the eligible individual for a school year that the eligible individual (or the parent of the eligible individual) would otherwise be obligated to pay to the eligible school.
>
> (2) An amount equal to:
>
> (A) ninety percent (90%) of the state tuition support amount determined under section 5 of this chapter if the eligible individual is a member of a household with an annual income of not more than the amount required for the individual to qualify for the federal free or reduced price lunch program; and

(B) fifty percent (50%) of the state tuition support amount determined under section 5 of this chapter if the eligible individual is a member of a household with an annual income of not more than one hundred fifty percent (150%) of the amount required for the individual to qualify for the federal free or reduced price lunch program.

(3) If the eligible individual is enrolled in grade 1 through 8, the maximum choice scholarship that the eligible individual may receive for a school year is four thousand five hundred dollars ($4,500).

Id. § 20–51–4–4.

8 In order to be "eligible," a school must not be "a charter school or the school corporation in which an eligible individual has legal settlement." Ind.Code § 20–51–1–4.7(6). That is, the school must be outside the defined geographical boundary of the student's charter or public school corporation.

9 To be eligible, students must be between five (5) to twenty-two (22) years of age. Ind.Code § 20–51–1–4.5(2). Thus, some eligible students, having reached the age of majority, may utilize the program of their own volition. However, common sense suggests that most eligible students will be minors and the actions and decisions regarding their school attendance will be made by their parent(s) or guardian(s). For ease of readability, we will thus refer to the decisions of parents and families throughout the remainder of this opinion.

10 The distinction here was aptly demonstrated by the brief of amicus curiae The Friedman Foundation for Educational Choice, which contended that the plaintiffs would have this Court read the Education Clause to say: "[I]t shall be the duty of the General Assembly to encourage~~, by all suitable means,~~ moral, intellectual, scientific, and agricultural improvement~~; and to provide~~ [by providing], by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." *See* Friedman Found. for Educ. Choice Br. at 13. We note that the framers could have accomplished the same by including other simple language, such as "it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement [in the common schools]; ...." We reject such an expansive reading as inconsistent with the words the framers chose and the people ratified.

11 As we noted in *Bonner,* the precatory language of the 1851 Education Clause also appears to have been adapted from its predecessors. *See Bonner,* 907 N.E.2d at 520 n. 4 (noting the similarities in the precatory language of the education provisions in the 1851 and 1816 constitutions and the Northwest Ordinance of 1787).

12 "It shall be the duty of the General [A]ssembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation, from township schools to a state university, wherein tuition shall be gratis, and equally open to all." Ind. Const. of 1816, art. IX, § 2.

13 The plaintiffs' contention appears to be founded, in part, upon the fact that the funding of an individual public school will be reduced commensurate to the number of voucher-program students withdrawing to attend other schools. However, this is equally so when a student transfers to another public or charter school, withdraws to attend a private school using personal funds, or withdraws to homeschool. *See* Ind.Code §§ 20–43–4–1 to –8 (providing the criteria for determining enrollment and calculation of the Average Daily Membership for public schools for purposes of determining tuition support).

14 Article IX, Section 1(a), of the Florida Constitution reads, in relevant part: "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."

15 Meaning "[o]n the same subject; relating to the same matter." *Black's, supra* note 6, at 862. "It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *Id.*

16 Article X, Section 3, of the Wisconsin Constitution states, in relevant part: "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."

17 Likewise, we are not persuaded by the plaintiffs' contention that we apply the canon of construction "*expressio unius est exclusio alterius,*" or "the expression of one thing implies the exclusion of another." *See Holmes,* 919 So.2d at 407. First, the use of canons of construction is unnecessary where our constitutional analysis leads unmistakably to a given result. Second, as discussed above, the first mandate given to the General Assembly ("to encourage, *by all suitable means* ..."), Ind. Const. art. 8, § 1 (emphasis added), is a broad delegation of legislative discretion. We decline to so limit that discretion contrary to the framers' intent.

18 The same is true with respect to the plaintiffs' contention that the constitutional provision for the "Common School fund," Ind. Const. art. 8, § 2, which funds may be "appropriated to the support of Common Schools, and to no other purpose whatever," *id.* art. 8, § 3, implies that the General Assembly may only "fulfill its educational responsibility" through the public school system. Appellants' Br. at 33–34. That the school fund may only be used for support of the public schools, in no way limits the legislature's prerogative to appropriate other general funds to fulfill its duty to encourage educational improvement in Indiana.

19 [Article 1,] Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

20 We acknowledge that a dispute exists among other states with respect to similar provisions. *See, e.g., Chittenden Town Sch. Dist. v. Dep't of Educ.,* 169 Vt. 310, 738 A.2d 539 (1999) (concluding that, where neither party disputed the meaning of "support," reimbursements paid to a parochial school violated the "compelled support clause" of the Vermont Constitution because the schools were "places of worship"). However, the opposite conclusion was reached in Wisconsin, one of the states from whom our Section 6 was borrowed, *see Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 964 (Austin H. Brown ed., 1851), based upon nearly identical constitutional language and arguments. *See Jackson,* 578 N.W.2d at 622–23 ("The Respondents additionally argue that the amended [voucher program] violates the 'compelled support clause' of art. I, § 18. The compelled support clause provides 'nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent....' The Respondents assert that since public funds eventually flow to religious institutions under the amended [voucher program], taxpayers are compelled to support places of worship against their consent. This argument is identical to the Respondents' argument under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy." (omission in original)).

21 In *Embry,* Justice Dickson authored the lead opinion for the Court, which was joined by Justice Rucker in full, discussing without deciding whether religious schools were "institutions" within the meaning of Section 6 and ultimately deciding the case based upon the "for the benefit of" language of Section 6. *Embry,* 798 N.E.2d at 160–67. Chief Justice Shepard concurred in result without any written opinion. *Id.* at 167. Justice Sullivan concurred in result with respect to Section 6, and otherwise concurred in part, writing an opinion with respect to the issue of standing (which was joined by Chief Justice Shepard). *Id.* at 167–69. Justice

Boehm concurred in result, with a written opinion (joined by Justice Sullivan), disagreeing "with the majority insofar as it concludes or implies" that religious schools are not "institutions" within the meaning of Section 6, *id.* at 169, but ultimately "agree[ing] that the legislation involved in this case is constitutional because it does not expend funds for the benefit of a religious institution," *id.* at 170. We intend today's opinion to bring resolution to these issues.

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233 Ariz. 195
Court of Appeals of Arizona,
Division 1, Department D.

Sharon NIEHAUS; Arizona School Boards Association; Arizona Education Association; and Arizona Association of School Business Officials, Plaintiffs/Appellants,
v.
John HUPPENTHAL, in his capacity as Arizona Superintendent of Public Instruction, Defendant/Appellee.
Goldwater Institute; Andrea Weck Robertson; Victoria Zicafoose; and Crystal Fox, Intervenors/Appellees.

No. 1 CA–CV 12–0242.
|
Oct. 1, 2013.

Synopsis

Background: School board association and others brought action for injunctive relief, challenging constitutionality of Empowerment Scholarship Accounts program (ESA), which provided scholarships to students with disabilities. The Superior Court, Maricopa County, No. CV2011-017911, Maria del Mar Verdin, J., denied plaintiff's request for injunctive relief. Plaintiff appealed.

Holdings: The Court of Appeals, Thompson, J., held that:

ESA did not violate Religion Clause of state constitution;

ESA did not violate Aid Clause of state constitution; and

ESA did not unconstitutionally condition receipt of government benefit on waiver of constitutional right to free public education.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****984** LaSota & Peters, PLC by Donald M. Peters, Arizona Center for Law in the Public Interest by Timothy M. Hogan, Phoenix, Attorneys for Appellants.

Thomas C. Horne, Arizona Attorney General, by Kevin D. Ray, Jinju Park, Jordan T. Ellel, Phoenix, Attorneys for Appellee.

Scharf–Norton Center for Constitutional Litigation by Clint Bolick, Carrie Ann Sitren, Taylor C. Earl, Phoenix, Attorneys for Intervenor/Appellee Goldwater Institute.

Institute for Justice by Timothy D. Keller, Paul V. Avelar, Tempe, Attorneys for Parent Intervenors/Appellees.

DeConcini McDonald Yetwin & Lacy, P.C. by Denise M. Bainton, Tucson, National School Boards Association by Francisco M. Negrón, Jr., Virginia, Attorneys for Amicus Curiae.

OPINION

THOMPSON, Judge.

***196** ¶ 1 Appellants Sharon Niehaus and other interested organizations (collectively, Niehaus) appeal the trial court's judgment denying their request for injunctive relief and granting judgment to appellee John Huppenthal (Huppenthal), in his capacity as Arizona State Superintendent of Public Instruction. Niehaus challenges the constitutionality of the Arizona Empowerment Scholarship Accounts program (ESA). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 In 2011, the Arizona Legislature passed Senate Bill 1553, establishing the ESA, codified at Arizona Revised Statutes (A.R.S.) sections 15–2401 through –2404, to provide education scholarships to students with disabilities. The purpose of the ESA is "to provide options for the education of students in this state." A.R.S. § 15–2402(A). To qualify, a student must have a recognized disability, and have either attended a public school in the previous year or been the recipient of a scholarship from either a school tuition organization or the ESA. *See* A.R.S. § 15–2401(5). A qualifying student can receive a scholarship equal to ninety percent of the base support level that otherwise would be provided for state education of the student. A.R.S. § 15–2402(C). The parent of a scholarship student must agree to provide an education for the student in at least "reading, grammar, mathematics, social studies and science," and agree to "[n]ot enroll the qualified student in a school district

or charter school and release the school district from all obligations to educate the qualified student." A.R.S. § 15–2402(1), (2). The parent may then apply the scholarship funds to one or more of eleven permissible uses:

(a) Tuition or fees at a qualified school.

(b) Textbooks required by a qualified school.

(c) Educational therapies or services for the qualified student from a licensed or accredited practitioner or provider.

**985 *197 (d) Tutoring services provided by a tutor accredited by a state, regional or national accrediting organization.

(e) Curriculum.

(f) Tuition or fees for a nonpublic online learning program.

(g) Fees for a nationally standardized norm-referenced achievement test, advanced placement examinations or any exams related to college or university admission.

(h) Contributions to a qualified tuition program established pursuant to 11 United States Code section 529.

(i) Tuition or fees at an eligible postsecondary institution.

(j) Textbooks required by an eligible postsecondary institution.

(k) Fees for management of the empowerment scholarship account by firms selected by the department.

A.R.S. § 15–2402(B)(4)(a)–(k). A "qualified school" is defined as "a nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state and that does not discriminate on the basis of race, color or national origin." A.R.S. § 15–2401(4).

¶ 3 Niehaus filed a complaint in Maricopa County Superior Court challenging the constitutionality of the ESA and seeking to enjoin Huppenthal from implementing its provisions. She argued the ESA violated Article 9, Section 10 of the Arizona Constitution (the Aid Clause), and Article 2, Section 12 of the Arizona Constitution (the Religion Clause), and that the ESA is invalid because it conditions the availability of a public benefit on a waiver of constitutional rights. She also filed an application for a preliminary injunction. After the trial court allowed the Goldwater Institute and other interested individuals (collectively, Intervenors) to intervene, they successfully moved to dismiss Niehaus's claim that the ESA places an unconstitutional condition on receipt of a government benefit. The trial court subsequently heard oral argument on the merits, denied Niehaus's request for injunctive relief, and granted judgment in favor of Huppenthal and Intervenors on Niehaus's complaint, finding the ESA did not violate the provisions of the Arizona Constitution cited by Niehaus. The court found the ESA did not violate the Aid Clause because of the "parental choice among education options," explaining that the "monies are earmarked for a student's educational needs as a parent may deem fit—not endorsed directly to a private institution in an all or nothing fashion." It also found the Religion Clause was not violated because the state "is not directing where monies are to go," so there "is no purpose by the State to directly benefit any religious school."

¶ 4 Niehaus timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12–2101(A)(1) and (5)(b) (Supp.2012).

STANDARD OF REVIEW

¶ 5 Niehaus argues on appeal that the ESA violates the Aid and Religion Clauses of the Arizona Constitution, and that it unconstitutionally conditions a benefit on the waiver of a constitutional right. We review questions of statutory interpretation and constitutional law de novo. *State ex rel. Thomas v. Klein,* 214 Ariz. 205, 207, ¶ 5, 150 P.3d 778, 780 (App.2007). We presume that a statute is constitutional. *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro–Life Obstetricians & Gynecologists,* 227 Ariz. 262, 268, ¶ 9, 257 P.3d 181, 187 (App.2011). We resolve any doubts in favor of constitutionality. *Klein,* 214 Ariz. at 207, ¶ 5, 150 P.3d at 780. The party challenging the validity of the statute bears the burden of proving beyond a reasonable doubt that the legislation is unconstitutional. *Chevron Chem. Co. v. Superior Court,* 131 Ariz. 431, 438, 641 P.2d 1275, 1282 (1982) (courts "will not declare an act of the legislature unconstitutional unless we are satisfied beyond a reasonable doubt that the act is in conflict with the federal or state constitutions"); *State v. Kaiser,* 204 Ariz. 514, 517, ¶ 8, 65 P.3d 463, 466 (App.2003).

DISCUSSION

Religion Clause

¶ 6 In *Cain v. Home (Cain I)*, 218 Ariz. 301, 305–06, ¶ 8, 183 P.3d 1269, 1273–74 (App.2008), *vacated by* ***198 **986** *Cain v. Home* (*Cain II*), 220 Ariz. 77, 202 P.3d 1178 (2009), this court distinguished Arizona's case law from a Washington case relied on by Cain, *Witters v. State Commission for the Blind,* 112 Wash.2d 363, 771 P.2d 1119 (1989), and held that the Arizona Supreme Court's interpretation of the Religion Clause was "virtually indistinguishable from the United States Supreme Court's interpretation of the federal Establishment Clause." To support this holding, we cited *Kotterman v. Killian,* 193 Ariz. 273, 287, ¶ 46, 972 P.2d 606, 620 (1999), and *Community Council v. Jordan,* 102 Ariz. 448, 451–52, 432 P.2d 460, 463–64 (1967). In *Cain II,* the Arizona Supreme Court noted our analysis of the Religion Clause, but did not indicate whether our conclusion was correct. 220 Ariz. at 80–81, 84 n. 4, ¶¶ 11–12, 29, 202 P.3d at 1181–82, 1185 n. 4. Instead, the supreme court focused on distinguishing the Religion and Aid Clauses. *Id.* at 81–82, ¶¶ 15–19, 202 P.3d at 1182–83. Then, when deciding the voucher program in that case violated the Aid Clause, the supreme court did not address the Religion Clause argument. *Id.* at 84 n. 4, ¶ 29, 202 P.3d at 1185 n. 4. Thus, we re-examine the case law interpreting the Religion Clause of the Arizona Constitution.

¶ 7 Article 2, Section 12, of the Arizona Constitution provides that "[n]o public money ... shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Niehaus relies on *Witters* to show that a statute may be upheld under the Establishment Clause while being invalidated under a stricter state constitution, pointing out that Washington's Religion Clause is virtually identical to Arizona's. While we acknowledge this point, we do not find *Witters* particularly helpful to our analysis here. Witters applied for vocational rehabilitation funds from a state commission for the blind. 771 P.2d at 1120. He planned to use the funds in undergraduate work for religious instruction to pursue a career as a pastor. *Id.* His curriculum included Old and New Testament studies and church administration. *Id.* The Washington Supreme Court found that Witters was "asking the State to pay for a religious course of study at a religious school, with a religious career as his goal. This falls precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction." *Id.* at 1121.

¶ 8 The ESA does not bear any similarity to the circumstances in *Witters.* The parents of a qualified student under the ESA must provide an education in reading, grammar, mathematics, social studies, and science. Whether that is done at a private secular or sectarian school is a matter of parental choice. The ESA students are pursuing a basic secondary education consistent with state standards; they are not pursuing a course of religious study. We also note that our supreme court has distanced itself from the Washington court's interpretation of its religion clause. *Kotterman,* 193 Ariz. at 291–92, ¶¶ 68–71, 972 P.2d at 624–25. At least thirty states have religion clauses in their constitutions similar to our own, and while those states' judicial decisions may be useful, they do not control Arizona law. *Id.* at ¶ 68. The Arizona Constitution differs in its historical circumstances and subsequent development from that of the State of Washington. *Id.* at ¶¶ 70–71.

¶ 9 Consequently, we turn to our Arizona case law concerning the Religion Clause. *Kotterman* involved a state tax credit for those who donate to school tuition organizations (STOs), charitable organizations providing scholarships and grants to allow parents choice in their children's school attendance. *Id.* at 276–77, ¶ 1, 972 P.2d at 609–10. A "qualified school" under the statute was defined as "a nongovernmental primary or secondary school in this state that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state." *Id.* at 277, ¶ 1, 972 P.2d at 610. In its discussion of the Religion Clause, the supreme court determined that the tax credit was not an appropriation, but stated that "[e]ven if we were to agree that an appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization violates this clause. The way in which an STO is limited, the range of choices reserved ***199 **987** to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach." *Id.* at 287, ¶ 46, 972 P.2d at 620.

¶ 10 In *Jordan,* the supreme court rejected the argument that any public monies channeled through a religious organization would aid that church contrary to constitutional mandate. 102 Ariz. at 451, 432 P.2d at 463. Instead, the supreme court upheld payments partially reimbursing the Salvation Army for emergency welfare services it had provided, stating that the Religion Clause was not intended to place a blanket prohibition against channeling public funds to religious organizations, but rather to prohibit "assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion." *Id.* at 454, 432 P.2d at 466.

¶ 11 The ESA does not result in an appropriation of public money to encourage the preference of one religion over another, or religion per se over no religion. Any aid to religious schools would be a result of the genuine and independent private choices of the parents. The parents are given numerous ways in which they can educate their children suited to the needs of each child with no preference given to religious or nonreligious schools or programs. Parents are required only to educate their children in the areas of reading, grammar, mathematics, social studies, and science.

¶ 12 The ESA is neutral in all respects toward religion and directs aid to a broad class of individuals defined without reference to religion. The ESA is a system of private choice that does not have the effect of advancing religion. Where ESA funds are spent depends solely upon how parents choose to educate their children. Eligible school children may choose to remain in public school, attend a religious school, or a nonreligious private school. They may also use the funds for educational therapies, tutoring services, online learning programs and other curricula, or even at a postsecondary institution. We therefore concur with the trial court that the ESA does not violate the Religion Clause.

Aid Clause

¶ 13 Article 9, Section 10, of the Arizona Constitution, referred to as the "Aid Clause," states that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." The Aid Clause is "primarily designed to protect the public fisc and to protect public schools." *Cain II,* 220 Ariz. at 82, ¶ 19, 202 P.3d at 1183. The framers of the Arizona Constitution "considered public education of prime importance," and "intended that Arizona have a strong public school system to provide mandatory education." *Id.* at ¶¶ 20–21.

¶ 14 The Aid Clause prohibits the appropriation of public money to private or sectarian schools. "An appropriation earmarks funds from 'the general revenue of the state' for an identified purpose or destination." *Kotterman,* 193 Ariz. at 287, ¶ 45, 972 P.2d at 620 (citation omitted); *see League of Ariz. Cities and Towns v. Martin,* 219 Ariz. 556, 560, ¶ 15, 201 P.3d 517, 521 (2009) (an appropriation is "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." (citation omitted)). In *Martin,* our supreme court stated that the essential components of an appropriation are the "certain sum," the "specified object," and the "authority to spend." 219 Ariz. at 560, ¶ 15, 201 P.3d at 521 (citations omitted). Here, our focus is on the "specified object" of the appropriation.

¶ 15 The specified object of the ESA is the beneficiary families, not private or sectarian schools. Parents can use the funds deposited in the empowerment account to customize an education that meets their children's unique educational needs. Depending on how the parents choose to educate their children, this may or may not include paying tuition at a private school. As we have noted, parents may use the funds for tuition, educational therapies, tutoring services, curriculum, online learning programs, standardized tests, or ***200 **988** advanced placement examinations. The choices are not limited to nongovernmental providers. The ESA funds may be used at eligible postsecondary institutions, which include community colleges and public universities. A.R.S. § 15–2401(2) (now A.R.S. § 15–2401(3) (Supp. 2012)). Parents may direct scholarship account funds to those public educational institutions to satisfy their children's K–12 educational requirements. Thus, beneficiaries have discretion as to how to spend the ESA funds without having to spend any of the aid at private or sectarian schools.

¶ 16 Niehaus relies on *Cain II* to support her argument that the ESA violates the Aid Clause and that the state "must provide education solely through the public-school system, and that it may not divert funds to private schools." The appropriation in *Cain II* involved two voucher programs that set aside state money to allow students to attend private schools instead of the public schools in their districts. 220 Ariz. at 79, ¶ 2, 202 P.3d at 1180. Parents would select the private secular or sectarian school of their choice and the state would then disburse a check to the parent, who was required to "restrictively endorse" the check for payment to the selected school. *Id.* at 79–80, ¶ 5, 202 P.3d at 1180–81. The supreme court found the voucher programs did precisely what the Aid Clause prohibits because the funds were withdrawn from the public treasury and earmarked for an identified purpose, funding private schools. *Id.* at 82, ¶ 23, 202 P.3d at 1183. The superintendent argued the programs were constitutional because, under the "true beneficiary" theory, the children were the true beneficiaries of the aid rather than the institution. *Id.* at 82, ¶¶ 23–24, 202 P.3d at 1183. The supreme court rejected this argument because, essentially, the voucher programs transferred state funds directly from the state treasury to private schools. *Id.* at 83, ¶ 26, 202 P.3d at 1184. The court found it immaterial that the checks first

passed through the hands of parents because once a student had been accepted into a qualified school, the parents had no choice but to endorse the check to the qualified school. *Id.* It was because of the "composition of these voucher programs" that the court found the true beneficiary theory exception would nullify the prohibition of aid to private and religious schools. *Id.* at ¶ 27.

¶ 17 In the programs disapproved in *Cain II,* the state was paying money directly to the institutions; although the payment first went to parents, they then went ineluctably to private schools. *Id.* at ¶ 26. The court noted, however, that there "may well be ways of providing aid to these student populations without violating the constitution." *Id.* at ¶ 29. Under the ESA, the state deposits funds into an account from which parents may draw to purchase a wide range of services, including educational therapies, home-based instruction, curriculum, tutoring, and early community college enrollment, from religious, nonreligious, and public providers. Thus, unlike in *Cain II,* in which every dollar of the voucher programs was earmarked for private schools, none of the ESA funds are preordained for a particular destination.

¶ 18 Niehaus contends that the state may only provide education through the public schools and that it may not divert funds in any way to private schools. The supreme court has never interpreted the Aid Clause to mean that no public money can be spent at private or religious schools. *See, e.g., Kotterman,* 193 Ariz. at 286, ¶ 42, 972 P.2d at 619 ("[W]hile the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, we see no evidence of a similar concern for indirect benefits."). In *Jordan,* the supreme court rejected the argument that no public funds could be given to private secular or sectarian schools or organizations at all, "notwithstanding the fact that the organization [was] merely a conduit," and instead adopted the approach to "take a more practical look at the facts and circumstances of each individual case and realistically analyze the situation to see if there is any violation of state or federal constitutional prohibitions." 102 Ariz. at 456, 432 P.2d at 468. We reject Niehaus's notion that if any state funds end up at private schools the program is automatically unconstitutional. This program enhances the ability of parents of disabled children to choose ***201** ****989** how best to provide for their educations, whether in or out of private schools. No funds in the ESA are earmarked for private schools. Thus, we hold that the ESA does not violate the Aid Clause.

Waiver of Constitutional Right

¶ 19 Niehaus asserts that the ESA unconstitutionally conditions receipt of a government benefit on the waiver of a constitutional right because it requires that the parent of a qualified student promise not to enroll the student in public school. The Arizona Constitution requires the legislature to provide a free public education to pupils between the ages of six and twenty-one years. Ariz. Const. art. 11, § 6; *Shofstall v. Hollins,* 110 Ariz. 88, 90, 515 P.2d 590, 592 (1973). To enroll a student in the ESA, the parent must agree to "[n]ot enroll the qualified student in a school district or charter school and release the school district from all obligations to educate the qualified student." A.R.S. § 15–2402(2). Niehaus uses a number of hypothetical scenarios to argue that this provision is unconstitutional, asserting that public schools will be unavailable to children withdrawing from the ESA, that they will be forced to reimburse lawfully expended funds, and that students will be forced to remain in private schools. These arguments fail for several reasons.

¶ 20 First, the ESA does not require a permanent or irrevocable forfeiture of the right to a free public education. *See State v. Quinn,* 218 Ariz. 66, 73, ¶ 27, 178 P.3d 1190, 1197 (App.2008) (states may not condition the grant of a privilege on the permanent surrender of a constitutional right). All the ESA requires is that students not simultaneously enroll in a public school while receiving ESA funds. This same restriction applies to any children who attend private school or are home-schooled. *See* A.R.S. § 15–802(B)(2) (2009) (requiring parent of a child attending a private school or being home-schooled to file an affidavit of intent with the county). In practice, parents that have taken advantage of the ESA have been able to re-enroll their children in a public school. During the first quarter, five recipients withdrew from the program, forfeiting $16,622.28 remaining from the first quarter's disbursement, and re-enrolled their children in public schools. Pursuant to the Arizona Constitution and the federal Individuals with Disabilities Education Act (IDEA), the public school is obligated to accept a child that has terminated the ESA contract just as the public school would be obligated to accept any other child. *See* Ariz. Const. art. 11, § 6; 20 U.S.C.A. §§ 1400–1482 (under IDEA, school district cannot refuse to provide a free appropriate public education to any child with a disability).

¶ 21 Second, parents are not coerced in deciding whether or not to participate in the ESA. *See Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (striking down

property tax exemption for veterans that was conditioned on beneficiaries attesting they did not advocate the overthrow of the government by force and violence); *Frost v. R.R. Comm'n of State of Cal.,* 271 U.S. 583, 593, 46 S.Ct. 605, 70 L.Ed. 1101 (1926) (state does not have "power to compel a private carrier to assume against his will the duties and burdens of a common carrier"). Parents are free to enroll their children in the public school or to participate in the ESA; the fact that they cannot do both at the same time does not amount to a waiver of their constitutional rights or coercion by the state.

¶ 22 Finally, the ESA does not limit the choices extended to families but expands the options to meet the individual needs of children. Section 15–2402(C) sets the ESA account funds at ninety percent of the base support level for that particular student. For example, if the parents desired to use ESA funds for a text book or education therapies, the parent would have to withdraw the child from public school at least temporarily. If the parent then enrolled the child in a private school, ESA funds for tuition would be limited. Thus, the ESA program does not force or encourage parents to use ESA funds to pay private school tuition. The ESA is neutral as to the parental choices offered. It is simply an exchange of one type of educational service for another, and the choice is voluntary and reversible. The funds are disbursed on a quarterly basis so ***202 **990** any reimbursement would not be the full value of the ESA scholarship. A.R.S. § 15–2403(F).

¶ 23 Because we conclude that the ESA does not unconstitutionally condition receipt of a government benefit on the waiver of a constitutional right, we need not address the Intervenors' and Huppenthal's argument that Niehaus lacks standing to raise this issue.

CONCLUSION

¶ 24 Based on the foregoing, we affirm the trial court's judgment. Niehaus requests an award of attorneys' fees under A.R.S. § 35–213(c) and under the private attorney general doctrine. Because Niehaus is not the prevailing party, we deny the request for attorneys' fees.

CONCURRING: JOHN C. GEMMILL, Presiding Judge, and DONN KESSLER, Judge.

All Citations

233 Ariz. 195, 310 P.3d 983, 670 Ariz. Adv. Rep. 24

305 F.3d 566
United States Court of Appeals,
Sixth Circuit.

Philip D. OVERSTREET, Plaintiff–Appellant,
v.
LEXINGTON–FAYETTE URBAN COUNTY GOVERNMENT, Defendant–Appellee.

No. 00–6635.
|
Argued June 11, 2002.
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Decided and Filed Sept. 30, 2002.

Synopsis

County employee brought action challenging constitutionality of county policy mandating public disclosure of real estate holdings by employees of certain departments and their family members. Employee's motion for "temporary injunction," treated as a motion for a temporary restraining order, was denied by the United States District Court for the Eastern District of Kentucky at Lexington, Karl S. Forester, Chief District Judge, and employee appealed. The Court of Appeals, Marbley, District Judge, sitting by designation, held that: (1) motion was tantamount to a motion for a preliminary injunction, and thus denial was appealable; (2) order granting an injunction pending appeal had no res judicata effect; (3) employee was unlikely to succeed on his right to privacy claim; (4) employee was unlikely to succeed on the merits of his claim that the policy constitutes an unreasonable search and an invasion of his privacy in violation of the Fourth Amendment and the Kentucky Constitution; (5) employee did not demonstrate irreparable harm; (6) issuance of an injunction was likely to cause the county substantial harm; and (7) the public interest lay with the denial of an injunction.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

Attorneys and Law Firms

***569** Sharon K. Morris, James M. Morris (argued and briefed), Morris & Morris, Lexington, KY, for Plaintiff–Appellant.

Terry Sellars (argued and briefed), James W. Gardner, Kara R. Marino, Henry, Watz, Gardner, Sellars & Gardner, Lexington, KY, for Defendant–Appellee.

Before: KEITH and DAUGHTREY, Circuit Judges; MARBLEY, District Judge. [*]

OPINION

MARBLEY, District Judge.

Plaintiff–Appellant, Philip D. Overstreet, appeals the district court's order denying his motion for a "temporary injunction" [1] to prohibit his employer, a governmental entity, from mandating public disclosure of real estate holdings by certain department employees and their family members. Mr. Overstreet assigns error to the district court's ruling denying the motion for a temporary injunction based on that court's finding that Mr. Overstreet is unlikely to succeed on the merits of his case. This Court's appellate jurisdiction is proper under 28 U.S.C. § 1292(a)(1).

Based on the following analysis, the Court **AFFIRMS** the ruling of the district court.

I. BACKGROUND

A. Factual Background

Plaintiff–Appellant, Philip D. Overstreet, is employed by Defendant Appellee, the Lexington Fayette Urban County Government ("LFUCG"), in its Division of Engineering. Mr. Overstreet describes his job duties as primarily consisting of plotting map coordinates as a computer operator.

On October 16, 2000, the LFUCG issued a Real Property Disclosure Policy ("Policy"). The stated purposes of the Policy were to promote public confidence in the integrity of the local government in Fayette County, Kentucky, and to avoid the perception of a conflict between government employees' private interests and their public duties. Specifically, the Policy stated that its purposes were, *inter alia:*

> ... to prevent actual or perceived conflicts by officers and employees of the [LFUCG], ... to insure that housing in Fayette County is safe, sanitary, and habitable ... and to unify the existing policies and procedures dealing with conflicts of interest of inspectors in the Division of Code Enforcement, Division of Building Inspection, and the Fire Prevention Bureau.

***570** The Policy applies to employees in the LFUCG's Divisions of Code Enforcement, Building Inspection, Planning, Engineering, and the LFUCG's Fire Prevention Bureau, and their immediate families. The term "immediate families" is defined to include the employee's "spouse, unemancipated child residing in [the] household, or a person claimed by [the employee or the employee's spouse] as a dependent for tax purposes." The Policy prohibits employees in certain divisions, such as Code Enforcement, from owning real property in Fayette County, other than property in which those employees reside. The Policy permits ownership of real property by employees in other divisions, such as the Division of Engineering, but requires employees who do own real property to disclose certain information about their ownership.

Pursuant to the Policy, employees who are allowed to own real property but are required to disclose information about such property must complete a form entitled, "Disclosure of Real Property and Business Interests" ("Disclosure Form"). Section I of the Disclosure Form requires the employee to list the addresses and owners of record for all real estate in Fayette County in which the employee or a member of his immediate family has an interest. The employee is also required to list the names of other individuals who have an interest in the property, and to indicate the type of property. Section II of the form requires the employee to list the names and addresses of any business [2] owning property in Fayette County in which the employee or a member of his immediate family has an ownership interest that exceeds the lesser of ten percent or five thousand dollars in value. The employee must specify the type of business and provide a general description of the business, and also must list the names of customers who do business with the employee's division. Section III of the form requires the employee to list the names, addresses, and owners of record for all property that the employee or a member of his immediate family manages or of which he oversees the management or maintenance in Fayette County. The employee is also required to list the addresses and owners of record for any businesses that manage or oversee the management or maintenance of any real property in Fayette County in which the employee or a member of his immediate family has an ownership interest as described in Section II. Finally, the Disclosure Form states that if the employee or a member of his immediate family acquires, obtains, inherits, is gifted, or is otherwise conveyed an interest in real property in Fayette County, or an ownership interest in a business that owns real estate in Fayette County, or starts to manage or maintain property or acquires an ownership interest in such a business, the employee must report the change in status to the LFUCG within twenty working days.

In late October 2000, the LFUCG presented the Disclosure Form to Mr. Overstreet with specific instructions that the form was to be filed by November 1, 2000. Rather than complete the form, Mr. Overstreet submitted a Notarized Disclosure Statement, which read:

> To the extent that this information is on record at the Fayette County Clerk's Office and the PVA Office, the requested information is public record and can be ***571** obtained through those offices. Any information as it pertains to my immediate family is an invasion of their privacy and requires me to verify what they own, something I cannot do. To the extent that this information is also available through the offices of the Fayette County Clerk and the PVA Office, said information is public record.

On November 22, 2000, the LFUCG issued a written reprimand to Mr. Overstreet for insubordination, and advised him that the failure to submit a properly completed Disclosure Form by 5:00 p.m. on November 29, 2000 would result in a suspension without pay. Following the issuance of the reprimand, Mr. Overstreet and his counsel requested that the LFUCG grant an extension of the deadline until it provided Mr. Overstreet with the legal basis for its entitlement to the information requested in the Disclosure Form. The LFUCG

did not respond to this request, and Mr. Overstreet failed to submit the Disclosure Form on or before November 29, 2000. Based upon his failure to submit the required form, the LFUCG suspended Mr. Overstreet without pay for seven days, and advised him that his failure to submit the form by December 11, 2000 would result in the filing of administrative charges seeking his dismissal.

B. Procedural History

On November 29, 2000, Mr. Overstreet filed a Complaint with the district court in the Eastern District of Kentucky alleging the following claims: (1) a violation of the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution based on an infringement of Mr. Overstreet's right to privacy; (2) a violation of the Fourth Amendment based on an unreasonable search; (3) a violation of the Fourteenth Amendment based on the fact that the Real Estate Disclosure policy is impermissibly vague; (4) a violation of the Fourteenth Amendment based on an infringement of Mr. Overstreet's right to substantive due process; and (5) a violation of the Fourteenth Amendment based on an infringement of Mr. Overstreet's right to equal protection. He filed his Complaint on behalf of himself and all former, current, and future officers and employees of the LFUCG Divisions of Code Enforcement, Building Inspection, Planning, Engineering, and the Fire Prevention Bureau, and their immediate families. On that same day, Mr. Overstreet also filed a Motion for a Temporary Injunction, which the district court treated as a Motion for a Temporary Restraining Order.

The district court held a hearing on Mr. Overstreet's motion on November 30, 2000. On December 1, 2000, the district court entered an order denying Mr. Overstreet's Motion for a Temporary Injunction. Mr. Overstreet filed a Notice of Appeal from that order on December 5, 2000. At the same time, he also filed a Motion for Temporary Injunction Pending Appeal, both with the district court and with this Court. On December 8, 2000, both courts ruled on the motion. The district court denied Mr. Overstreet's Motion for a Temporary Injunction Pending Appeal. This Court, per Chief Judge Martin, however, granted Mr. Overstreet's Motion in part, and enjoined Defendant Appellee from initiating administrative charges for Mr. Overstreet's dismissal in response to his refusal to complete, sign, and submit the Disclosure Form, pending this appeal.

II. PRELIMINARY ISSUES

A. Jurisdiction

Mr. Overstreet filed a motion for a "temporary injunction" with the district court. Because the Federal Rules of Civil Procedure do not recognize the existence ***572** of a "temporary injunction," the district court treated the motion as a motion for a temporary restraining order.

A district court's denial of a motion for a temporary restraining order generally is not appealable. *Wilson v. Wilkinson,* 28 Fed.Appx. 465, 465, 2002 WL 123580, at *1 (6th Cir. Jan.28, 2002) (citing *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL–CIO,* 473 U.S. 1301, 1304–06, 105 S.Ct. 3467, 87 L.Ed.2d 603 (1985) and *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.,* 29 F.3d 993, 1000 (5th Cir.1994)). Such a ruling is appealable, however, if it is tantamount to a ruling on a preliminary injunction. *Id.* at 466 (citing *Manbourne, Inc. v. Conrad,* 796 F.2d 884, 887 n. 3 (7th Cir.1986)).

This Court finds that Plaintiff Appellant's Motion for a Temporary Injunction is tantamount to a motion for a preliminary injunction. Although the district court treated the motion as one for a temporary restraining order, both parties have treated the motion, and the district court's ruling thereon, as a motion for a preliminary injunction. Indeed, in their respective pleadings, the parties set forth, and base their arguments upon, the elements that must be shown for a court to grant a preliminary injunction. Furthermore, the district court treated Plaintiff Appellant's Motion for Temporary Injunction Pending Appeal, styled in essentially the same manner as the original motion, as a motion for a preliminary injunction pending appeal.

Therefore, the Court construes Plaintiff Appellant's Motion for a Temporary Injunction and the district court's ruling thereon as a motion for a preliminary injunction, properly postured for review by this Court.

B. Motion for a Temporary Injunction Pending Appeal

On December 5, 2000, Plaintiff Appellant filed a Motion for a Temporary Injunction Pending Appeal with this Court. On December 8, 2000, this Court, per Chief Judge Martin,

granted that motion in part, and enjoined Defendant Appellee from initiating administrative charges for Mr. Overstreet's dismissal in response to his refusal to complete, sign, and submit the Disclosure Form, pending this appeal.[3] Mr. Overstreet now contends that this panel should simply extend the life of the December 8, 2000 order because Chief Judge Martin has already ruled on the merits of Plaintiff Appellant's claims.

This Court has the power to grant an injunction pending appeal to prevent irreparable harm to the party requesting such relief during the pendency of the appeal. *Eastern Greyhound Lines v. Fusco,* 310 F.2d 632, 634 (6th Cir.1962) (concluding that the authority to grant an injunction pending appeal is a "necessary incident" to the Court's power to issue writs to protect appellate jurisdiction under 28 U.S.C. § 1651) (citation omitted). In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction. *Walker v. Lockhart,* 678 F.2d 68, 70 (8th Cir.1982) (reasoning that the same analysis is appropriate because, in seeking both motions, the movant is requesting that the court issue an order to maintain the *status quo* until the court rules on the merits of the case).

***573** Although, under *Walker,* Mr. Overstreet is correct that Chief Judge Martin's order was, at least implicitly, based on the conclusion that he had met the requirements for the issuance of a preliminary injunction, this panel is, nonetheless, not bound to extend the life of that order. To the contrary, Chief Judge Martin's order, by its own terms, expires upon the disposition of this appeal from the district court's December 1, 2000 denial of Plaintiff Appellant's motion for a temporary injunction. *See Fed. Trade Comm'n v. Food Town Stores, Inc.,* 547 F.2d 247, 249 (4th Cir.1977) ("The injunction pending the appeal expires by its own terms upon disposition of the appeal."). Furthermore, Chief Judge Martin's ruling has no *res judicata* effect because it does not constitute a final adjudication of the merits of an issue. *Id.* The purpose of that order was to maintain the *status quo* only until this panel ruled upon Plaintiff Appellant's appeal from the district court's order.

III. STANDARD OF REVIEW

The grant or denial of a preliminary injunction is reviewed for an abuse of discretion. *Michigan Bell Tel. Co. v. Engler,* 257 F.3d 587, 592 (6th Cir.2001) (citations omitted). Accordingly, the district court's findings of fact will stand unless found to be clearly erroneous, but its legal conclusions are reviewed *de novo. Id.* (citations omitted).

In determining whether to issue a preliminary injunction, the Court must examine four factors: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Leary v. Daeschner,* 228 F.3d 729, 736 (6th Cir.2000) (citing *McPherson v. Michigan High Sch. Athletic Ass'n,* 119 F.3d 453, 459 (6th Cir.1997) (*en banc*)). These factors are not prerequisites, but are factors that are to be balanced against each other. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir.1998) (citation omitted). A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it. *Leary,* 228 F.3d at 739 (citations omitted).

IV. DISCUSSION

A. Likelihood of Success on the Merits

In denying Plaintiff Appellant's Motion for a Temporary Injunction, the district court concluded that Mr. Overstreet is unlikely to succeed on the merits of his case. The court based its conclusion on the fact that it could discern no constitutional violation from Defendant Appellee's Real Property Policy and Disclosure Form. Mr. Overstreet now argues that the district court erred as a matter of law in its finding that the Policy and the Disclosure Form are not likely to be found to violate the United States Constitution. Although Mr. Overstreet's Complaint asserted that the Policy violates as many as five provisions of the Constitution, on appeal, he argues only that the Policy constitutes an invasion of his privacy and an unreasonable search under the Fourth Amendment to the Constitution.

1. Right to Privacy

The Supreme Court has recognized that some of its cases may indicate the existence of an individual privacy interest

in avoiding disclosure of personal matters. ***574** *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The *Whalen* Court observed that "the cases sometimes characterized as protecting 'privacy' have ... involved ... the individual interest in avoiding disclosure of personal matters." *Id.* at 598–99, 97 S.Ct. 869; *see Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (citing *Whalen* and finding that public officials may have a privacy interest in avoiding disclosure of personal matters that are unrelated to the acts they perform in their official capacities).

This Court has been loath to view either *Whalen* or *Nixon* as having created a constitutional privacy right that protects against the disclosure of personal information. To the contrary, this Court has read those cases quite narrowly. Indeed, in *J.P. v. DeSanti,* 653 F.2d 1080 (6th Cir.1981), we stated:

> Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure.
>
> ...
>
> [W]e note that of the cases cited holding that there is a constitutional right to nondisclosure of private information, none cites a constitutional provision in support of its holding. It is understandable, though rare, to fail to cite a supporting provision of the Constitution when one is dealing with such well-established rights as those in the first or fourth amendments. It is quite a telling failure when the constitutional right at issue is not well-established.
>
> For all the foregoing reasons, we conclude that the Constitution does not encompass a general right to nondisclosure of private information.

Id. at 1089–90. The *DeSanti* court ultimately held that the constitutional right to privacy is restricted to protecting "those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' " *Id.* at 1090 (citations omitted). Since *DeSanti,* this Court has not strayed from its holding, and continues to evaluate privacy claims based on whether the interest sought to be protected is a fundamental interest or an interest implicit in the concept of ordered liberty. *See, e.g., Cutshall v. Sundquist,* 193 F.3d 466, 480–81 (6th Cir.1999) (finding that a state law, which required sex offenders to register with law enforcement agencies and allowed law enforcement officials to release registry information to the public, did not violate the sex offender's constitutional right to privacy because no fundamental interest was implicated); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1062 (6th Cir.1998) (concluding that the privacy interest of undercover police officers in the personal information contained in their personnel records—the interest in preserving their lives and the lives of their families—implicated a fundamental liberty interest). When an individual's interest in the nondisclosure of personal information is of a constitutional dimension, the Court must balance the individual's interest in nondisclosure against the public's interest in the invasion of privacy. *Kallstrom,* 136 F.3d at 1061 (citing *DeSanti,* 653 F.2d at 1091).

Mr. Overstreet alleges, first, that the LFUCG has infringed his right to privacy because the Policy constitutes a demand for the disclosure of family living arrangements, which he claims is prohibited because of the privacy interests at stake. *See Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Second, he contends that the intrusion on his privacy interest is not justified ***575** because, unlike other public officials, Mr. Overstreet is not in a position to influence the planning, zoning, or housing in Fayette County by virtue of his employment. Finally, Mr. Overstreet argues that any legitimate interest the government may have in obtaining information regarding his real estate holdings is outweighed by the fact that the LFUCG intends to make the provided information a matter of public record.

The Court finds that the district court correctly concluded that Plaintiff Appellant is unlikely to succeed on his right to privacy claim. Because this Court has determined that the constitutional right to privacy is protected only when the interest at stake involves a fundamental interest, or an interest that is implicit in the concept of ordered liberty, the Court's analysis must begin with a determination of whether Mr. Overstreet's privacy interest in his financial affairs is such an interest. The Supreme Court has found that "fundamental" interests include the privacy interest one has in matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. *See Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). The privacy interest one may have in one's personal finances and real estate holdings is far afield from such intimate concerns. *See Hahn v. Star Bank,* 190 F.3d 708, 715 (6th Cir.1999) (finding that production of plaintiffs' loan file to third parties is "far afield" from the fundamental interests protected by the right to privacy). Therefore, Mr. Overstreet's

claim that the LFUCG infringed his right to privacy is likely to fail on the merits. [4]

Even if the facts did implicate a fundamental interest, the Court would nonetheless conclude that Plaintiff Appellant's right to privacy claim will likely fail because any protected privacy interest that he might have will probably be outweighed by the public interest in the disclosure of his personal information. In *Barry v. New York,* 712 F.2d 1554 (2d Cir.1983), the Second Circuit concluded that the mandatory disclosure of financial information by government employees and their spouses, which was then made available to the public, implicated the constitutional right to privacy, but that such right was not infringed because the mandatory disclosure was justified by a substantial, possibly compelling, state interest. *Id.* at 1559–60 (emphasizing the government's interests in deterring corruption and conflicts of interest among city officers and employees, and enhancing public confidence in the integrity of government). As the Second Circuit did in *Barry,* this Court recognizes the substantial public interest in preventing corruption in local government and ensuring that no conflict of interest exists between the personal lives and public duties of government employees. Significantly, despite Mr. Overstreet's contention that he has no significant influence on zoning or other real estate issues through his work, employees in the Engineering Division are sometimes privy to information regarding the LFUCG's interest in acquiring certain real estate. Thus, a conflict of interest could arise simply by virtue of his employment within that division. The Court, therefore, finds that the district court properly concluded that any privacy interest that government employees such as Mr. Overstreet may have in their financial affairs is likely to be outweighed by the public interests that are at stake.

***576** The Court notes that Plaintiff Appellant's reliance on *Moore v. City of East Cleveland* is misplaced. In *Moore,* a plurality of the Supreme Court struck down a city ordinance that limited the occupancy of dwelling units to single families, and defined "family" quite narrowly, such that extended families could not live together. *Moore,* 431 U.S. at 495–96, 97 S.Ct. 1932. In striking down the ordinance, the Court discussed the long-recognized privacy interest one has in matters relating to family, including choices regarding family living arrangements, and concluded that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499, 97 S.Ct. 1932. Thus, Mr. Overstreet is incorrect in his assertion that, under *Moore,* the government is completely prohibited from inquiring into one's family living arrangements. To the contrary, while there may be a privacy right that protects one's right to determine one's family living arrangements, that right does not protect such arrangements from being disclosed.

Therefore, this Court finds that the district court did not err in its legal conclusion that Plaintiff Appellant is unlikely to succeed on the merits of his claim that the LFUCG Real Property Policy and Disclosure Form violate his constitutional right to privacy.

2. Fourth Amendment–Unreasonable Search

Mr. Overstreet argues that the LFUCG's Disclosure Policy constitutes an unreasonable search and an invasion of his privacy in violation of the Fourth Amendment and Section 10 of the Kentucky Constitution. [5]

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. Under the Fourth Amendment, a "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). "Searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *O'Connor v. Ortega,* 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

The Court finds that the district court correctly concluded that Plaintiff Appellant is unlikely to succeed on the merits of this claim. Although searches and seizures conducted by government employers are subject to the strictures of the Fourth Amendment, the district court is likely to ***577** find, after a trial on the merits, that the Fourth Amendment does not apply under these particular circumstances because Mr. Overstreet has no reasonable expectation of privacy in the information sought by the LFUCG. In *Barry v. City of New York,* 712 F.2d 1554 (2d Cir.1983), the Second Circuit considered the constitutionality of a financial disclosure statute adopted by the City of New York that applied to most elected and appointed officials, candidates for City office, and all civil service employees who earned an annual salary of $30,000 or above. *Id.* at 1556. Pursuant to the statute, covered employees and their spouses were required to provide extensive information about their personal finances, including, *inter alia,* "the identity of professional organizations from which the employee or a spouse derives $1,000 or more in income during the preceding year; the source of capital gains of $1,000 or more, other than from the sale of a residence; the source of gifts or honoraria of $500 or more; indebtedness in excess of $500 that is outstanding for 90 days or more; and the nature of investments worth $20,000 or more." *Id.* at 1557. Discussing the plaintiff employees' claims that the law violated the Fourth Amendment, the Second Circuit stated that it was "doubtful ... whether the Fourth Amendment applies in this context.... [P]laintiffs plainly have no reasonable expectation that the information sought ... can be withheld from their employers." *Id.* at 1564 (citing *Whalen,* 429 U.S. at 604 n. 32, 97 S.Ct. 869). Likewise, this Court finds that the district court is likely to conclude that Mr. Overstreet has no legitimate expectation of privacy in the information sought by his employer, much of which is already a matter of public record.

Even if Mr. Overstreet does have a reasonable expectation of privacy in the information pertaining to his real property holdings, any search conducted by virtue of the Policy and Disclosure Form is likely to be found reasonable, and, therefore, in compliance with the strictures of the Fourth Amendment. As discussed above with reference to Mr. Overstreet's right to privacy claim, the district court is likely to conclude that the Policy and Disclosure Form are reasonable in light of the LFUCG's interests in preventing corruption and the appearance of impropriety when weighed against Mr. Overstreet's limited expectation of privacy in information regarding the real property that he and members of his immediate family own. Significantly, the LFUCG has limited the application of the Policy to employees in those departments that may have access to privileged information, and may use their professional roles to their own personal advantage.

Therefore, the district court did not err in its conclusion that Mr. Overstreet is unlikely to prevail on the merits of his claim that the LFUCG Policy and Disclosure Form constitute an unreasonable search in violation of the Fourth Amendment.

3. Vagueness

Though the issue was not raised by Plaintiff Appellant in his final brief submitted to this Court, Defendant Appellee, in its brief, argued that the Real Property Disclosure Policy is not impermissibly vague. Defendant Appellee presumably addressed this issue because it was mentioned in Plaintiff Appellant's Complaint filed with the district court.

In his Reply brief, Plaintiff Appellant argued that the district court erred in finding that he was unlikely to succeed on the merits of his claim because the Policy is impermissibly vague. Mr. Overstreet had not presented an argument regarding ***578** the alleged impermissible vagueness of the Policy in his Motion for a Temporary Injunction, in his Motion for a Temporary Injunction Pending Appeal, during oral argument before the district court on his Motion for a Temporary Injunction, or in his final brief to this Court.

Appellant's vagueness arguments are not properly before this Court. "It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice." *Bailey v. Floyd County Bd. of Educ.,* 106 F.3d 135, 143 (6th Cir.1997) (citing *Roush v. KFC Nat'l Mgmt. Co.,* 10 F.3d 392, 397 (6th Cir.1993)); *see White v. Anchor Motor Freight, Inc.,* 899 F.2d 555, 559 (6th Cir.1990) ("This court will not decide issues or claims not litigated before the district court."). Although Mr. Overstreet referred to the vagueness of the Policy in his Complaint, he failed to argue that issue before the district court, either in his motions or at oral argument. Furthermore, he failed to raise the issue before this Court until he filed his reply brief. An argument raised for the first time in a reply brief will not be considered by this Court. *Wright v. Holbrook,* 794 F.2d 1152, 1156 (6th Cir.1986) (specifying that the application of this rule is "particularly appropriate when the issue raised for the first time in reply is based largely on the facts and circumstances of the case"). Particularly here, where

the facts relied upon were presented neither to the district court nor to this Court until Plaintiff Appellant filed his reply, it would be improper for the Court to find that the district court erred in its failure to consider this newly-developed vagueness argument.

For all of the foregoing reasons, the Court finds that the district court did not err in its conclusion that Plaintiff Appellant is unlikely to succeed on the merits of his claim.

B. Irreparable Harm

A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. *Basicomputer Corp. v. Scott,* 973 F.2d 507, 511 (6th Cir.1992). Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights. *See, e.g., Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm) (citations omitted); *Covino v. Patrissi,* 967 F.2d 73, 77 (2d Cir.1992) (holding that plaintiffs may establish irreparable harm based on an alleged violation of their Fourth Amendment rights); *McDonell v. Hunter,* 746 F.2d 785, 787 (8th Cir.1984) (finding that a violation of privacy constitutes an irreparable harm).

Plaintiff–Appellant contends that he has demonstrated irreparable harm because Defendant Appellee's disclosure requirement violates his Fourth and Fourteenth Amendment rights. He also claims that, absent the issuance of an injunction, he will suffer irreparable harm because he will be required to choose between disclosing certain personal information and being terminated from his employment.

The Court has already discussed the fact that it is unlikely that Mr. Overstreet will be able to demonstrate that he has a cognizable constitutional claim. Thus, his argument that he is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit. The Court must, therefore, examine whether Mr. Overstreet has met his burden of demonstrating irreparable ***579** harm based on the fact that he faces the loss of his employment for his failure to complete and submit the Disclosure Form.

The Court concludes that Mr. Overstreet will not suffer irreparable harm by virtue of the fact that he may lose his job while this litigation is pending. The fact that an individual may lose his income for some extended period of time does not result in irreparable harm, as income wrongly withheld may be recovered through monetary damages in the form of back pay. *Sampson v. Murray,* 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (finding that "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury"); *see Aluminum Workers Int'l Union, AFL–CIO, Local Union No. 215 v. Consol. Aluminum Corp.,* 696 F.2d 437, 444 (6th Cir.1982) (finding that employees did not suffer irreparable harm from temporary unemployment pending arbitration). Indeed, "[t]he loss of a job is quintessentially reparable by money damages." *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.,* 59 F.3d 80, 83 (8th Cir.1995).

Therefore, the Court finds that Plaintiff Appellant has not demonstrated that he will suffer irreparable harm if the preliminary injunction does not issue.

C. Substantial Harm to Others

Although Mr. Overstreet contends that the granting of a preliminary injunction could not possibly harm the LFUCG, the Court finds, to the contrary, that the issuance of an injunction is likely to cause the LFUCG substantial harm. The Policy originated because of a widespread public belief of on-going corruption at the LFUCG, arising from a conflict of interest between the employees' public duties and their personal real estate holdings. To avoid such a public perception, the LFUCG must be able to demonstrate that employees who can influence real estate development within Fayette County are being held accountable for their personal interests. Such employees include employees in the Engineering Division, such as Mr. Overstreet, who may get advance notice of the LFUCG's interest in acquiring real property. If the LFUCG is unable to hold its employees accountable for the real estate that they own, then that negative public opinion of the local government may once again pervade the community. In short, an injunction would harm the LFUCG because it would undermine public confidence in the local government.

Therefore, the Court finds that the issuance of a preliminary injunction is likely to cause substantial harm to others.

D. Public Interest

Mr. Overstreet contends that the public interest lies with the granting of the injunction because the public has a strong interest in protecting constitutional rights, which he maintains would be violated by the denial of the injunction. The Court finds, however, that the public interest lies with the denial of Mr. Overstreet's request for an injunction. First, while the public clearly has interest in vindicating constitutional rights, it is unlikely that Mr. Overstreet can demonstrate that any constitutional rights are implicated on these facts. Second, the public interest lies in promoting public confidence in the integrity of local government and in avoiding the perception of a conflict of interest between government employees' private interests and their public duties. Both of these interests are furthered by the denial of the injunction sought by Plaintiff Appellant.

Therefore, the Court finds that the public interest lies in the denial of Plaintiff Appellant's request for an injunction.

*580 V. CONCLUSION

For all of the foregoing reasons, this Court concludes that the district court did not err in its denial of Plaintiff Appellant's Motion for a Temporary Injunction, and, therefore, **AFFIRMS** the district court's ruling.

All Citations

305 F.3d 566, 19 IER Cases 527, 2002 Fed.App. 0337P

Footnotes

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

1 Although Plaintiff Appellant styled his motion as one for a “temporary injunction,” the Federal Rules of Civil Procedure do not provide for a “temporary injunction.” Therefore, the district court construed Plaintiff Appellant's motion as a motion for a temporary restraining order, pursuant to Fed.R.Civ.P. 65(b). On appeal, however, the parties have treated the motion as one for a preliminary injunction, pursuant to Fed.R.Civ.P. 65(a).

2 “Business” is defined as “any corporation, partnership, limited liability company, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust, professional service corporation or limited liability company, or any legal entity through which business is conducted for profit.”

3 Plaintiff Appellant's motion was granted in part, rather than in its entirety, because the ruling applied only to Plaintiff Appellant, and not to the other employees on whose behalf Mr. Overstreet sought the temporary injunctive relief.

4 The fact that the LFUCG Policy requires information about Mr. Overstreet's immediate family does not alter this conclusion, as members of Mr. Overstreet's immediate family have no more a fundamental privacy interest in their financial affairs than he does.

5 Section 10 of the Kentucky Constitution states:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Ky. Const. § 10. The Kentucky Constitution provides individuals no greater protection from unreasonable searches and seizures than does the United States Constitution. *LaFollette v. Commonwealth,* 915 S.W.2d 747, 748 (Ky.1996).

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45 S.Ct. 571
Supreme Court of the United States.

PIERCE, Governor of Oregon, et al.
v.
SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.
SAME
v.
HILL MILITARY ACADEMY.

Nos. 583, 584.
|
Argued March 16 and 17, 1925.
|
Decided June 1, 1925.

Synopsis

Appeals from the District Court of the United States for the District of Oregon.

Two suits, one by the Society of the Sisters of the Holy Names of Jesus and Mary, the other by the Hill Military Academy, both against Walter M. Pierce as Governor of Oregon, and others, to enjoin enforcement of Compulsory Education Act 1922. From decrees for plaintiffs, denying motions to dismiss and granting a preliminary injunction (296 F. 928), defendants appeal. Affirmed.

Attorneys and Law Firms

Messrs. George E. Chamberlain, of Portland, Or., and Albert H. Putney, of Washington, D. C., for appellant Pierce.

Mr. Willis S. Moore, of Salem, Or., for other appellants.

Messrs. Wm. D. Guthrie, of New York City, and J. P. Kavanaugh, of Portland, Or., for appellee Society of the Sisters of the Holy Names of Jesus and Mary.

Mr. John C. Veatch, of Portland, Or., for appellee Hill Military Academy.

Opinion

***529** Mr. Justice McREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary ****572** orders restraining ***530** appellants from threatening or attempting to enforce the Compulsory Education Act[1] adopted November 7, 1922 (Laws Or. 1923, p. 9), under the initiative provision of her Constitution by the voters of Oregon. Judicial Code, § 266 (Comp. St. § 1243). They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor. There are ***531** exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eight grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal ***532** property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income

from primary schools exceeds $30,000—and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business ****573** or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of lthe measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged ***533** in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. The average attendance is 100, and the annual fees received for each student amount to some $800. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the state board of education. Military instruction and training are also given, under the supervision of an army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the state and county, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that unless appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges (Judicial Code, § 266 [Comp. St. § 1243]) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the ***534** deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy appellees' business and property. Finally, that the threats to enforce the act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children ***535** under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to

accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; Western Turf Association v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such ****574** action. Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 543, Ann. Cas. 1917B, 283; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255.

The courts of the state have not construed the act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in Berea College v. Kentucky, 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81. No argument in favor of such view has been advanced.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be de prived ***536** of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360; Nebraska District, etc., v. McKelvie, 262 U. S. 404, 43 S. Ct. 628, 67 L. Ed. 1047; Truax v. Corrigan, supra, and cases there cited.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

The decrees below are affirmed.

All Citations

268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468

Footnotes

1 *Be it enacted by the people of the state of Oregon:*

Section 1. That section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*.—Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

(a) *Children Physically Unable*.—Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Who Have Completed the Eighth Grade*.—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from School*.—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*.—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the first day of September, 1926.

132 Nev. 732
Supreme Court of Nevada.

Dan SCHWARTZ, in His Official Capacity as Treasurer of the State of Nevada, Appellant,
v.
Hellen Quan LOPEZ, individually and on behalf of Her Minor Child, C.Q.; Michelle Gorelow, individually and on behalf of her minor children, A.G. and H.G.; Electra Skryzdlewski, individually and on behalf of Her Minor Child, L.M.; Jennifer Carr, Individually and on Behalf of Her Minor Children, W.C., A.C., and E.C.; Linda Johnson, Individually and on Behalf of Her Minor Child, K.J.; and Sarah Solomon and Brian Solomon, Individually and on Behalf of Their Minor Children, D.S. and K.S., Respondents.
Ruby Duncan, an individual; Rabbi Mel Hecht, an individual; Howard Watts, III, an individual; Leora Olivas, an individual; and Adam Berger, an individual, Appellants,
v.
The State of Nevada Office of the State Treasurer; The State of Nevada Department of Education; Dan Schwartz, Nevada State Treasurer, in His Official Capacity; Steve Canavero, Interim Superintendent of Public Instruction, in His Official Capacity; Aimee Hairr; Aurora Espinoza; Elizabeth Robbins; Lara Allen; Jeffrey Smith; and Trina Smith, Respondents.

No. 69611, No. 70648
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FILED SEPTEMBER 29, 2016

Synopsis

Background: In case no. 69611, Nevada citizens and parents of children enrolled in public schools filed complaint against State Treasurer, seeking declaration that legislation creating education savings accounts into which public funds were transferred from state Distributive School Account for parents to use to subsidize private school, tutoring, or other non-public educational services was unconstitutional and sought injunctive relief. The First Judicial District Court, Carson City, James E. Wilson, J., granted preliminary injunction, but rejected constitutional challenge. State Treasurer appealed. In case no. 70648, citizens filed complaint challenging constitutionality of education savings account program. Parents of children who had opened such accounts intervened. The Eighth Judicial District Court, Clark County, Eric Johnson, J., dismissed complaint. Citizens appealed.

Holdings: The Supreme Court, Hardesty, J., held that:

plaintiffs had standing, under "public importance" exception to injury requirement, to assert constitutional challenge to legislation establishing education spending account program;

legislation creating education savings accounts did not violate provision of Nevada Constitution requiring legislature to provide for uniform system of common schools by allegedly allowing for use of funds to subsidize non-common, non-uniform private schools and home-based schooling that were not subject to curriculum requirements and performance standards;

legislation creating education savings accounts program did not violate provision of Nevada Constitution prohibiting use of public funds for sectarian purpose;

legislation creating education savings account program was not "appropriation" of public funds for education savings accounts; and

use of public funds from amount appropriated to DSA to fund education savings accounts violated Nevada Constitution's provisions requiring establishment of uniform system of common schools and appropriation of public funds to operate public schools.

Judgments affirmed in part, reversed in part, and remanded.

Douglas, J., filed opinion concurring in part and dissenting in part in which Cherry, J., concurred.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Preliminary Injunction.

West Codenotes

Held Unconstitutional
Nev. Rev. St. § 387.124

****890** Appeals from a district court order granting a preliminary injunction (Docket No. 69611) and from a district court order dismissing a complaint (Docket No. 70648). First

Judicial District Court, Carson City; James E. Wilson, Judge (Docket No. 69611), and Eighth Judicial District Court, Clark County; Eric Johnson, Judge (Docket No. 70648).

Attorneys and Law Firms

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BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

***738** In 2015, the Nevada Legislature passed the Education Savings Account (ESA) program, which allows public funds to be transferred from the State Distributive School Account into private education savings accounts maintained for the benefit of school-aged children to pay for private schooling, tutoring, and other non-public educational services and expenses. Two separate complaints were filed challenging the ESA program as violating several provisions of the Education Article in the Nevada Constitution. In one case,

the district court rejected all of the constitutional claims and dismissed the complaint. In the other case, the district court found that one of the constitutional challenges had merit and granted a preliminary injunction. These appeals were brought, and because they share common legal questions as to the constitutionality of the ESA program, we resolve them together in this opinion.

We are asked to decide whether the ESA program is constitutional under Nevada Constitution Article 11, Section 2 (requiring a uniform system of common schools), Section 6 (obligating the Legislature to appropriate funds to operate the public schools before any other appropriation is enacted for the biennium), and Section 10 (prohibiting the use of public funds for a sectarian purpose). We must emphasize that the merit and efficacy of the ESA program is not before us, for those considerations involve public policy choices left to the sound wisdom and discretion of our state Legislature. But it is the judiciary's role to determine the meaning of the Constitution and to uphold it against contrary legislation. Thus, the scope of our inquiry is whether the ESA program complies with these constitutional provisions.

For the reasons set forth in this opinion, we conclude that Article 11, Section 1 does not limit the Legislature's discretion to encourage other methods of education. Based on that reasoning, the ESA program is not contrary to the Legislature's duty under Article 11, Section 2 to provide for a uniform system of common schools. We also conclude that funds placed in education savings accounts under SB 302 belong to the parents and are not "public funds" subject to Article 11, Section 10.

The issue remaining relates to the funding of the education savings accounts. Based on the State Treasurer's concession that SB 302 does not operate as an appropriation bill, and that nothing in the legislative measure creating the State Distributive School Account funding for public education provides an appropriation for education savings accounts, we must conclude that the use of money that the Legislature appropriated for K–12 public education to instead fund education savings accounts undermines the constitutional mandates ***739** under Sections 2 and 6 to fund public education. Accordingly, we affirm in part and reverse in part the district court orders in both cases, and we remand each case for the entry of a final declaratory judgment and a permanent injunction enjoining the use of any money appropriated for K–12 public education in the State Distributive School Account to instead fund the education savings accounts.

I.

A.

The ESA program is contained in Senate Bill (SB) 302, passed by the Nevada Legislature in 2015. It allows grants of public funds to be transferred into private education savings accounts for Nevada school-aged children to pay for their private schooling, tutoring, and other nonpublic educational services and expenses. The ESA program provides financial resources for children to pay for an alternative to education in the public school system. SB 302 was passed by the Legislature on May 29, 2015, and signed into law by ****892** the governor on June 2, 2015. 2015 Nev. Stat., ch. 332, at 1824. [1]

An education savings account is established when a parent enters into an agreement with the State Treasurer for the creation of the account. NRS 353B.850(1). To be eligible for an account, a child must have been enrolled in public school for 100 consecutive days immediately preceding the account's establishment. *Id.* The accounts are administered by the Treasurer and must be maintained with a financial management firm chosen by the Treasurer. NRS 353B.850(1), (2); NRS 353B.880(1). Once an account is created, the amount of money deposited into it by the Treasurer each year is equal to a percentage of the statewide average basic support guarantee per pupil: 100 percent for disabled and low-income children ($5,710 for the 2015–16 school year) and 90 percent for all other children ($5,139 for the 2015–16 school year). NRS 353B.860(2); 2015 Nev. Stat., ch. 537, § 1, at 3736. The money is deposited in quarterly installments and may be carried forward from year to year if the agreement is renewed for that student. NRS 353B.860(5), (6). An ESA agreement is valid for one school year but may be terminated early. NRS 353B.850(4). If the child's parent terminates the ESA agreement, or if the child graduates from high school or moves out of state after an account is created, unused funds revert to the State General Fund. NRS 353B.850(5); NRS 353B.860(6)(b). The statutory provisions governing the ESA program contain no limit on the number of education savings accounts that can be created and no maximum sum of money that can be utilized to fund the accounts for the biennium. NRS 353B.700–.930.

***740** The ESA program requires participating students to receive instruction from one or more "participating entities," which include private schools, a university, a program of distance education, tutors, and parents. NRS 353B.850(1)(a); NRS 353B.900. For a private school to qualify as a participating entity, it must be licensed or exempt from such licensing pursuant to NRS 394.211; "[e]lementary and secondary educational institutions operated by churches, religious organizations and faith-based ministries" are exempt from licensing under NRS 394.211 and thus may qualify as a participating entity. NRS 353B.900(1)(a); NRS 394.211(1)(d). The ESA funds may only be spent on authorized educational expenses, which include tuition and fees, textbooks, tutoring or teaching services, testing and assessment fees, disability services, and transportation to and from the participating entities. NRS 353B.870(1). An account may be frozen or dissolved if the Treasurer determines that there has been a substantial misuse of funds. NRS 353B.880(3).

B.

On June 1, 2015, three days after passing SB 302, the Nevada Legislature passed SB 515, an appropriations bill to fund K–12 public education for the 2015–17 biennium. SB 515 was approved by the governor on June 11, 2015. 2015 Nev. Stat., ch. 537, at 3736. In SB 515, the Legislature applied a formula-based statutory framework known as the Nevada Plan to establish the basic support guarantee for each school district, which is the amount of money each district is guaranteed to fund the operation of its schools. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 49 n.8, 293 P.3d 874, 883 n.8 (2013); *Rogers v. Heller*, 117 Nev. 169, 174, 18 P.3d 1034, 1037 (2001) (describing the Nevada Plan). The basic support guarantee is established as a per-pupil amount for each school district, and the amount varies between districts based on the historical cost of educating a child in that district. NRS 387.122(1). The per-pupil basic support guarantee is then multiplied by the district's enrollment. NRS 387.1223(2). Once the total amount of the basic support guarantee is established for each district, the State determines how much each school district can contribute from locally collected revenue, and the State makes up the disparity by paying to each district the difference between ****893** the basic support guarantee and the local funding. *See* NRS 387.121(1).

To fund the basic support guarantee, state revenue is deposited into the State Distributive School Account (DSA), which is located in the State General Fund. NRS 387.030. Money placed in the DSA must "be apportioned among the several school districts and charter schools of this State at the times and in the manner provided by law." NRS 387.030(2). Additional funds may be advanced if the DSA is insufficient to pay the basic support guarantee. 2015 ***741** Nev. Stat., ch. 537, § 9, at 3741. Because student enrollment may fluctuate from year to year, a "hold-harmless" provision allows a district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next. NRS 387.1223(3).

SB 515 sets forth the specific amounts of the per-pupil basic support guarantee for each district. 2015 Nev. Stat., ch. 537, §§ 1–2, at 3736–37. Although the amounts vary from district to district, the *average* basic support guarantee per pupil is $5,710 for FY2015–16 and $5,774 for FY2016–17. *Id.* §§ 1–2(1), at 3736. To fund the basic support guarantee for K–12 public schools, SB 515 appropriated a total of just over $2 billion from the State General Fund to the DSA for the 2015–17 biennium. *Id.* § 7, at 3740.

C.

When an education savings account is created, the amount of money deposited by the Treasurer into an account for a child within a particular school district is deducted from that school district's apportionment of legislatively appropriated funds in the DSA. Specifically, Section 16 of SB 302 amended NRS 387.124(1) to provide that the apportionment of funds from the DSA to the school districts, computed on a yearly basis, equals the difference between the basic support guarantee and the local funds available[2] *minus* "all the funds deposited in education savings accounts established on behalf of children who reside in the county pursuant to NRS 353B.700 to NRS 353B.930." *See* 2015 Nev. Stat., ch. 332, § 16, at 1839–40. According to the Treasurer's estimate, over 7,000 students have applied for an education savings account so far.

II.

A.

The plaintiffs/respondents in *Schwartz v. Lopez*, Docket No. 69611, are seven Nevada citizens and parents of children enrolled in Nevada public schools who filed a complaint seeking a judicial declaration that SB 302 is unconstitutional and an injunction enjoining its implementation. The complaint named as the defendant State Treasurer Dan Schwartz, who is charged with enforcement and administration of the ESA program. The complaint alleged that SB 302 violates the requirement for a uniform school system under ***742** Article 11, Section 2; diverts public school funds contrary to Article 11, Section 2 and Section 6; and seeks a permanent injunction enjoining the State Treasurer from implementing the ESA program. [3]

The *Lopez* plaintiffs moved for a preliminary injunction, arguing that they were likely to prevail on the merits because SB 302 was clearly unconstitutional and that Nevada's public school children will suffer irreparable harm because the education savings accounts will divert substantial funds from public schools. After a hearing, the district court granted a preliminary injunction, concluding that SB 302 violated Section 6 and thus the ****894** *Lopez* plaintiffs were likely to succeed on their constitutional claim, and that the balance of potential hardship to the *Lopez* plaintiffs' children outweighed the interests of the State Treasurer and others. The district court rejected the constitutional challenge under Section 2. The Treasurer now appeals.

B.

The plaintiffs/appellants in *Duncan v. Nevada State Treasurer*, Docket No. 70648, are five Nevada citizens who filed a complaint for injunctive and declaratory relief, asserting a constitutional challenge to SB 302 and alleging that it diverts public funds to private schools, many of which are religious, in violation of Article 11, Section 10 (prohibiting public funds from being used for sectarian purpose) and Article 11, Section 2 (requiring the Legislature to provide for a "uniform system of common schools"). The complaint named as defendants the Office of the State Treasurer of Nevada, the Nevada Department of Education, State Treasurer Dan Schwartz in his official capacity, and Interim Superintendent of Public Instruction Steve Canavero in his official capacity. Six parents who wish to register their children in the ESA program were permitted to intervene as defendants.

The State Treasurer, joined by the intervenor-parents, filed a motion to dismiss for failure to state a claim and for lack of jurisdiction. The State Treasurer argued that the *Duncan* plaintiffs lacked standing to challenge SB 302 and that the constitutional challenges were without merit. In granting the State Treasurer's motion to dismiss, the district court found that the *Duncan* plaintiffs had standing to bring facial challenges to the ESA program but that the facial challenges under Sections 2 and 10 were without merit. The *Duncan* plaintiffs appealed.

***743** III.

As a threshold argument, the State Treasurer contends that the plaintiffs lack standing to challenge SB 302 because they cannot show that they will suffer any special injury. The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. *See Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983) (citing *Harman v. City & Cty. of San Francisco*, 7 Cal.3d 150, 101 Cal.Rptr. 880, 496 P.2d 1248, 1254 (1972) (" 'The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court.' ")). The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party. *See Harman*, 101 Cal.Rptr. 880, 496 P.2d at 1254.

Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public. *See, e.g., Doe v. Bryan*, 102 Nev. 523, 525–26, 728 P.2d 443, 444–45 (1986) (requiring plaintiffs, who sought to have criminal statute declared unconstitutional, to first demonstrate a personal injury, i.e., that they were arrested or threatened with prosecution under the statute); *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929) (requiring property owner to show that he would suffer a special or peculiar injury different from that sustained by the general public in order to maintain complaint for injunctive relief).

We now recognize an exception to this injury requirement in certain cases involving issues of significant public importance. Under this public-importance exception, we may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury. We stress, as have other jurisdictions recognizing a similar exception to the general standing requirements, that this public-importance exception is narrow and available only if the following criteria

are met. First, the case must involve an issue of significant public importance. *See, e.g., Trs. for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987). Second, the case must involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *See Dep't of Admin. v. Horne*, 269 So.2d 659, 662–63 (Fla. 1972). And third, the plaintiff must be an "appropriate" party, meaning that there is no one else in a better position who will likely ****895** bring an action and that the plaintiff is capable of fully advocating his or her position in court. *See Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 972–73 (Utah 2006); *Trs. for Alaska*, 736 P.2d at 329–30.

***744** The plaintiffs here are citizens and taxpayers of Nevada, and most are also parents of children who attend public schools.[4] They allege that SB 302 allows millions of dollars of public funds to be diverted from public school districts to private schools, in clear violation of specific provisions in the Nevada Constitution, which will result in irreparable harm to the public school system. These cases, which raise concerns about the public funding of education, are of significant statewide importance. Public education is a priority to the citizens of this state, so much so that our Constitution was amended just ten years ago to require the Legislature to sufficiently fund public education before making any other appropriation. *See* Nev. Const. art. 11, § 6(1). The plaintiffs allege that SB 302 specifically contravenes this constitutional mandate and also violates other constitutional provisions regarding the support of public schools and the use of public funds. The plaintiffs are appropriate parties to litigate these claims. There is no one else in a better position to challenge SB 302, given that the financial officer of this state charged with implementing SB 302 has indicated his clear intent to comply with the legislation and defend it against constitutional challenge. Further, the plaintiffs have demonstrated an ability to competently and vigorously advocate their interests in court and fully litigate their claims. We conclude that, under the particular facts involved here, the plaintiffs in these cases have demonstrated standing under the public-importance exception test.[5]

IV.

We now turn to the plaintiffs' constitutional claims. Initially, we note that these cases come before us in different procedural contexts—one from an order granting a preliminary injunction and the other from an order dismissing a complaint for failure to state a claim. Consequently, these proceedings would ordinarily be governed by different standards. *Compare* NRS 33.010 (injunction), *with* NRCP 12(b)(5) (motion to dismiss for failure to state a claim upon which relief can be granted). In each case, however, the district court rendered a decision as to the constitutionality of SB 302, which is purely a legal question reviewed de novo by this court. *See Hernandez v. Bennett–Haron*, 128 Nev. 580, 586, 287 P.3d 305, 310 (2012) ("[T]his court reviews de novo determinations of whether ***745** a statute is constitutional."). Thus, our review in these cases is de novo, and we apply the standards governing facial challenges to a statute's constitutionality.

In considering a constitutional challenge to a statute, we must start with the presumption in favor of constitutionality, and therefore we "will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). "When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). The rules of statutory construction apply when interpreting a constitutional provision. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1054 (2014). This court will look to the plain language of the provision if it is unambiguous. *See City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 359, 302 P.3d 1118, 1126 (2013). If, however, the provision is subject to more than one reasonable interpretation, the provision is ambiguous, and this court will look beyond the plain language and consider the provision's history, public policy, and reason in order to ascertain the intent of the drafters. *Id.* Our interpretation ****896** of an ambiguous provision also must take into consideration the spirit of the provision and avoid absurd results. *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011).

V.

The plaintiffs first argue that the ESA program violates Section 2 of Article 11 in the Nevada Constitution, which requires the Legislature to provide for "a uniform system of common schools." The plaintiffs contend that SB 302 violates Section 2 by using public funds to subsidize an alternative system of education that includes non-common,

non-uniform private schools and home-based schooling, which are not subject to curriculum requirements and performance standards and which can discriminate in their admission practices. For support, the plaintiffs cite the maxim *expressio unius est exclusio alterius*, to argue that the expression in Section 2 requiring the Legislature to maintain a uniform system of common schools necessarily forbids the Legislature from simultaneously using public funding to pay for private education that is wholly outside of the public school system. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of ***746** any power in the legislature to establish a different policy." (quoting *State v. Hallock*, 14 Nev. 202, 205–06 (1879))).

The State Treasurer, on the other hand, argues that the "uniform" requirement in Section 2 is concerned with maintaining uniformity within the public school system, by avoiding differences between public schools across the state, and the Legislature has fulfilled its duty by maintaining public schools that are uniform, free of charge, and open to all. The State Treasurer also asserts that Section 2 must be read in conjunction with the broader mandate of Section 1 of Article 11, requiring the Legislature to encourage education "by all suitable means," and that nothing prohibits the Legislature from promoting education outside of public schools.

A.

We begin our analysis with the text of Section 2 of Article 11, which states:

> 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.

Nev. Const. art. 11, § 2. Looking to the plain language of Section 2, it is clearly directed at maintaining uniformity *within* the public school system. *See State v. Tilford*, 1 Nev. 240, 245 (1865) (upholding under Section 2 the Legislature's abolition of Storey County's Board of Education, which was different from any other county). Section 2 requires that a school be maintained in each school district at least six months each year, provides that funding may be withheld from any school district that allows sectarian instruction, and permits the Legislature to set parameters on attendance "in each school district upon *said public schools*." (Emphasis added.)

The plaintiffs do not dispute that Nevada's public school system is uniform, free of charge, and open to all students. SB 302 does not alter the existence or structure of the public school system. Nor does SB 302 transform private schools or its other participating entities into public schools. Indeed, NRS 353B.930 states that nothing in the provisions governing education savings accounts "shall be deemed to limit the independence or autonomy of a participating entity or to make the actions of a participating entity the actions of the State ***747** Government." Thus, SB 302 is not contrary to Section 2's mandate to provide for a uniform system of common schools.

B.

We find additional support for this conclusion in Section 1 of Article 11, which requires ****897** the Legislature to encourage education "by all suitable means." Section 1 of Article 11 states:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of

> appointment, term of office and the duties thereof.

Nev. Const. art. 11, § 1. Use of the phrase "by all suitable means" reflects the framers' intent to confer broad discretion on the Legislature in fulfilling its duty to promote intellectual, literary, scientific, and other such improvements, and to encourage other methods in addition to the public school system.

The plaintiffs argue that Section 1 cannot be read in isolation to permit the Legislature to take any action as long as it tends to encourage education, and that the mandate in the second clause requiring a superintendent of public instruction, as well as the debates surrounding the adoption of Article 11, show that Section 1 was meant to apply only to public education. Yet, use of the phrase "and also" to separate the superintendent clause from the suitable means clause signifies two separate legislative duties: the first *to encourage* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements; and the second *to provide* for a superintendent of public instruction. *See Meredith v. Pence*, 984 N.E.2d 1213, 1221 (Ind. 2013) (interpreting use of the word "and" in the Indiana Constitution's education clause as setting forth two separate and distinct duties). While both clauses pertain to education, they operate independently, and the second duty is not a limitation on the first. And although the debates surrounding the enactment of Article 11 reveal that the delegates discussed the establishment of a system of public education and its funding, they also noted the importance of parental freedom over the education of their children, rejected the notion of making public school attendance compulsory, and acknowledged the need to vest the Legislature with discretion over education into the future. *See Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 565–77 (Andrew J. Marsh off. rep., 1866); *see also* Thomas W. Stewart & Brittany Walker, *Nevada's Education Savings Accounts: A Constitutional Analysis* (2016) (Nevada Supreme Court Summaries), http://scholars.law.unlv.edu/nvscs/950, at 12–15 (discussing ***748** the history of Nevada Constitution Article 11, Section 2). If, as the plaintiffs argue, the framers had intended Section 2's requirement for a uniform school system to be the *only* means by which the Legislature could promote educational advancements under Section 1, they could have expressly stated that, but instead they placed these directives in two separate sections of Article 11, neither of which references the other. To accept the narrow reading urged by the plaintiffs would mean that the public school system is the *only* means by which the Legislature could encourage education in Nevada. We decline to adopt such a limited interpretation. *See State v. Westerfield*, 23 Nev. 468, 474, 49 P. 119, 121 (1897) (authorizing expenditure of general fund money to pay a teacher's salary at a non-public school).

Our holding is consistent with the Indiana Supreme Court's decision in *Meredith v. Pence*, which upheld an education choice program against a challenge brought under the Indiana Constitution's school uniformity clause similar to Nevada's. 984 N.E.2d at 1223. That case involved the state's statutory school voucher program, which permits eligible students to use public funds to attend private instead of public schools. *Id.* at 1223. The education clause at issue stated:

> [I]t 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.

Id. at 1217 n.1 (quoting Ind. Const. art. 8, § 1). Focusing in part on the use of the conjunction "and," the court interpreted this provision as plainly setting forth two separate and distinct duties—the first *to encourage*, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and the second *to provide* for a general and uniform ****898** system of common schools—and concluded that the second duty cannot be read as a restriction on the first. *Id.* at 1221, 1224. Because the public school system remained in place and available to all school children and the voucher program did not alter its structure or components, the court held that the voucher program did not conflict with the legislature's imperative to provide for a general and uniform system of common schools. *Id.* at 1223. The Indiana court instead concluded that the program fell within the legislature's independent and broader duty to encourage moral, intellectual, scientific, and agricultural improvement. *Id.* at 1224–25. The court also interpreted the phrase "by all suitable means" as demonstrating an intent to confer broad legislative discretion, and was not persuaded by the plaintiffs' argument in that case to apply the *expressio unius* canon in part because it

would limit, contrary to ***749** the framers' intent, this broad delegation of legislative authority. *Id.* at 1222 & 1224 n.17. [6]

The plaintiffs' reliance on *Bush v. Holmes*, wherein the Florida Supreme Court held unconstitutional the state's Opportunity Scholarship Program (OSP) that permitted expenditure of public funds to allow students to attend private schools, is inapposite. 919 So.2d 392, 407 (2006). Florida's constitutional uniformity provision is different than Nevada's, providing:

> 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....

Fla. Const. art. 9, § 1(a) (West 2010). The Florida court stated that the second sentence imposed a "paramount duty" on the state to make "adequate provision" for the education of all children within the state, but the third sentence contains a restriction on the execution of that duty by requiring "a uniform, efficient, safe, secure, and high quality system of free public schools" that allows students to obtain a high quality education. *Bush*, 919 So.2d at 406–07. The court held that the OSP violated this section by "devoting the state's resources to the education of children within [Florida] through means other than a system of free public schools." *Id.* at 407. The *Meredith* court distinguished the *Bush* decision because the Indiana Constitution contained no "adequate provision" clause and no restriction on the mandate to provide a free public school system, and instead contained two distinct duties—"to encourage ... moral, intellectual, scientific, and agricultural improvement," and "to provide ... for a general and uniform system of Common Schools." *Meredith*, 984 N.E.2d at 1224.

Similarly here, the Nevada Constitution contains two distinct duties set forth in two separate sections of Article 11—one to encourage ***750** education through all suitable means (Section 1) and the other to provide for a uniform system of common schools (Section 2). We conclude that as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate of Section 2 is satisfied, and the Legislature may encourage other suitable educational measures under Section 1. The legislative duty to maintain a uniform public school system is "not a ceiling but a floor upon which the legislature can build additional opportunities for school children." *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602, 628 (1998). For these reasons, we conclude that the plaintiffs have not established that the creation of an ESA program ****899** violates Section 2. [7]

VI.

The *Duncan* plaintiffs argue that the ESA program violates Section 10 of Article 11 in the Nevada Constitution by allowing public funds to be used for tuition at religious schools. Article 11, Section 10 of the Nevada Constitution states: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nev. Const. art. 11, § 10.

A.

As detailed above, the ESA program established by SB 302 allows for public funds to be deposited by the State Treasurer into an account set up by a parent on behalf of a child so that the parents may use the funds to pay for the child's educational expenses. It is undisputed that the ESA program has a secular purpose—that of education—and that the public funds which the State Treasurer deposits into the education savings accounts are intended to be used for educational, or non-sectarian, purposes. Thus, in depositing public funds into an education savings account, the State is not using the funds for a "sectarian purpose." The plaintiffs do not disagree on this point. Instead, they point to the fact that the ESA program permits parents to use the funds at religious schools, and they argue that this would constitute a use of public funds for a sectarian purpose, in violation of Section 10. We disagree. Once the public funds are deposited into an education savings account, the funds are no longer "public funds" but are instead the private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools. Any decision by the parent to use the funds in his

***751** or her account to pay tuition at a religious school does not involve the use of "public funds" and thus does not implicate Section 10.

The plaintiffs contend that the mere placement of public funds into an account held in the name of a private individual does not alter the public nature of the funds. As support, the plaintiffs point to regulatory aspects of the ESA program that they claim demonstrate that the funds in the education savings accounts remain public funds under State control. For example, the accounts must be established through a financial management firm chosen by the State Treasurer, the State Treasurer may audit the accounts and freeze or dissolve them if any funds are misused, and the funds revert back to the State if the child no longer participates in the ESA program or graduates from high school. NRS 353B.850(2); NRS 353B.860(6)(b); NRS 353B.880(2), (3). We recognize the ESA program imposes conditions on the parents' use of the funds in their account and also provides State oversight of the education savings accounts to ensure those conditions are met. But, as we explained earlier, the Legislature may use suitable means to encourage and promote education, *see* Nev. Const. art. 11, § 1, and all of the conditions imposed on the ESA funds are consistent with the Legislature's non-sectarian purpose of promoting education.[8] That the funds may be used by the parents only for authorized educational expenses does not alter the fact that the funds belong to the parents. And, though the funds may revert back to the State under certain circumstances, we nonetheless conclude that, during the time the funds are in the education savings accounts, they belong to the parents and are not "public funds" subject to Article 11, Section 10.

B.

The plaintiffs contend that *State v. Hallock*, 16 Nev. 373 (1882)—the only case in ****900** which this court has addressed the meaning of Section 10—prohibits any public funds from ending up in the coffers of a religious institution or school. We disagree with the plaintiffs' reading of *Hallock*. The *Hallock* decision concerned an appropriation of public funds from the State treasury *directly* to a *sectarian institution* and held that such a payment was prohibited by Section 10. The ESA program, however, provides for public funds to be deposited *directly* into an account belonging to a *private individual*, not to a sectarian institution. No public funds are paid directly to a sectarian school or institution under the ESA program. Rather, public funds ***752** are deposited into an account established by a parent, who may then choose to spend the money at a religious school or one of the other participating entities. Those funds, once deposited into the account, are no longer public funds, and this ends the inquiry for Section 10 purposes. Our holding in *Hallock* does not require a different conclusion.[9] Accordingly, we conclude that the ESA program does not result in any public funds being used for sectarian purpose and thus does not violate Article 11, Section 10 of the Nevada Constitution.

VII.

Both the *Lopez* and *Duncan* plaintiffs contend that SB 302 violates Section 2 of Article 11 of the Nevada Constitution, and the *Lopez* plaintiffs assert that SB 302 violates Section 6 of Article 11 of the Nevada Constitution, which requires the Legislature to appropriate money in an amount the Legislature deems sufficient to pay for the operation of the public schools before the Legislature enacts any other appropriation for the biennium. Nev. Const. art. 11, §§ 2, 6. The plaintiffs argue that SB 302 undermines the funding of the public school system by diverting funds appropriated for public schools to the education savings accounts for private expenditures in violation of these constitutional provisions. The State Treasurer argues that Article 11, Section 2 and Section 6 impose only three requirements on the Legislature: (1) fund the public schools from the general fund; (2) appropriate funds for the public schools before any other appropriation; and (3) appropriate funds it deems to be sufficient for public schools. According to the State Treasurer, the Legislature satisfied these requirements when it passed the appropriation in SB 515 that funded the DSA, and SB 302's movement of funds from the DSA into the education savings accounts does not contravene any of these requirements.

A.

Nevada Constitution Article 4, Section 19 states that "[n]o money shall be drawn from the treasury but in consequence of appropriations ***753** made by law." An "appropriation" is " 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.' " *Rogers v. Heller*, 117 Nev. 169, 173 n.8, 18 P.3d 1034, 1036 n.8 (2001) (quoting *Hunt v. Callaghan*, 32 Ariz. 235, 257 P. 648, 649 (1927)). General legislation may contain an

appropriation to fund its operation. *See State v. Eggers*, 29 Nev. 469, 475, 91 P. 819, 820 (1907). No technical words are necessary to constitute an appropriation if there is a clear legislative intent authorizing the expenditure and a maximum amount set aside for the payment of claims or at least a formula by which the amount can be ****901** determined. *See id.* at 475, 484–85, 91 P. at 820, 824; *Norcross v. Cole*, 44 Nev. 88, 93, 189 P. 877, 878 (1920). While this court has not required any particular wording to find an appropriation, there must be language manifesting a clear intent to appropriate. *See State v. Eggers*, 35 Nev. 250, 258, 128 P. 986, 988 (1913) (interpreting an appropriation act by its terms and declining to infer an expenditure when the language did not manifest such an intent).

Applying these principles, one could argue that SB 302 impliedly appropriates funds for education savings accounts because it authorizes the Treasurer to issue a grant of money for each education savings account in an amount based on a percentage of the statewide average basic support per pupil. [10] There are two problems with that argument.

First, SB 302 contains no limit on the number of education savings accounts that can be created or the maximum sum of money that can be utilized to fund the accounts for the biennium. These omissions suggest that SB 302 does not contain an appropriation. Because of the "hold-harmless" provision under NRS 387.1223(3), which allows a school district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next, if all ***754** students left the public school system, the State must still fund *both* the school districts' per pupil amount based on 95 percent of the prior year's enrollment *and* the education savings accounts for all students, an amount potentially double the $2 billion appropriated in SB 515 for just the public schools. Given that scenario, surely the Legislature would have specified the number of education savings accounts or set a maximum sum of money to fund those accounts if the Legislature had intended SB 302 to include an appropriation.

Second, the Legislature passed SB 302 on May 29, 2015, but it did not enact SB 515, appropriating the money to fund the public schools, until June 1, 2015. Section 6(2) of Article 11 of the Nevada Constitution directs that, "before any other appropriation is enacted to fund a portion of the state budget ... the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient ... to fund the operation of the public schools in the State for kindergarten through grade 12," while section 6(5) provides, "[a]ny appropriation of money enacted in violation of [section 6(2)] is void." If SB 302 contained an appropriation to fund the education savings accounts, it would violate Nevada Constitution Article 11, Section 6(2), requiring that before any other appropriation is enacted the Legislature shall appropriate the money to fund the operation of the public schools. Such an appropriation would be void. *See* Nev. Const. art. 11, § 6(5). For these two reasons, we necessarily conclude that SB 302 does not contain an appropriation to fund its operation. *See* Nev. Const. art. 4, § 19.

B.

The State Treasurer therefore concedes, as he must, that SB 302 did not appropriate funds for the education savings accounts. Instead, the State Treasurer asserts that the $2 billion lump sum appropriation to the DSA in SB 515 is the total amount the Legislature deemed sufficient to fund *both* public schools and the education savings accounts. This argument fails, however, because SB 515 does not mention, let alone appropriate, any funds for the education savings accounts. The title of SB 515 states that ****902** it is an act "ensuring sufficient funding for K–12 *public education* for the 2015–2017 biennium." 2015 Nev. Stat., ch. 537, at 3736 (emphasis added). Consistent with the title's focus on public education, and the mandate in Article 11, Section 2 and Section 6, the text of SB 515 sets forth the basic support guarantee for each school district and appropriates just over $2 billion to the DSA for payment of those expenditures. The text of SB 515 does not address the ESA program or appropriate any money to fund it. The legislative history of SB 515 contains no discussion of the education savings accounts or their fiscal impact on the amount appropriated for public schools. Moreover, the DSA ***755** Summary for the 2015–17 biennium contains a list of amounts for the basic support guarantee funding and other categorical funding components of public education, but there is no line item for funding the education savings accounts. Thus, the record is devoid of any evidence that the Legislature included an appropriation to fund the education savings accounts in the amount the Legislature itself deemed sufficient to fund K–12 public education in SB 515. [11]

The State Treasurer also argues that we must presume that the Legislature understood that SB 515 would fund both public education and the education savings accounts from the $2

billion because SB 302 had already been approved, *see City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985) (recognizing a presumption that when the Legislature enacts a statute it acts with full knowledge of existing statutes on same subject). We will not, however, infer an appropriation for a specific purpose when the legislative act does not expressly authorize the expenditure for that purpose. *See Eggers*, 35 Nev. at 258, 128 P. at 988. SB 515 does not, by its terms, set aside funds for the education savings accounts. Nor could we make such an inference. While SB 302 passed the Legislature on May 29, 2015, it was not signed into law by the governor until June 2, 2015, after the Legislature passed SB 515 on June 1, 2015. For these reasons, we reject the State Treasurer's argument that SB 515 appropriates funds for the education savings accounts created under SB 302.

C.

Having determined that SB 515 did not appropriate any funds for the education savings accounts, the use of any money appropriated in SB 515 for K–12 public education to instead fund the education savings accounts contravenes the requirements in Article 11, Section 2 and Section 6 and must be permanently enjoined. *See* 2015 Nev. Stat., ch. 332, § 16, at 1839–41 (amending NRS 387.124(1) to require that all funds deposited in the education savings accounts be ***756** subtracted from the school districts' quarterly apportionments of the DSA). Additionally, because SB 302 does not provide an independent basis to appropriate money from the State General Fund and no other appropriation appears to exist, the education savings account program is without an appropriation to support its operation. *See* Nev. Const. art. 4, § 19. Given our conclusion, it is unnecessary to address any additional constitutional arguments under Section 6 of Article 11 of the Nevada Constitution.

VIII.

In *Duncan v. Nevada State Treasurer*, Docket No. 70648, we affirm in part and reverse in part the district court's order dismissing the complaint and remand the case to the district court to enter a final declaratory ****903** judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 absent appropriation therefor consistent with this opinion. In *Schwartz v. Lopez*, Docket No. 69611, we affirm in part and reverse in part the district court's order granting a preliminary injunction, and we remand the case to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 consistent with this opinion.

We concur:

Parraguirre, C.J.

Gibbons, J.

Pickering, J.

DOUGLAS, J., with whom CHERRY, J., agrees, concurring in part and dissenting in part:

I concur in all but Part VI of the court's opinion. As to Part VI, I do not believe the court should reach the issue of whether SB 302 violates Article 11, Section 10 of the Nevada Constitution for two reasons.

First, our holding that the funding of the education savings accounts must be permanently enjoined as unconstitutional makes it unnecessary for us to consider whether certain portions of SB 302 also violate Section 10. *See Cortes v. State*, 127 Nev. 505, 516, 260 P.3d 184, 192 (2011) ("Constitutional questions should not be decided except when absolutely necessary to properly dispose of the particular case." (internal quotation marks omitted)). Second, the Section 10 challenge is not ripe for a decision on the merits. In reaching the merits of the Section 10 challenge, the court ignores that the *Duncan* complaint (which raised the Section 10 challenge) was dismissed by the district court for failure to state a claim under NRCP 12(b)(5). At that stage of the litigation, the only issue to be considered is whether, accepting all factual allegations as true, the complaint alleged a claim upon which relief may be granted. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Because the *Duncan* plaintiffs stated a legally sufficient ***757** claim when they alleged that the ESA program violates Article 11, Section 10 by allowing public funds to be used for sectarian purpose, the district court erred in dismissing the complaint as to this claim. The court appears to concede that the plaintiffs alleged a legally sufficient claim but nevertheless would affirm on the basis that no relief is warranted because the funds in the education savings accounts are not "public" and thus do not implicate Section 10. However, in my opinion, the issue as to whether the funds in the education savings accounts are private or public in nature involves factual

determinations that were not made by the district court and should not be made by this court in the first instance. And, as the Section 10 claim is a matter of first impression and not as well-defined and easily resolved as my colleagues suggest, *see, e.g., Moses v. Skandera*, 367 P.3d 838, 849 (N.M. 2015) (holding that state constitution prohibits public funds from being used to buy textbooks for students attending private schools), *petition for cert. filed*, 84 U.S.L.W. 3657 (U.S. May 16 2016)); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015) (plurality) (holding that state constitution prohibits public funds from being given to students to use at religious schools), *petition for cert. filed*, 84 U.S.L.W. 3261 (U.S. Oct. 28, 2015) (No. 15–558), the proper action here, had a majority of this court not determined that SB 302's funding is unconstitutional, would be to remand this matter to the district court for further proceedings and factual development as to this claim. For these reasons, I respectfully dissent as to Part VI of the court's opinion.

I concur:

Cherry, J.

All Citations

132 Nev. 732, 382 P.3d 886, 336 Ed. Law Rep. 1151, 132 Nev. Adv. Op. 73

Footnotes

1 The provisions governing the ESA program are codified in NRS 353B.700–.930. *See* 2015 Nev. Stat., ch. 332, §§ 2–15, at 1826–31. SB 302 became effective on January 1, 2016. 2015 Nev. Stat., ch. 332, § 17(1), at 1848.

2 To illustrate how the basic support guarantee operates by district, according to information provided in the record, Clark County had a basic support guarantee of $5,393 per pupil for FY 2014, and of that amount, $2,213 constituted the state's portion of the funding and the remaining $3,180 was paid from local funds. For the same period in Washoe County, the basic support guarantee was $5,433 per pupil, which consisted of $2,452 from state funding and $2,981 from the local funds.

3 The *Lopez* plaintiffs also asserted a challenge under Article 11, Section 3 (requiring that certain property and proceeds pledged for educational purposes not be used for other purposes), which the district court rejected. Because the parties' appellate briefs do not develop an argument as to the Section 3 challenge, we do not address it in this opinion.

4 All of the *Lopez* plaintiffs have children in the Nevada public school system, and one of the *Duncan* plaintiffs has a child in public school and is also a teacher at a public school in Nevada.

5 Because we conclude the plaintiffs have standing under the public-importance exception, we decline to consider the parties' arguments regarding whether the plaintiffs have taxpayer standing.

6 The Supreme Courts of North Carolina and Wisconsin have likewise upheld educational choice programs against challenges under their state's uniform-school provisions. *See Hart v. State*, 368 N.C. 122, 774 S.E.2d 281, 289–90 (2015) (holding that the uniformity clause applied exclusively to the public school system, mandating public schools of like kind throughout the state, and did not prevent the legislature from funding educational initiatives outside that system); *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460, 473–74 (1992) (holding that the uniformity clause requires the legislature to provide the state's school children with the opportunity to receive a free uniform basic education, and the school choice program "merely reflects a legislative desire to do more than that which is constitutionally mandated").

7 As for the plaintiffs' argument that SB 302's diversion of public school funding undermines the public school system in violation of Section 2, we address that issue under Section VII of this opinion.

8 For example, parents are restricted to using funds only on authorized educational expenses, such as tuition, fees, textbooks, curriculum, and tutoring. NRS 353B.870(1). And they must use those funds to receive instruction from "participating entities," which include private schools, public universities or community colleges, distance education providers, accredited tutoring providers, and parents that have applied for such status and met all of the requirements set forth in NRS 353B.900. NRS 353B.750; NRS 353B.850(1)(a).

9 In support of their contention that Section 10 prohibits ESA funds from being paid to religious schools, the plaintiffs rely on a statement in *Hallock* that "public funds should not be used, directly or *indirectly*, for the building up of any sect." 16 Nev. at 387 (emphasis added). The plaintiffs read this as prohibiting any public funds from going to religious schools, whether paid directly by the State or indirectly by way of the parents. The more likely meaning of this statement was to address concern that, while public funds given to a "sectarian institution" such as the one in *Hallock*—a Catholic-run orphanage and school—may be used by that institution only to pay for the physical needs of the orphans, those funds nevertheless have the indirect effect of "building up a sect" through the instruction and indoctrination of those children in a particular sect. Regardless, the issue in *Hallock* concerned only the direct payment of public funds to a sectarian institution, and thus any statement about an indirect payment of public funds would be dictum.

10 This court may raise sua sponte a constitutional issue not asserted in the district court. *See, e.g., Desert Chrysler–Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 644, 600 P.2d 1189, 1191 (1979) ("[S]ince the statutes were assailed on constitutional grounds, it would be paradoxical for us to uphold the statutes on the grounds raised by the parties, yet ignore a clear violation of the separation of powers doctrine."). Although the plaintiffs did not challenge the ESA program under Article 4, Section 19, they did challenge the constitutionality of SB 302's diversion to the education savings accounts of funds appropriated for the public schools in SB 515. Like in *Desert Chrysler–Plymouth*, it would be paradoxical for us to decide whether SB 302 diverts funds from the public school appropriation in SB 515, without addressing whether the education savings account funds were, in fact, appropriated in either SB 302 or SB 515. Furthermore, based on the State Treasurer's concession that SB 302 is not an appropriation, we find no need for further briefing on this issue.

11 The State Treasurer argues that the question of whether the Legislature appropriated funds "it deems sufficient" to fund public schools under Section 6(2) is nonjusticiable because that determination is a policy choice committed to the legislative branch. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty. Comm'rs*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 587 (2013) ("Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." (internal quotation marks omitted)). We do not pass judgment on whether the amount appropriated is in fact sufficient to fund the public schools. Rather, the issue before us is whether the amount the Legislature *itself* deemed sufficient in SB 515 must be safeguarded for and used by public schools and cannot be diverted for other uses under our state constitution.

86 Ohio St.3d 1
Supreme Court of Ohio.

SIMMONS–HARRIS et al.,
Appellees and Cross–Appellants,
v.
GOFF, Supt., et al., Appellants and Cross–Appellees.
Gatton et al., Appellees,
v.
Goff, Supt., et al., Appellants.

No. 97–1117.
|
Submitted Sept. 28, 1999.
|
Decided May 27, 1999.

Synopsis
In two consolidated actions, various citizens and teachers' union brought action against State and State Superintendent challenging constitutionality of school voucher program. The Franklin County Court of Common Pleas granted State's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, 1997 WL 217583, declared the school voucher program to be unconstitutional, and discretionary appeals and cross-appeal were allowed. The Supreme Court, Pfeifer, J., held that: (1) school voucher program did not violate the federal establishment clause, except for selection criteria which gave priority to students whose parents belonged to a religious group that supported a sectarian school; (2) unconstitutional selection criteria was severable from remainder of statutory scheme; (3) program did not violate school fund clause of state constitution; (4) school voucher program did not violate provision of state constitution establishing a thorough and efficient system of common schools; (5) program did not violate state constitution's uniformity clause; and (6) school voucher program violated state constitution's one-subject rule.

Affirmed in part, and reversed in part.

Douglas, J., filed an opinion concurring in the judgment only, in which Resnick and Francis E. Sweeney, Sr., JJ., joined.

Baird, J., filed an opinion concurring in part and dissenting in part, in which William W. Young, J., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

****205** ***1** On June 28, 1995, the General Assembly of the state of Ohio adopted Am.Sub.H.B. No. 117, the biennial operating appropriations bill for fiscal years 1996 and 1997. 146 Ohio Laws, Part I, 898. Among the provisions were those establishing the Pilot Project Scholarship Program, commonly known as the School Voucher Program. See R.C. 3313.974 through 3313.979.

The School Voucher Program requires the State Superintendent of Public Instruction to provide scholarships to students residing within Cleveland City School District. [1] R.C. 3313.975(A). Students receiving scholarships may use them only to attend an "alternative school," *id*., which is defined as a registered private school or a public school located in an adjacent school district. R.C. 3313.974(G). The scholarships are ninety percent (for students with family income below two hundred percent of the maximum income level established by the superintendent) or seventy-five percent (for students with family income at or above two hundred percent of that level) of the lesser of the actual tuition charges or an amount to be established by the superintendent not to exceed $2,500. R.C. 3313.978(A) and (C)(1). The number of scholarships available in a given year is limited ****206** by the amount appropriated by the General Assembly. R.C. 3313.975(B).

Scholarship funds are made available in the form of checks. A check for a student enrolled in a registered private school is payable to the student's parents; a check for a student enrolled in an adjacent public school district is payable to that school district. R.C. 3313.979. Checks for students enrolled in registered private schools are sent to the school, where the parents are required to endorse ***2** the checks to the school. This mechanism, which is not part of the statutory scheme, ensures that the scholarship funds are expended on education.

On January 10, 1996, Sue Gatton, Millie Waterman, Walter Hertz, Reverend James Watkins, Robin McKinney, Loretta Heard, Reverend Don Norenburg, Deborah Schneider, and the Ohio Federation of Teachers ("Gatton") filed suit against the state of Ohio and John M. Goff, the state superintendent, asserting that the School Voucher Program violated various provisions of the Ohio Constitution and the Establishment Clause of the First Amendment to the United States Constitution. On January 31, 1996,

Doris Simmons–Harris, Sheryl Smith, and Reverend Steven Behr ("Simmons–Harris") filed suit against the state superintendent, challenging the constitutionality of the School Voucher Program. The cases were consolidated, and the state moved for summary judgment. Summary judgment was granted. Gatton and Simmons–Harris appealed.

The court of appeals declared the School Voucher Program to be unconstitutional, holding it violative of the Establishment Clause of the First Amendment to the United States Constitution; the School Funds Clause of Section 2, Article VI of the Ohio Constitution; the Establishment Clause of Section 7, Article I of the Ohio Constitution; and the Uniformity Clause of Section 26, Article II of the Ohio Constitution. The court of appeals also held that the School Voucher Program did not violate the Thorough and Efficient Clause of Section 2, Article VI of the Ohio Constitution, or the single-subject rule of Section 15(D), Article II of the Ohio Constitution.

The cause is now before this court pursuant to the allowance of discretionary appeals and a cross-appeal.

Attorneys and Law Firms

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Clint Bolick, pro hac vice, William H. Mellor III and Richard D. Komer, Southfield, MI; Reminger & Reminger, Cleveland and Columbus and Kevin Foley, for appellants and cross-appellees Hope for Cleveland's Children et al.

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Zeiger & Carpenter, John W. Zeiger and Marion H. Little, Jr., Columbus, urging reversal for amici curiae Citizens for Educational Freedom, Parents Rights Organization, and Education Freedom Foundation.

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Hugh Calkins and John K. Sullivan, amici curiae, urging reversal.

Miller, Cassidy, Larroca & Lewin, L.L.P., Nathan Lewin and Richard W. Garnett, Washington, DC; and Dennis Rapps, urging reversal for amici curiae the National Jewish Commission on Law and Public Affairs, Agudath Harabonim of the United States and Canada, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah, National Society of Hebrew Day Schools, Agudath Israel of America, and Union of Orthodox Jewish Congregations of America.

Kevin J. Hasson, Eric W. Treene and Roman P. Storzer, urging reversal for amicus curiae Becket Fund for Religious Liberty.

Thomas G. Hungar and Eugene Scalia, Washington, DC, pro hac vice, urging reversal for amici curiae Center for Education Reform, Representative William F. Adolph, Jr., American Legislative Exchange Council, Arkansas Policy Foundation, ATOP Academy, Center for Equal Opportunity, CEO America, Representative Henry Cuellar, Education Leaders Council, Floridians for Educational Choice, Maine School Choice Coalition, Reach Alliance, Texas Coalition for Parental Choice in Education, United New Yorkers for Choice in Education," I Have a Dream" Foundation of Washington, D.C., Institute for Transformation of Learning, Liberty Counsel, Milton & Rose D. Friedman Foundation, Minnesota Business Partnership, National Federation of Independent Business, North Carolina Education Reform Foundation, Pennsylvania Manufacturers Association, Putting Children

First, Mayor Bret Schundler, Texas Justice Foundation, and Toussaint Institute.

Goldstein & Roloff and Morris L. Hawk, Cleveland, urging affirmance for amicus curiae Ohio Coalition for Equity and Adequacy in School Funding.

Wolman, Genshaft & Gellman and Benson A. Wolman, Columbus, urging affirmance for amicus curiae National Committee for Public Education & Religious Liberty.

***4** Patrick F. Timmins, Jr., Bronx, NY, urging affirmance for amicus curiae Coalition of Rural and Appalachian Schools.

Opinion

PFEIFER, J.

PFEIFER, J. The court of appeals ruled on six substantive constitutional issues. We will address each of them in turn. We conclude that the current School Voucher Program generally does not violate the Establishment Clause of the First Amendment to the United States Constitution or the Establishment Clause of Section 7, Article I of the Ohio Constitution, and does not violate the School Funds Clause of Section 2, Article VI of the Ohio Constitution, the Thorough and Efficient Clause of Section 2, Article VI of the Ohio Constitution, or the Uniformity Clause of Section 26, Article II of the Ohio Constitution. We also conclude that the current School Voucher Program does violate the one-subject rule, Section 15(D), Article II of the Ohio Constitution. Further, we conclude that former R.C. 3313.975(A) does violate the Uniformity Clause of Section 26, Article II of the Ohio Constitution. Accordingly, we affirm in part and reverse in part.

I

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." In *Cantwell v. Connecticut* (1940), 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218, the Supreme Court stated that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Thus, Ohio's General Assembly is proscribed from enacting laws respecting an establishment of religion.

In *Lemon v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, the Supreme Court set forth a three-prong test to determine whether the Establishment Clause has been violated. Various Supreme Court Justices have challenged the continuing validity of the *Lemon* test. See ****208** *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.* (1993), 508 U.S. 384, 398–399, 113 S.Ct. 2141, 2149–2150, 124 L.Ed.2d 352, 364 (Scalia, J., concurring); *Allegheny Cty. v. Am. Civ. Liberties Union, Greater Pittsburgh Chapter* (1989), 492 U.S. 573, 655–657, 109 S.Ct. 3086, 3134–3135, 106 L.Ed.2d 472, 535 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in the judgment in part and dissenting in part); *Westside Community Schools Bd. of Edn. v. Mergens* (1990), 496 U.S. 226, 258, 110 S.Ct. 2356, 2376, 110 L.Ed.2d 191, 221 (Kennedy, J., joined by Scalia, J., concurring in part and concurring in the judgment). See, also, Nowak & Rotunda, Constitutional Law (5 Ed.1995) 1223, Section 17.3, fn. 1. Nevertheless, *Lemon* remains the law of the land, and we are constrained to apply it. In its most recent Establishment Clause case, the Supreme Court used the principles ***5** set forth in the *Lemon* test, even as it modified the analytical framework of the three prongs. *Agostini v. Felton* (1997), 521 U.S. 203, 223, 230–233, 117 S.Ct. 1997, 2010, 2014–2015, 138 L.Ed.2d 391, 414, 419–421.

According to *Lemon,* a statute does not violate the Establishment Clause when (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion. *Lemon,* 403 U.S. at 612–613, 91 S.Ct. at 2111, 29 L.Ed.2d at 755.

The first prong of the *Lemon* test is satisfied when the challenged statutory scheme was enacted for a secular legislative purpose. On its face, the School Voucher Program does nothing more or less than provide scholarships to certain children residing within the Cleveland City School District to enable them to attend an alternative school. Nothing in the statutory scheme, the record, or the briefs of the parties suggests that the General Assembly intended any other result. We conclude that the School Voucher Program has a secular legislative purpose and that the challenged statutory scheme complies with the first prong of the *Lemon* test.

The second prong of the *Lemon* test is satisfied when the primary effect of a challenged statutory scheme is neither to advance nor to inhibit religion. Appellees argue that *Commt. for Pub. Edn. & Religious Liberty v. Nyquist* (1973), 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948, compels a holding that the School Voucher Program unconstitutionally advances religion. In *Nyquist,* a program that provided direct

money grants to certain nonpublic schools for repair and maintenance, reimbursed low-income parents for a portion of the cost of private school tuition, including sectarian school tuition, and granted other parents certain tax benefits was ruled unconstitutional. The court held that there was no way to ensure that the monies received pursuant to the tuition-reimbursement portion of the program, even though received directly by the parents and only indirectly by the schools, would be restricted to secular purposes. *Id.* at 794, 93 S.Ct. at 2976, 37 L.Ed.2d at 975. Therefore, according to the court, the program had "the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794, 93 S.Ct. at 2976, 37 L.Ed.2d at 975.

The *Nyquist* holding has been undermined by subsequent case law that culminated in the court stating, "[W]e have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid." *Agostini,* 521 U.S. at 225, 117 S.Ct. at 2011, 138 L.Ed.2d at 415. See *Witters v. Washington Dept. of Serv. for the Blind* (1986), 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (state provision of vocational aid to a blind person, who used it to attend a Christian college, held constitutional). Thus, we continue our analysis of the impermissible-effect prong of the *Lemon* test unburdened by the bright-line *Nyquist* test advocated by appellees.

***6** In *Agostini,* the court stated that its understanding of the criteria used to assess whether aid to religion has an impermissible effect had changed. *Id.,* 521 U.S. at 223, 117 S.Ct. at 2010, 138 L.Ed.2d at 414. According to the *Agostini* court, the three primary criteria to use to evaluate whether government aid has the effect of advancing religion are (1) whether the program results in governmental indoctrination, (2) whether the program's recipients are defined by reference to religion, and (3) whether the program creates an excessive entanglement between government ****209** and religion. *Id.* at 230–233, 117 S.Ct. at 2014–2015, 138 L.Ed.2d at 419–421. In applying this test, we bear in mind that analysis of Establishment Clause jurisprudence is not a "legalistic minuet in which precise rules and forms must govern." *Lemon,* 403 U.S. at 614, 91 S.Ct. at 2112, 29 L.Ed.2d at 757.

Among the factors to consider to determine whether a government program results in indoctrination is whether a "symbolic link" between government and religion is created. *Agostini,* 521 U.S. at 224, 117 S.Ct. at 2011, 138 L.Ed.2d at 415. It can be argued that the government and religion are linked in this case because the School Voucher Program results in money flowing from the government to sectarian schools. We reject the argument, primarily because funds cannot reach a sectarian school unless the parents of a student decide, independently of the government, to send their child to that sectarian school. See *Zobrest v. Catalina Foothills School Dist.* (1993), 509 U.S. 1, 8, 113 S.Ct. 2462, 2466, 125 L.Ed.2d 1, 10 (government programs that naturally provide benefits to a broad class of citizens without reference to religion are not invalid merely because sectarian institutions may also receive an attenuated financial benefit); *Witters,* 474 U.S. at 486, 106 S.Ct. at 751, 88 L.Ed.2d at 854 ("It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution").

In *Zobrest,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1, the court upheld the constitutionality of a state program that provided a sign-language interpreter for a deaf student attending a sectarian school. The court stated that the reasoning of *Mueller v. Allen* (1983), 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721, and *Witters,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, where Establishment Clause challenges were rejected, applied to *Zobrest* because the service at issue "is a general government program that distributes benefits neutrally * * * without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467, 125 L.Ed.2d at 11, quoting *Witters,* 474 U.S. at 487, 106 S.Ct. at 752, 88 L.Ed.2d at 855. The School Voucher Program meets this standard. It is a general program, even if targeted solely at the Cleveland City School District, and its benefits are available irrespective of the type of alternative school the eligible students attend.

***7** Whatever link between government and religion is created by the School Voucher Program is indirect, depending only on the "genuinely independent and private choices" of individual parents, who act for themselves and their children, not for the government. *Witters,* 474 U.S. at 487, 106 S.Ct. at 752, 88 L.Ed.2d at 854. To the extent that children are indoctrinated by sectarian schools receiving tuition dollars that flow from the School Voucher Program, it is not the result of direct government action. Cf. *Rosenberger v. Rector & Visitors of Univ. of Virginia* (1995), 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700. Direct government subsidies to a religious school are clearly unconstitutional. *Witters,* 474 U.S. at 487, 106 S.Ct. at 751, 88 L.Ed.2d at 854. We conclude that the School Voucher Program does not create an unconstitutional link between government and religion.

No other aspect of the statutory scheme involves the government in indoctrination. It is difficult to see how the School Voucher Program could result in governmental indoctrination. No governmental actor is involved in religious activity, no governmental actor works at a religious setting, and no government-provided incentive encourages students to attend sectarian schools. We conclude that the School Voucher Program does not involve the state in religious indoctrination.

Next we consider whether the School Voucher Program defines its recipients by reference to religion. There are two specific references to religion in the statutory scheme. They are directed to ensuring that registered private schools do not discriminate on the basis of religion or teach hatred on the basis of religion. R.C. 3313.976(A)(4) and (A)(6). On its face, the statutory scheme does not define its recipients by reference to religion. That does not end our inquiry, ****210** however. We must also determine whether the statutory scheme has "the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini,* 521 U.S. at 231, 117 S.Ct. at 2014, 138 L.Ed.2d at 419.

Most of the beneficiaries of the School Voucher Plan attend sectarian schools. That circumstance alone does not render the School Voucher Program unconstitutional if the scholarships are "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [are] made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini,* 521 U.S. at 231, 117 S.Ct. at 2014, 138 L.Ed.2d at 419. See *Mueller,* 463 U.S. at 401, 103 S.Ct. at 3070, 77 L.Ed.2d at 732 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law"). We conclude that the selection criteria of the School Voucher Program do not all satisfy this standard.

***8** The School Voucher Program provides scholarships to students to enable them to attend certain schools other than the public school in the district in which they reside. Registered private schools admit students according to the following priorities: (1) students enrolled in the previous year, (2) siblings of students enrolled in the previous year, (3) students residing within the school district in which the private school is located by lot, (4) students whose parents are affiliated with any organization that provides financial support to the school, and (5) all other applicants by lot. R.C. 3313.977(A). We conclude that priorities (1), (2), (3), and (5) are neutral and secular and that priority (4) is not.

Under priority (4), a student whose parents belong to a religious group that supports a sectarian school is given priority over other students not admitted according to priorities (1), (2), and (3). Priority (4) provides an incentive for parents desperate to get their child out of the Cleveland City School District to "modify their religious beliefs or practices" in order to enhance their opportunity to receive a School Voucher Program scholarship. *Agostini,* 521 U.S. at 232, 117 S.Ct. at 2014, 138 L.Ed.2d at 420. That a student whose parents work for a company that supports a nonsectarian school would also have priority over students not admitted according to priorities (1), (2), and (3) does not negate the incentive to modify religious beliefs or practices. We conclude that priority (4) favors religion and therefore hold that R.C. 3313.977(A)(1)(d) is unconstitutional. No other part of the statutory scheme defines the School Voucher Program's recipients by reference to religion.

Next we must determine whether R.C. 3313.977(A)(1)(d) can be severed from the rest of the statutory scheme. "The test for determining whether part of a statute is severable was set forth in *Geiger v. Geiger* * * *:

" '(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?' " *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464, 668 N.E.2d 457, 466–467, quoting *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, 160 N.E. 28, 33.

The removal of R.C. 3313.977(A)(1)(d) does not render the remainder of the statutory scheme incapable of standing on it own. *Id.* The removal of R.C. 3313.977(A)(1)(d) does not "make it impossible to give effect to the apparent intention" of the General Assembly. *Id.* The removal of R.C. 3313.977(A)(1)(d) does not necessitate the insertion of words to "separate the constitutional part ***9** from the unconstitutional part." *Id.* R.C. 3313.977(A)(1)(d) is severable, and we sever it from the remainder of the statutory scheme.

Next we examine whether the School Voucher Program has the effect of ****211** advancing religion by excessively entangling church and state. See *Agostini,* 521 U.S. at 233, 117 S.Ct. at 2015, 138 L.Ed.2d at 420 ("Entanglement must be excessive before it runs afoul of the Establishment Clause"). In making this determination, we must consider " 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.' " *Id.* at 232, 117 S.Ct. at 2015, 138 L.Ed.2d at 420, quoting *Lemon,* 403 U.S. at 615, 91 S.Ct. at 2112, 29 L.Ed.2d at 757.

The primary beneficiaries of the School Voucher Program are children, not sectarian schools. *Zobrest,* 509 U.S. at 12, 113 S.Ct. at 2469, 125 L.Ed.2d at 13. For purposes of Establishment Clause analysis, the institutions that are benefited are nonpublic sectarian schools. However, the nonpublic sectarian schools that admit students who receive scholarships from the School Voucher Program do not receive the scholarship money directly from the state. The aid provided by the state is received from the parents and students who make independent decisions to participate in the School Voucher Program and independent decisions as to which registered nonpublic school to attend. See *Witters,* 474 U.S. at 488, 106 S.Ct. at 752, 88 L.Ed.2d at 855. Given the indirect nature of the aid, the resulting relationship between the nonpublic sectarian schools and the state is attenuated. *Zobrest,* 509 U.S. at 8, 113 S.Ct. at 2466, 125 L.Ed.2d at 10.

To be sure, a sectarian school must register with the state before enrolled students may avail themselves of the benefits of the School Voucher Program to attend that school. R.C. 3313.976. However, these requirements are not onerous, and failure to comply is punished by no more than a revocation of the school's registration in the School Voucher Program. *Id.* We do not see how this relationship (which is, at least in part, preexisting, because sectarian schools are already subject to certain state standards, see R.C. 3301.07; Ohio Adm.Code Chapter 3301–35) has the effect of excessively entangling church and state. In sum, there is no credible evidence in the record that the *primary* effect of the School Voucher Program is to advance religion.

We conclude that the School Voucher Program has a secular legislative purpose, does not have the primary effect of advancing religion, and does not excessively entangle government with religion. Accordingly, we hold that the School Voucher Program does not violate the Establishment Clause of the First Amendment to the United States Constitution. We hold that R.C. 3313.977(A)(1)(d) does violate the Establishment Clause and sever it from the remainder of the statutory scheme.

***10** II

Section 7, Article I of the Ohio Constitution states that "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." For purposes of the case before us, this section is the approximate equivalent of the Establishment Clause of the First Amendment to the United States Constitution. See *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 8, 15 O.O.3d 3, 4, 399 N.E.2d 66, 67; *S. Ridge Baptist Church v. Indus. Comm.* (S.D.Ohio 1987), 676 F.Supp. 799, 808. This court has had little cause to examine the Establishment Clause of our own Constitution and has never enunciated a standard for determining whether a statute violates it. See *Protestants & Other Americans United for Separation of Church & State v. Essex* (1971), 28 Ohio St.2d 79, 57 O.O.2d 263, 275 N.E.2d 603 (federal Establishment Clause jurisprudence discussed; Section 7, Article I of the Ohio Constitution applied but not discussed). Today we do so by adopting the elements of the three-part *Lemon* test. We do this not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method by which to determine whether a statutory scheme establishes religion.

There is no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States ****212** Constitution, though they have at times been discussed in tandem. See *Pater v. Pater* (1992), 63 Ohio St.3d 393, 588 N.E.2d 794; *In re Milton* (1987), 29 Ohio St.3d 20, 29 OBR 373, 505 N.E.2d 255. The language of the Ohio provisions is quite different from the federal language. Accordingly, although we will not on this day look beyond the *Lemon–Agostini* framework, neither will we irreversibly tie ourselves to it. See *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 42, 616 N.E.2d 163, 169 (Ohio Constitution is a document of independent force). We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason.

We reiterate the reasoning discussed during our analysis of the federal constitutional standard, and although we now analyze pursuant to the Ohio Constitution, we not surprisingly reach the same conclusion. See *Michigan v. Long* (1983), 463 U.S. 1032, 1040–1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214. We conclude that the School Voucher Program does not have an impermissible legislative purpose or effect and does not excessively entangle the state and religion. The School Voucher Program does not violate Section 7, Article I of the Ohio Constitution.

***11** Section 2, Article VI of the Ohio Constitution states that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." While this clause has seldom been discussed by this court, we did state in *Protestants & Other Americans United for Separation of Church & State,* 28 Ohio St.2d at 88, 57 O.O.2d at 268, 275 N.E.2d at 608, that "the sole fact that some private schools receive an indirect benefit from general programs supported at public expense does not mean that such schools have an exclusive right to, or control of, any part of the school funds of this state." As discussed previously, no money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on its efforts or the efforts of the state. Sectarian schools receive money that originated in the School Voucher Program only as the result of independent decisions of parents and students. Accordingly, we conclude that the School Voucher Program does not result in a sectarian school having an "exclusive right to, or control of, any part of the school funds of this state." The School Voucher Program does not violate this clause of Section 2, Article VI of the Ohio Constitution.

Section 2, Article VI of the Ohio Constitution also states that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State." In *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, this court held that the state has an obligation to establish a "thorough and efficient system of common schools." It can be argued that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state.

Private schools have existed in this state since before the establishment of public schools. They have in the past provided and continue to provide a valuable alternative to the public system. However, their success should not come at the expense of our public education system or our public school teachers. We fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education.[2] The School Voucher Program does not violate this clause of Section 2, Article VI of the Ohio Constitution.

III

Section 26, Article II of the Ohio Constitution, the Uniformity Clause, states that "[a]ll laws of a general nature, shall have a uniform operation throughout the State * * *." To determine whether the School Voucher Program violates the Uniformity Clause, we must ascertain "(1) whether the ****213** statute is a law of a ***12** general or special nature, and (2) whether the statute operates uniformly throughout the state." *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 541, 706 N.E.2d 323, 330.

A subject is general " 'if the subject does or may exist in, and affect the people of, every county, in the state.' " *Id.* at 542, 706 N.E.2d at 330, quoting *Hixson v. Burson* (1896), 54 Ohio St. 470, 481, 43 N.E. 1000, 1002. The parties agree that schools are a subject of general nature. Further, that is the law of this state. See *State ex rel. Wirsch v. Spellmire* (1902), 67 Ohio St. 77, 65 N.E. 619, paragraph two of the syllabus ("The subject-matter of schools * * * is of a general nature"). Because the School Voucher Program is of a general nature, the Uniformity Clause applies.

We therefore must determine whether the School Voucher Program operates uniformly throughout the state. The General Assembly amended R.C. 3313.975(A), effective June 30, 1997. Former R.C. 3313.975(A) stated that the School Voucher Program was limited to "one school district that, as of March 1995, was under a federal court order requiring supervision and operational management of the district by the state superintendent." (146 Ohio Laws, Part I, 1183.) We agree with the court of appeals and find that former R.C. 3313.975(A) violates the Uniformity Clause because it can only apply to one school district.

For purposes of judicial economy, we will also rule on the constitutionality of the current R.C. 3313.975(A), as amended on June 30, 1997. R.C. 3313.975(A) now reads that the School Voucher Program is limited to "school districts that are or have ever been under a federal court order requiring supervision and operational management of the district by

the state superintendent." It is clear that the current School Voucher Program does not apply to the vast majority of the school districts in the state. At the time this case was filed, the School Voucher Program was in effect only within the Cleveland City School District. However, that does not mean that the School Voucher Program cannot satisfy the Uniformity Clause.

In *State ex rel. Stanton v. Powell* (1924), 109 Ohio St. 383, 385, 142 N.E. 401, this court stated: "Section 26, Art. II of the Constitution [the Uniformity Clause] was not intended to render invalid every law which does not operate upon all persons, property or political subdivisions within the state. It is sufficient if a law operates upon every person included within its operative provisions, provided such operative provisions are not arbitrarily and unnecessarily restricted. And the law is equally valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail. A law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists." This court has also stated that "a statute is deemed to be ***13** uniform despite applying to only one case so long as its terms are uniform and it may apply to cases similarly situated in the future." *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 138, 568 N.E.2d 1206, 1213.

The General Assembly amended R.C. 3313.975(A) after the court of appeals below determined that former R.C. 3313.975(A) violated the Uniformity Clause. In amending this statute, the General Assembly was likely guided by our *Zupancic* decision. In *Zupanci*c, we held that a statute that differentiated between taxing districts based on whether they contained electric power plants having initial production equipment costs in excess of $1 billion did not violate the Uniformity Clause, even though at the time the statute was enacted only one electric power plant had production equipment whose initial cost exceeded $1 billion. The court reasoned that "[a]lthough the statute may presently apply to one particular electric power plant with an initial cost exceeding $1 billion, there is nothing within the Act itself to prevent its prospective operation upon any electric power plant similarly situated throughout the state." *Zupancic,* 58 Ohio St.3d at 138, 568 N.E.2d at 1213.

The same is true in this case. The Cleveland City School District is the only school district that is currently eligible for the ****214** School Voucher Program. However, the statutory limitation, as amended, does not prohibit similarly situated school districts from inclusion in the School Voucher Program in the future. R.C. 3313.975(A).

The General Assembly had a rational basis for enacting the School Voucher Program, which relates to a statewide interest, and for specifically targeting the Cleveland City School District, which is the largest in the state and arguably the one most in need of state assistance.[3] Further, the School Voucher Program is a pilot program, which suggests that the General Assembly is experimenting to determine whether the voucher concept is beneficial or worthy of further implementation. Though the School Voucher Program is currently limited to one school district, we conclude that the General Assembly did not arbitrarily or unnecessarily restrict the operative provisions of the program.

The distinction between districts that satisfy the conditions and those that do not is not artificial. It is clear from the record that the Cleveland City School District is in a crisis related to the supervision order. The General Assembly took extraordinary measures to attempt to alleviate an extraordinary situation. That other school districts also have significant problems does not mean the distinction between school districts under state supervision by order of a federal court and other school districts is not real. The distinction is at least as real as ***14** the distinction between electric power plants with initial production equipment costs exceeding $1 billion and those with initial production equipment costs of less that $1 billion. See *Zupancic.*

We conclude that the School Voucher Program operates uniformly throughout the state because it operates upon every person included within its operative provisions and those operative provisions are not arbitrarily or unnecessarily restrictive.

The School Voucher Program, although extremely limited in its current application, is a law of a general nature and operates uniformly throughout the state. Accordingly, it does not violate the Uniformity Clause.

IV

Section 15(D), Article II of the Ohio Constitution states that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." This court has stated that the one-subject rule "is merely directory in nature." *State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141, 11 OBR 436,

464 N.E.2d 153, syllabus. However, the court elaborated by stating that "when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, *i.e.*, logrolling. Inasmuch as this was the very evil the one-subject rule was designed to prevent, an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule." *Id.* at 145, 11 OBR at 440, 464 N.E.2d at 157. See *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 6, 19 OBR 1, 5, 482 N.E.2d 575, 580. The court reiterated this standard when it stated, "In order to find a legislative enactment violative of the one-subject rule, a court must determine that various topics contained therein lack a common purpose or relationship so that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act." *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506, 507.

The first provision of Am.Sub.H.B. No. 117, as enacted, R.C. 3.15, concerns the residency of certain elected officials. Baldwin's Ohio Legislative Service (1995) L–622. [4] The second provision, R.C. 9.06, which enables certain government entities to contract for the private operation of correctional facilities, is not related to the first provision. 146 Ohio Laws, Part I, 906. The third provision, ****215** R.C. 101.34, which declares some files of the joint legislative ethics committee to ***15** be confidential, is not related to either of the first two provisions. *Id.* at 911. The fourth provision, R.C. 102.02, which requires candidates for elective office to file financial statements with the Ethics Commission, is not related to any of the first three provisions. *Id.* at 913. The fifth provision, R.C. 103.31, which creates a joint legislative committee on federal funds, and the sixth provision, R.C. 103.32, which requires certain state agencies to submit proposals to that committee, are not related to any of the first four provisions. *Id.* at 920–921. It is obvious that none of the first six provisions of Am.Sub.H.B. No. 117 has anything to do with the School Voucher Program. Am.Sub.H.B. No. 117 contains many other examples of topics that "lack a common purpose or relationship." [5] Am.Sub.H.B. No. 117 contained three hundred eighty-three amendments in twenty-five different titles of the Revised Code, ten amendments to renumber, and eighty-one new sections in sixteen different titles of the Revised Code. Baldwin's Ohio Legislative Service (1995) L–621–622.

There is considerable disunity in subject matter between the School Voucher Program and the vast majority of the provisions of Am.Sub.H.B. No. 117. Cf. *State ex rel. Ohio AFL–CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 229, 631 N.E.2d 582, 586; *Beagle,* 78 Ohio St.3d at 62, 676 N.E.2d at 507. Given the disunity, we are convinced that the General Assembly's consideration of the one-subject rule was based on this court's pre-*Dix* holdings, virtually total deference to the General Assembly. See *Pim v. Nicholson* (1856), 6 Ohio St. 176; *State ex rel. Atty. Gen. v. Covington* (1876), 29 Ohio St. 102, paragraph seven of the syllabus. Despite the "directory" language of *Dix,* the recent decisions of this court make it clear that we no longer view the one-subject rule as toothless. *Hoover; State ex rel. Hinkle v. Franklin Cty. Bd. of Elections* (1991), 62 Ohio St.3d 145, 580 N.E.2d 767; *Ohio AFL–CIO*. The one-subject rule is part of our Constitution and therefore must be enforced. [6]

***16** We recognize that appropriations bills, like Am.Sub.H.B. No. 117, are different from other Acts of the General Assembly. Appropriations bills, of necessity, encompass many items, all bound by the thread of appropriations. Accordingly, even though many of the provisions in Am.Sub.H.B. No. 117 appear unrelated, we will restrict our analysis to the School Voucher Program, the only part of H.B. No. 117 whose constitutionality is challenged in the case before us.

The School Voucher Program allows parents and students to receive funds from the state and expend them on education at nonpublic schools, including sectarian schools. It is a significant, substantive program. Nevertheless, the School Voucher Program was created in a general appropriations bill consisting of over one thousand pages, of which it comprised only ten pages. See 146 Ohio Laws, Part I, 898–1970. The School Voucher Program, which is leading-edge legislation, was in essence little more than a rider attached to an appropriations bill. Riders are provisions that are included in a bill that is " 'so certain of adoption that the rider will secure adoption not on its own merits, ****216** but on [the merits of] the measure to which it is attached.' " *Dix,* 11 Ohio St.3d at 143, 11 OBR at 438, 464 N.E.2d at 156, quoting Ruud, "No Law Shall Embrace More Than One Subject" (1958), 42 Minn.L.Rev. 389, 391. Riders were one of the problems the *Dix* court was concerned about. *Id.* The danger of riders is particularly evident when a bill as important and likely of passage as an appropriations bill is at issue. See Ruud at 413 ("[T]he general appropriation bill presents a special temptation for the attachment of riders.

It is a necessary and often popular bill which is certain of passage").

Another significant aspect of the one-subject rule, according to the *Dix* court, is that "[b]y limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed." *Dix,* 11 Ohio St.3d at 143, 11 OBR at 438, 464 N.E.2d at 156. This principle is particularly relevant when the subject matter is inherently controversial and of significant constitutional importance.

This court has stated that "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics. However, where there is a blatant disunity between topics and no rational reason for their combination can be discerned, it may be inferred that the bill is the result of logrolling * * *." *Hoover,* 19 Ohio St.3d at 6, 19 OBR at 5, 482 N.E.2d at 580. As discussed previously, there is a "blatant disunity between" the School Voucher Program and most other items contained in Am.Sub.H.B. No. 117. Further, we have been given "no rational reason for their combination," which strongly suggests that the inclusion of the School Voucher Program within ***17** Am.Sub.H.B. No. 117 was for tactical reasons. *Dix,* 11 Ohio St.3d at 145, 11 OBR at 440, 464 N.E.2d at 157.

Given the factors discussed above, we conclude that creation of a substantive program in a general appropriations bill violates the one-subject rule. Accordingly, the School Voucher Program must be stricken from Am.Sub.H.B. No. 117. See *Ohio AFL–CIO,* 69 Ohio St.3d at 247, 631 N.E.2d at 598–599 (Pfeifer, J., concurring); *Hinkle,* 62 Ohio St.3d at 147–149, 580 N.E.2d at 769–770.

Our holding does not overrule *Dix* ; indeed we have relied on its reasoning extensively. Instead, we modify *Dix* to the extent necessary to ensure that it is not read to support the position that a substantive program created in an appropriations bill is immune from a one-subject-rule challenge as long as funds are also appropriated for that program.

In order to avoid disrupting a nearly completed school year, our holding is stayed through the end of the current fiscal year, June 30, 1999.

Judgment affirmed in part and reversed in part.

MOYER, C.J., concurs.

DOUGLAS, RESNICK and FRANCIS E. SWEENEY, SR., JJ., concur in judgment only.

BAIRD and WILLIAM W. YOUNG, JJ., concur in part and dissent in part.

WILLIAM R. BAIRD, J., of the Ninth Appellate District, sitting for COOK, J.

WILLIAM W. YOUNG, J., of the Twelfth Appellate District, sitting for LUNDBERG STRATTON, J.

DOUGLAS, J., concurring in judgment only.

DOUGLAS, J., concurring in judgment only. I concur that the School Voucher Program, as enacted by the General Assembly, violates the one-subject rule, Section 15(D), Article II of the Ohio Constitution. With regard to the rest of the majority opinion, while there is much I agree with, I find a number of the other assertions by the majority to be advisory in nature and, accordingly, while I concur, I do so only in the judgment.

I also write separately to address the dissent. I do so with regard to four matters.

I recognize that the majority opinion discusses the dissent in footnote 6. I believe that more needs to be said regarding the reliance by the dissenters on *Pim v. Nicholson* (1856), 6 Ohio St. 176. For whatever reason, the dissenters fail to quote from *Pim* that court's reasoning for holding as it did. *Pim* ****217** also says that "[w]e are therefore of the opinion, that in general the only safeguard against ***18** the violation of these rules [the one-subject rule] of the houses, is their regard for, and their oath to support the constitution of the state. We say in general the only safeguard: for whether a manifestly gross and fraudulent violation of these rules might authorize the court to pronounce a law unconstitutional, it is unnecessary to determine. *It is to be presumed that no such case will ever occur."* (Emphasis added.) *Id*. at 181. Thus, the *Pim* court, in the year 1856, found it unnecessary to determine, in that case, whether a violation of the one-subject rule did or would ever occur, and the court operated on the presumption that such a violation would never occur. It is, however, now apparent that a number of violations of the one-subject rule have occurred, and we have had brought to us a number of cases, like the case now before us, complaining of the persistent violation of the rule. Even the dissenters herein tacitly acknowledge this by adroitly avoiding any real discussion of the issue. Given such pronouncements as are contained in Appendix A, attached, we have a constitutional duty to no longer ignore the practice.

The dissenters also say that the majority "has concluded that the School Voucher Program is unconstitutional *merely* because Am.Sub.H.B. No. 117 contained unrelated subjects." (Emphasis added.) "Merely" is defined as "[w]ithout including anything else; purely; only; solely; *absolutely*; wholly." (Emphasis added.) Black's Law Dictionary (6 Ed.1990) 988. Here the dissenters are correct. The School Voucher Program absolutely (merely) does violate the Constitution and our oaths require us to say so when that is the fact.

Further, the dissenters say that "[t]his court recently observed the distinction between 'directory' and 'mandatory,' and refused to render void a judicial decision made in violation of a procedural *statutory* provision it deemed directory. *In re Davis* (1999), 84 Ohio St.3d 520, 705 N.E.2d 1219. The *statute* at issue required a juvenile court to enter judgment within seven days of a dispositional hearing." (Emphasis added.) We, of course, in the case now before us are not deciding a *statutory* issue. We are called upon, herein, to interpret a clear, unambiguous and absolute provision of our *Ohio Constitution,* to wit, "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." The difference should be obvious. Need we be reminded that it was Chief Justice John Marshall, as early as March 7, 1819, who explained for all of us who would follow that "[i]n considering this question, then, we must never forget that it is a *constitution* we are expounding"? (Emphasis *sic.*) *McCulloch v. Maryland* (1819), 4 Wheat. 316, 17 U.S. 316, 407, 4 L.Ed. 579, 601.

Finally, the dissenters, in perhaps the most disturbing part of the dissent, say that "[t]he salutary effect of [judicial refusal to intervene] is the disentanglement of the courts from the procedural business of the legislature, reserving to the citizens the oversight of the legislature without unnecessary judicial intrusion." ***19** Should that proposition be accepted by a majority of this court, then the message would go forth to all of the judges of this state that they should become disentangled from the "business" of the legislature. In one fell swoop we would be turning our backs on *Marbury v. Madison* (1803), 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60, decades and decades of cases following the doctrine of judicial review and, even, Alexander Hamilton's reply to Brutus (Robert Yates) in Federalist, No. 78.

Fulfilling our obligations as a court does not give us any practical or real omnipotence. We are simply meeting the obligations and exercising the power mandated and conferred by the United States and Ohio Constitutions and sustaining the principle of separation of powers. We must always remember that the power of the people expressed through our Constitutions is superior to the authority of both the legislative and judicial branches of government. While some might call exercise of duty "intrusion," others would define it as "commitment." I ascribe to the latter.

Accordingly, I concur in the judgment of the majority.

****218** RESNICK and FRANCIS E. SWEENEY, SR., JJ., concur in the foregoing opinion.

BAIRD, J., concurring in part and dissenting in part.

I respectfully dissent from that portion of the majority opinion that determines that the School Voucher Program must be stricken from Am.Sub.H.B. No. 117 because it violates the one-subject rule.

The one-subject rule "was incorporated into the constitution, for the purpose of making it a permanent rule of the houses, and to operate only upon bills in their progress through the general assembly. It is directory only, and the supervision of its observance must be left to the general assembly." *Pim v. Nicholson* (1856), 6 Ohio St. 176, paragraph one of the syllabus. The one-subject rule is not applicable to Acts. *Id.* at 180. It "was imposed to facilitate orderly legislative procedure, *not* to hamper or impede it." (Emphasis *sic.*) *State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141, 143, 11 OBR 436, 438, 464 N.E.2d 153, 156.

The majority acknowledges that the one-subject rule is directory but not mandatory but deviates from nearly one hundred fifty years of precedent as to the import of the terms "directory" and "mandatory." A legislative action taken in violation of a mandatory constitutional provision renders the enactment void, while violation of a directory provision does not. See *State ex rel. Atty. Gen. v. Covington* (1876), 29 Ohio St. 102, 117.

This court recently observed the distinction between "directory" and "mandatory," and refused to render void a judicial decision made in violation of a procedural statutory provision it deemed directory. ***20** *In re Davis* (1999), 84 Ohio St.3d 520, 705 N.E.2d 1219. The statute at issue required a juvenile court to enter judgment within seven days of a

dispositional hearing. The judgment at issue was entered seventeen months after the hearing. This court determined that the remedy for violation of the directory statute was enforcement of its provisions through a writ of procedendo, rather than nullification of the order. *Id.* at 523, 705 N.E.2d at 1222.

Today's majority ruling establishes that the sort of deference accorded by this court to judicial tribunals that fail to follow directory procedural guidelines is not necessarily available to the General Assembly. It has concluded that the School Voucher Program is unconstitutional merely because Am.Sub.H.B. No. 117 contained unrelated subjects. This, according to the majority, "suggests" logrolling by members of the General Assembly, although the record is devoid of any evidence of logrolling. There is no evidence to suggest that senators or representatives were unaware that the School Voucher Program was a part of Am.Sub.H.B. No. 117 when they voted, no evidence that someone surreptitiously attached the School Voucher Program as a rider to the bill on the eve of the vote, and no evidence of fraud or conspiracy by and among members of the General Assembly relative to passage of the bill or any of its components.

As a result of today's majority opinion, there are now, in effect, three categories of constitutional provisions governing the General Assembly: "directory," "mandatory," and "directory but void if determined by a court to contain more than one subject." The majority relies on *Dix v. Celeste* to support its reasoning but ignores the *Dix* syllabus law, which requires that a bill be "a manifestly gross and fraudulent violation" of the one-subject rule before it will be invalidated on constitutional grounds. Accord *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506, 507. The requirement that a bill be a manifestly gross and fraudulent violation of the one-subject rule, when read together with earlier decisions of this court, suggests a two-part inquiry when analyzing whether a bill must be stricken as violative of the one-subject rule. The first step is what the majority today views as the only step: whether the bill contained a "blatant disunity between topics." The second step is whether evidence shows that passage of the bill was "a manifestly gross and fraudulent violation" of the one-subject rule. *Dix,* 11 Ohio St.3d 141, 11 OBR 436, 464 N.E.2d 153, at the syllabus. By eliminating this second step, the majority has apparently concluded that violation of the one-subject rule ****219** will be determined solely by the numbers. If two subjects can be discerned, even within the context of an appropriations bill that is by its nature a multi-subject bill, a portion of the bill may be challenged, and proclaimed void, even years after it has been enacted and implemented. Plaintiffs need not plead fraud, with or without particularity, and they need not prove fraud, in order to have a statute stricken. Moreover, because the majority has opted to strike only a portion of Am.Sub.H.B. No. 117, and not the bill itself, ***21** multiple litigants can require this court to repeat today's exercise, again and again, until all but one subject remains.

By today's majority ruling, Ohio's judicial branch of government has intruded on its legislative branch on the basis of an inference of logrolling (in the absence of evidence of logrolling) and has invalidated an otherwise constitutional law on the basis of a technical procedural infraction. At one time, such intrusions by one branch of a government into the business of another were taken only with extreme caution and only to protect great public or private constitutional interests. The United States Supreme Court, for example, was willing to intrude upon the executive branch of the United States government by creation of the exclusionary rule only because, not to do so, would have rendered the Fourth Amendment's protection against illegal searches and seizures to be of no value. *Weeks v. United States* (1914), 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652, 656.

When this court held in *Dix* that the one-subject rule was "merely directory," it stated that, rather than "disparag[ing] the constitutional provision[,]" it had "simply accorded appropriate respect to the General Assembly, a coordinate branch of the state government." *Dix,* 11 Ohio St.3d at 144, 11 OBR at 439, 464 N.E.2d at 157. The salutary effect of such reasoning is the disentanglement of the courts from the procedural business of the legislature, reserving to the citizens the oversight of the legislature without unnecessary judicial intrusion.

WILLIAM W. YOUNG, J., concurs in the foregoing opinion.
****220** ***22**

APPENDIX A

APPENDIX A
CLEVELAND PLAIN DEALER
February 8, 1998

Constitution ignored in bills with riders, lawmaker says

By PAUL SOUHRADA
ASSOCIATED PRESS

COLUMBUS — Quick. What do special auto license plates, free seedlings from the Ohio Department of Natural Resources and a no-wake zone on Lake Erie have in common?

Nothing — and that is the problem, says Rep. Bill Schuck, a Columbus Republican and self-appointed guardian of the Ohio Constitution's single-subject rule.

The plates, seedlings and no-wake zone were lumped together a couple of years ago in what Schuck says is his favorite example of the legislature's violation of the constitutional mandate to stick to one subject.

Rarely a week goes by, though, without Schuck standing up on the House floor and chiding his colleagues for doing it again.

The single-subject rule is intended to prevent "log-rolling" and "riders" — legislative sleight of hand used to win passage of measures that might not get enough votes on their own by joining them together or attaching them to bills guaranteed to pass.

Now Schuck has introduced a bill that would require the nonpartisan Legislative Services Commission to raise a red flag any time it suspects constitutional problems with a bill.

Recently, House members fixed a bill creating new judgeships in Marion and Lorain counties by inserting language into a bill eliminating a requirement that the attorney general send reports to the legislature of property seized in drug raids.

> 'When we take the oath of office, we don't say, "I will support the parts of the constitution I know about and I like."'
>
> REP. BILL SCHUCK, Columbus Republican

Lawmakers had not noticed until after the judgeship bill was passed that they had inadvertently eliminated the primary election for the races. There wasn't time before the Feb. 4 filing deadline to introduce and pass a whole new bill, so they just stuck the fix into the next bill to come along.

Schuck raised the issue and — as usual — most of his colleagues gave a wink and a nod and passed the pit anyway.

"There are marriages of love and there are marriages of convenience," Rep. Bill Batchelder, a Medina Republican, joked before the vote. "This is a marriage of convenience."

Comments like that, and another common Statehouse adage — "What's the constitution among friends?" — drive Schuck to distraction.

"When we take the oath of office, we don't say, 'I will support the parts of the constitution I know about and I like,'" he said.

Schuck said House leadership's continued choice of convenience over constitutionality forces lawmakers to pick between violating their oaths or voting against legislation they support.

Schuck's bill also would raise the stakes if the courts ever throw out a law because it violates the single-subject rule. In the past, courts tossed out just the part of the law that was unconstitutional. Schuck's bill would make it all or nothing.

The prospects for Schuck's bill becoming law are probably slim. Not only would it complicate the operations of the legislature, it also isn't necessary, according to some lawmakers.

Rep. Jerry Luebbers, a Cincinnati Democrat, doesn't believe it is the Legislative Services Commission's — or even the legislature's — place to determine constitutionality.

The Legislative Services Commission's "opinion on whether something is unconstitutional or not is no more valid than yours, mine or the guy walking down the street," Luebbers told Schuck at a committee hearing last week.

"The only real opinion is the one from the court."

Schuck, though, thinks all branches of government have a duty to try to determine whether a bill is constitutional.

The courts start with the presumption that a law is constitutional, he explained. That is because they presume that legislators are upholding the constitution.

"If we don't police ourselves, it invites the courts to police us."

All Citations

86 Ohio St.3d 1, 711 N.E.2d 203, 135 Ed. Law Rep. 596, 78 A.L.R.5th 623, 1999 -Ohio- 77

Footnotes

1 The Pilot Project Scholarship Program also requires the state superintendent to provide tutorial assistance grants. R.C. 3313.975(A). As the provisions governing tutorial assistance have not been challenged in this case, we need not explain or discuss them.

2 It is possible that a greatly expanded School Voucher Program or similar program could damage public education. Such a program could be subject to a renewed constitutional challenge.

3 Our conclusion might be different if a program benefited only the district of a particularly powerful legislator.

4 Due to a printing error, the amendment to R.C. 3.15 does not appear in 146 Ohio Laws, Part I, 905, which repeats page 904.

5 For example, R.C. 3721.011 addresses skilled nursing care. 146 Ohio Laws, Part I, 1329–1333. R.C. 3721.012 addresses risk agreements between residential care facilities and residents of residential care facilities. *Id.* at 1333. R.C. 3721.02 addresses the inspection of nursing homes. *Id.* at 1334. R.C. 3721.04 requires the public health council to adopt rules governing the operation of nursing homes. *Id.* at 1335. R.C. 3721.05 requires operators of nursing homes to obtain a license. *Id.* at 1336.

6 In dissent, Judge Baird relies heavily on *Pim v. Nicholson* (1856), 6 Ohio St. 176. *Pim* was the controlling authority on this subject through this court's decision in *Dix,* 11 Ohio St.3d 141, 11 OBR 436, 464 N.E.2d 153. However, at this time, it is clearly established that bills enacted by the General Assembly may be challenged "on the basis that the original bill contained more than one subject in violation of Section 15(D), Article II of

the Ohio Constitution." *Hoover,* 19 Ohio St.3d at 6, 19 OBR at 5, 482 N.E.2d at 580. In *Hoover,* this court went on to state that "the court of appeals held that no enactment may be attacked on this basis, as the 'one-subject' provision of Section 15(D) has been consistently viewed as merely directory rather than mandatory. We disagree and reverse." *Id.* Today, we adhere to the holdings of *Dix* and its progeny, rather than *return* to the one-hundred-forty-three-year-old *Pim*.

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111 Ohio St.3d 568
Supreme Court of Ohio.

The STATE ex rel. OHIO CONGRESS OF PARENTS & TEACHERS et al., Appellants and Cross–Appellees,
v.
STATE BOARD OF EDUCATION et al., Appellees and Cross–Appellants.

No. 2004–1668.
|
Submitted Nov. 29, 2005.
|
Decided Oct. 25, 2006.

Synopsis
Background: Education associations, teachers' unions, parents, taxpayers, and school district boards of education brought action against State Board of Education, Superintendent of Public Instruction, Department of Education, charter schools, and community school operators for declaratory and injunctive relief that Community Schools Act was unconstitutional. Appeal and cross-appeal were accepted. The Court of Common Pleas, Franklin County, dismissed claims against state defendants and entered judgment on pleadings in favor of charter schools and operator. Plaintiffs appealed. The Court of Appeals affirmed in part and reversed in part. Appeal and cross-appeal were accepted.

Holdings: The Supreme Court, Lanzinger, J., held that:

Community Schools Act does not violate constitutional requirement of thorough and efficient system of common schools throughout state;

the Act does not usurp the powers of city school districts;

it does not violate state constitutional requirement to apply taxes to stated object;

statute which permits charter schools to borrow money from the state does not violate state constitutional prohibition against extending state credit to private business enterprises; and

charter schools are not private business "corporations" within the meaning of state constitutional prohibition against state assuming debt of corporation.

Affirmed in part and reversed in part.

Alice Robie Resnick, J., dissented and filed opinion.

Pfeifer, J., dissented and filed opinion.

O'Donnell, J., dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Judgment on the Pleadings.

****1150 SYLLABUS OF THE COURT**

R.C. Chapter 3314, relating to the establishment and operation of community schools as part of the state's educational system, is constitutional, both on its face and as applied.

Attorneys and Law Firms

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****1151** Louis B. Geneva Co., L.P.A., and M. Jayne H. Geneva, supporting appellants and cross-appellees for amici curiae Coalition for School Funding Reform, Community Advocates for Public Education, Cleveland

Heights–University Heights City School District, Lakewood City School District, and Shaker Heights City School District.

Rachelle Johnson, supporting appellants and cross-appellees for amicus curiae Ohio Education Association.

Carpenter & Lipps, L.L.P., Jeffrey A. Lipps, and Michael N. Beekhuizen, Columbus, supporting appellees and cross-appellants for amicus curiae Buckeye Community Hope Foundation.

McNamara, Hanrahan, Callender & Loxterman, James S. Callender Jr., Mentor, and Sheila M. Sexton, supporting appellees and cross-appellants for amici curiae Ohio Counsel of Community Schools, Lucas County Educational Service Center, Reynoldsburg Board of Education, Ashe Cultural Center, and National Association of Charter School Authorizers.

Nicola, Gudbranson & Cooper, L.L.C., Timothy L. McGarry, Arthur L. Clements III, and Becky M. Scheiman, Cleveland, supporting appellees and cross-appellants for amici curiae parent-teacher organizations of the following schools: Hope Academy–Canton Campus; Hope Academy–University Campus; Parma Community School; Summit Academy–Akron; Summit Academy–Dayton; Summit Academy–Parma; W.E.B. DuBois Academy; Ohio Coalition of E School Families, Inc.; Summit Academy–Xenia; and The Edge Academy.

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Bricker & Eckler, L.L.P., Susan B. Greenberger, Anne Marie Sferra, and Jennifer A. Flint, Columbus, not in support of the position of any party for amicus curiae Tri–Rivers Educational Computer Association.

Opinion

LANZINGER, J.

***568** {¶ 1} In this action, while recognizing that the challengers retain their ability to litigate alleged statutory violations against particular schools, we hold that community schools, also known as "charter schools," in and of themselves, are not unconstitutional. The appellants and cross-appellees are the Ohio Federation of Teachers, the Ohio Congress of Parents and Teachers, the Ohio School Boards Association, other education associations and teachers' unions, certain parents, taxpayers, school district boards of education, and residents of various school districts ("appellants"). Their lawsuit challenges the constitutionality of laws for the establishment and operation of Ohio's community schools enacted by the General Assembly by Am.Sub.H.B. No. 215 in 1997 and codified at R.C. Chapter 3314. [1]

{¶ 2} The appellees and cross-appellants include the State Board of Education, Ohio's Superintendent of Public Instruction, the Ohio Department of Education, various Ohio community schools, Ohio community-school operators, and White Hat Management, L.L.C., a company that manages 28 community schools in the state ("appellees").

***569** {¶ 3} The parties filed jurisdictional memoranda asking us to accept this case as a discretionary appeal to determine the constitutionality of R.C. Chapter 3314. We accepted the appeal and the cross- ****1152** appeals solely to determine the constitutional issues. Appellants' charges regarding the establishment and operation of community schools are still pending at the trial court.

{¶ 4} After first providing an overview of the enabling legislation and the history of this case, this opinion will analyze the constitutional claims arising under the Ohio Constitution, specifically (1) Section 2, Article VI, the Thorough and Efficient Clause, (2) Section 3, Article VI, governing city school districts, (3) Section 5, Article XII, limiting proceeds of taxes to their stated purposes, and (4) Sections 4 and 5, Article VIII, restricting the lending of the state's credit and the state's assumption of debt.

I. Overview of the Community–Schools Act, R.C. Chapter 3314

{¶ 5} Ohio adopted charter-school legislation when the Ohio General Assembly enacted R.C. Chapter 3314 in 1997. Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 909, 1187. As legislatively created, community schools are independently governed public schools that are funded from state revenues pursuant to R.C. Chapter 3314.

{¶ 6} In enacting R.C. Chapter 3314, the General Assembly declared that its purposes included "providing parents a choice of academic environments for their children and providing the education community with the opportunity

to establish limited experimental educational programs in a deregulated setting." Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. Community schools are permitted to target and tailor programs for small student populations such as learning-disabled students or dropouts from traditional schools. R.C. 3314.06(B), 3314.03(A)(2), and 3314.04.

{¶ 7} The General Assembly explained that "[a] community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education." R.C. 3314.01(B). Community schools are state-funded, R.C. 3314.08(D), but each is privately run, R.C. 3314.01 and 3314.02(B) and (C)(1). Each community school must be formed as either a nonprofit corporation or a public-benefit corporation. R.C. 3314.03(A)(1). Community schools cannot charge tuition, R.C. 3314.08(I), and must be nonsectarian, R.C. 3314.03(A)(11)(c), with enrollment policies that comply with R.C. 3314.06. While community schools are exempt from certain state laws and regulations, R.C. 3314.04, they must comply with many of the same statewide academic standards, R.C. 3314.03(A)(11). Community schools contract with sponsors, which are responsible for monitoring their performance and compliance with applicable standards and requirements. R.C. 3314.03(A)(4). In turn, sponsors ***570** are monitored and overseen by the Ohio Department of Education ("ODE"). R.C. 3314.015.

{¶ 8} Formerly, sponsors were required to be public entities (i.e., local boards of education, the ODE, educational service centers, or trustees of universities or their designees). Former R.C. 3314.02(A)(1) and (C)(1), 1999 Am.Sub.H.B. No. 282, 148 Ohio Laws, Part I, 2022–2023. Since April 8, 2003, certain other approved, nonprofit, education-oriented entities may also be sponsors. R.C. 3314.02(C)(1)(f), 2002 Sub.H.B. No. 364, 149 Ohio Laws, Part V, 10,208 and 10,210. Under R.C. 3314.015(A), the ODE must approve sponsors, monitor the effectiveness of their oversight of their schools, and issue reports on the effectiveness of the schools' academic programs, operations, and legal compliance and on their financial condition. Sponsors must seek ODE approval, according to criteria, procedures, and deadlines established by ODE. ****1153** R.C. 3314.015(B). If a sponsor becomes unwilling or unable to complete its duties, ODE may revoke approval to act as a sponsor and assume direct sponsorship of the community school in question for up to two years. R.C. 3314.015(C).

{¶ 9} Each community school is governed by a contract between the governing authority of the school and its sponsor. R.C. 3314.03. The initial contract term may last no more than five years. R.C. 3314.03(A)(13). If the school does not meet its contract objectives, the sponsor may choose not to renew the contract. Alternatively, the sponsor may terminate the contract for good cause before the end of the contract's term. R.C. 3314.07.

{¶ 10} Ohio is not alone in adopting charter-school legislation. As of 1992 a majority of states allow for the creation of charter schools, typically allowing those schools to use a per-pupil funding stream from government sources (either state or local) to pay for the schools. With the increasing prevalence of charter schools has come increased statutory oversight and regulation, especially for licensing, regulatory inspections, and academic testing. 50 State Statutory Survey, "Charter School Licensing Requirements, Inspections, and Testing" (2006). R.C. Chapter 3314 has been amended frequently since it was enacted, [2] and the law governing community schools continues to evolve.

*571 II. Procedural History of Case

{¶ 11} The appellants filed suit on May 14, 2001, requesting declaratory and injunctive relief and writs of mandamus, raising several constitutional challenges to various aspects of R.C. Chapter 3314. The appellants filed a third amended complaint asserting ten different claims, including several as bases for the trial court to issue a declaratory judgment stating that R.C. Chapter 3314 is unconstitutional on its face and as applied.

{¶ 12} At a status conference on November 9, 2001, the trial judge bifurcated the litigation to reduce the potential burden on the parties. In the first phase, they were to focus solely on legal issues that could be decided without discovery—these issues relate to the constitutional challenges to Ohio's community-school program. In the second phase, which is still pending, the trial court will examine the factual claims that address compliance with statutes and with sponsorship contracts. As already noted, the first phase is the subject of the parties' discretionary appeal and cross-appeals, which we accepted solely to decide the constitutional challenges. [3]

****1154** {¶ 13} On May 20, 2002, several motions were filed: (1) the appellants filed motions for summary judgment on counts four, five, seven, eight, nine, and ten, (2) the

state appellees filed a motion to dismiss the third amended complaint and for summary judgment, (3) the community-school appellees filed a motion for judgment on the pleadings on counts three, four, five, six, seven, and eight, and (4) White Hat filed a motion for judgment on the pleadings. The trial court identified counts four, five, six, and seven of the third amended complaint as the legal claims to be resolved based on the pleadings and motions filed by the parties.

{¶ 14} In its decision, the trial court first considered count four of the third amended complaint. This count is a facial challenge to R.C. Chapter 3314, alleging that the statute violates both Section 3, Article VI and Section 5, Article XII of the Ohio Constitution, sections that deal with the powers of city school boards and restrictions on the use of tax revenue. Count four contains two underlying claims. First, the appellants allege that Section 3, Article VI has been violated because R.C. Chapter 3314 has "usurped this constitutional right of local educational self-determination by allowing the creation of privately owned ***572** 'community schools' not authorized or governed by locally elected school boards." The trial court disagreed and held that the General Assembly has the power to create and modify school districts as it believes necessary, without the approval of the school districts. Second, the appellants claim that the method of funding community schools violates Section 5, Article XII of the Constitution by in effect diverting local tax dollars to community schools. The trial court disagreed again and found that the appellants "cannot show a diversion of local tax levies to community schools in violation of Section 5, Article XII of the Ohio Constitution."

{¶ 15} Counts five and six are challenges to R.C. Chapter 3314 on its face and as applied. In these counts, the appellants allege that community schools violate Section 2, Article VI of the Ohio Constitution, the Thorough and Efficient Clause. The appellants argue that community schools are not part of the thorough and efficient system of common schools, because they have been allowed to operate with different standards. They also claim that the manner in which community schools are funded takes money away from traditional school districts, making them less thorough and efficient. The trial court found these claims barred by res judicata because *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, had determined already that the public school system, of which community schools are part, is not constitutionally thorough and efficient.

{¶ 16} Count seven alleges that R.C. 3314.08(J), 3318.50, and 3318.52 violate Sections 4 and 5, Article VIII, which restrict the lending of the state's credit and the state's assumption of debt. The statutory provisions at issue under this count allow community schools to borrow money in anticipation of state payments and to receive state-guaranteed loans for buildings and other facilities. Because community schools are organized for a public purpose (educating children), the trial court found that R.C. 3314.08(J), 3318.50, and 3318.52 permit community schools to borrow money and the state to guarantee loans without constitutional violation.

{¶ 17} The trial court granted the state appellees' motion to dismiss, the community-school appellees' motion for judgment on the pleadings, and White Hat's motion for judgment on the pleadings on counts four through seven. The trial court denied appellants' motion for partial summary judgment.

****1155** {¶ 18} The Court of Appeals for Franklin County agreed with the trial court on count four that the General Assembly's exercise of its broad power to create, change, or modify the state's school districts does not impinge on Section 3, Article VI. However, the court disagreed with the decision to dismiss the portion of count four that implicates Section 5, Article XII, the constitutional provision that requires that local levy funds go to their intended purpose. The court of appeals found that the appellants' claim that the method of funding community schools diverts state funds from local school districts raises issues of fact. ***573** Accordingly, the court remanded this claim, as well as counts five, six, and seven.[4] Both sides filed jurisdictional memoranda asking this court to address the legal merits of all of appellants' constitutional claims. We accepted all propositions of law (except the proposition addressing the res judicata effects of *DeRolph*).

III. Legal Analysis

A. Summary of Constitutional Claims

{¶ 19} The complaint in this case asserted that numerous constitutional provisions were implicated in this case, so we will first summarize the constitutional provisions and the relevant standards of proof before analyzing each claim in turn. We are asked to determine whether R.C. Chapter 3314 violates Section 2, Article VI, which contains the Thorough and Efficient Clause; Section 3, Article VI, which governs the organization of city school districts; Section 5, Article

XII, which limits tax proceeds to their stated purposes; and Sections 4 and 5, Article VIII, which restricts the state's lending of credit and assumption of debt. [5]

B. Standard of Proof

{¶ 20} Initially, we must acknowledge that legislative enactments are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 377, 15 O.O.3d 450, 402 N.E.2d 519. When the constitutionality of legislation is attacked, we must interpret the applicable constitutional provisions and acknowledge that "a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power." *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 40 N.E.2d 913. A statute should not be declared unconstitutional "unless it 'appear[s] beyond a reasonable doubt that the legislation and constitutional provision are clearly incompatible.' " *Kelleys Island Caddy Shack, Inc. v. Zaino,* 96 Ohio St.3d 375, 2002-Ohio-4930, 775 N.E.2d 489, ¶ 10, quoting *State ex rel.* ***574** *Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Furthermore, a statute "must be ****1156** enforced unless it is in clear and irreconcilable conflict with some express provision of the constitution." *Spivey v. Ohio* (N.D.Ohio 1998), 999 F.Supp. 987, 999. Thus, in reviewing these constitutional claims, we must give due deference to the General Assembly. But this still means, of course, that we must conduct an independent review.

{¶ 21} The constitutional challenges to the statutes involve facial challenges as well as challenges to the application of R.C. Chapter 3314. The two types of challenges require different standards of proof. To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher,* 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629, paragraph six of the syllabus. " 'Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *Lansdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St.3d 176, 180–181, 512 N.E.2d 979, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus.

{¶ 22} With this background in mind, we turn to the appellants' specific claims.

C. Counts Five and Six: The "common schools" argument

1. Introduction

{¶ 23} Because counts five and six both implicate the Thorough and Efficient Clause of the Ohio Constitution, we will discuss both counts in this section. The appellants claim that R.C. Chapter 3314, the Ohio Community–Schools Act, violates the Thorough and Efficient Clause of Section 2, Article VI of the Ohio Constitution. Section 2 provides:

{¶ 24} "The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state * * *."

{¶ 25} The appellants argue in count five that community schools violate the Thorough and Efficient Clause because they are not part of the system of common schools, being publicly funded but privately owned and not subject to ***575** uniform statewide standards. Count six provides the second part of their argument, asserting that because community schools are state-funded, they have diverted money from local school districts, thus depriving the districts of the ability to provide a thorough and efficient educational system. Both claims allege that the statutes, as applied, are unconstitutional. Thus, the appellants must present clear and convincing evidence of the statutes' constitutional defect. *Belden v. Union Cent. Life Ins. Co.,* 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629.

{¶ 26} In response to the argument that community schools are unconstitutional because they are privately owned and subject to different standards, the appellees contend that the General Assembly is authorized by the Thorough and

Efficient Clause to create community schools as part of **1157 Ohio's system of common schools. The appellees maintain that community schools do not have to be owned or operated by the public to be part of the common-school system. Community schools have been declared to be "public schools, independent of any school district, and * * * part of the state's program of education." R.C. 3314.01(B). Furthermore, the appellees assert that because the term "common schools" is not defined in the Constitution, and because there is no constitutional requirement that all public schools must be governmentally owned and operated, the General Assembly should be allowed to determine the requirements of "common schools."

2. Count Five: Different standards for schools under private ownership

{¶ 27} Throughout time, new educational movements have faced opponents and detractors. But just as the common-school movement of the 1800s increasingly gained supporters throughout the United States, so too has the charter-school movement.

{¶ 28} The Thorough and Efficient Clause was adopted at the 1851 Constitutional Convention, largely in response to the common-school movement. Before Section 2, Article VI was adopted, Ohio had officially encouraged, but had not required, education. Section 3, Article VIII, Ohio Constitution of 1802. Originally, "[s]chools received no public aid except through revenues from lands set aside by Congress for the purpose in the Northwest Territory. * * * Early Ohio schools were private, organized by individual schoolmasters, a group of neighbors, a church, or a charitable society. Some were free, but many charged tuition in addition to receiving a share of the school lands revenue * * *." Editor's Comment to Section 2, Article VI, in Baldwin's Ohio Revised Code Annotated (2004). The common-school movement, originating in Massachusetts through the work of Horace Mann, held the basic ideology that all citizens should have "a common foundation of literacy, morality, and patriotism, regardless of their origins, through free public schools supported by taxes, with compulsory school attendance and supervision at the state level." Id. Common schools were highly controversial at first, but gained wide acceptance after 1841. By 1851, the *576 common-school movement had wide support in Ohio, leading to the adoption of the Thorough and Efficient Clause. Id.

{¶ 29} As early as 1923, this court had the opportunity to interpret this clause and to set forth a standard for evaluating a thorough and efficient system of common schools. *Miller v. Korns* (1923), 107 Ohio St. 287, 140 N.E. 773. We recognized that the purpose of providing a thorough and efficient system was statewide in nature and "[w]ith this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state." Id. at 297–298, 140 N.E. 773. Furthermore, in *DeRolph v. State,* Chief Justice Moyer noted that "our Constitution commits the responsibility for ascribing meaning to the phrase 'thorough and efficient' to the General Assembly and not to this court." *DeRolph v. State* (1997), 78 Ohio St.3d 193, at 264, 677 N.E.2d 733, 747 (Moyer, C.J., dissenting). As the statewide body, the General Assembly has the legislative authority and latitude to set the standards and requirements for common schools, including different standards for community schools. In fulfilling its governmental role, it must still function according to its constitutional directive.

{¶ 30} In enacting community-school legislation, the General Assembly added to **1158 the traditional school system by providing for statewide schools that have more flexibility in their operation. Community schools were designed to give parents a choice and give educators "the opportunity to establish limited experimental educational programs in a deregulated setting." 1997 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. Deregulation implies exemption, and while it is true that community schools are exempted from certain state standards, [6] there are others to which the schools must also adhere. Community school students must pass the same graduation test that students in traditional public schools must pass. R.C. 3314.03(A)(11)(f). Community schools must administer proficiency and achievement tests, R.C. 3314.03(A)(11)(d), and diagnostic tests, R.C. 3314.03(A)(3), maintain adequate facilities and meet all health and safety standards, R.C. 3314.05, and comply with numerous Revised Code sections as if they were school districts, R.C. 3314.03(A)(11)(d). (See Appendix A for additional requirements from which community schools are *not* exempt.) Community-school sponsors are monitored and supervised by the ODE, the same department that oversees traditional public schools. *577 R.C. 3314.015. Although Justice Resnick's dissent focuses on the requirements that community schools are exempted from, upon closer examination, many of these exemptions are picayune in nature.

{¶ 31} The Ohio Community–Schools Act was drafted with the intent that parental choice and sponsor control would hold community schools accountable, in a fashion similar to traditional school management. In exchange for enhanced flexibility, community schools face heightened accountability to parents and sponsors. Either can threaten shutdown, sponsors by suspending operations pursuant to R.C. 3314.072, and parents by withdrawing their children. In fact, internet- or computer-based community schools lose their funding if they do not show expected gains for two years, and any community school will be permanently shut down if it fails to meet expected goals for three years. R.C. 3314.36. Traditional schools, on the other hand, may not be shut down no matter how poorly they perform (although they will face decreased funding). R.C. 3302.04(F). Because community schools may serve a targeted student population, their requirements may be more narrowly tailored. This idea is not totally new to Ohio's system of education. In the past, for example, the General Assembly has permitted different requirements for vocational education and special education and has allowed traditional schools to establish magnet schools and specialized schools in arts and science. The General Assembly's statutory scheme sets forth a framework, in keeping with its constitutional directive, for alternative accountability and academic standards for community schools.

{¶ 32} Contrary to Justice Resnick's statement in dissent, we do not approve of just "any schooling arrangement." ¶ 82. The Ohio Constitution requires establishment of a system of common schools. This requirement is grounded in the state's interest in ensuring that all children receive an adequate education that complies with the Thorough and Efficient Clause. To achieve the goal of improving and customizing public education programs, the General Assembly has augmented the state's ****1159** public school system with public community schools. The expressed legislative intent is to provide a chance of educational success for students who may be better served in their educational needs in alternative settings. Requiring community schools to be operated just like traditional public schools would extinguish the experimental spirit behind R.C. Chapter 3314.

{¶ 33} While the wide discretion granted to the General Assembly is not without limits, *Cincinnati City School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 387, 12 O.O.3d 327, 390 N.E.2d 813, we hold that the General Assembly has not transgressed the limits of its legislative power so as to render R.C. Chapter 3314 unconstitutional under the Thorough and Efficient Clause. Over time, the General Assembly has increased the number of state requirements with ***578** which community schools must comply, [7] and has also enacted additional, specific, and unique requirements such as control and oversight by sponsors, R.C. 3314.03, mandated forms of entity status, R.C. 3314.03(A)(1), and annual reporting requirements on fiscal, operational, and academic issues, R.C. 3314.03(A)(11)(g) and 3314.03(D).

{¶ 34} The General Assembly is the branch of state government charged by the Ohio Constitution with making educational policy choices for the education of our state's children. Our personal choices are not relevant to this task. The appellants have not shown beyond a reasonable doubt that the statute is unconstitutional on its face; nor have they met their high burden of presenting clear and convincing evidence of the statute's unconstitutionality as applied. We hold that the General Assembly has the authority to set the standards and requirements for a system of common schools. In providing for community schools within that system, the state legislature has not exceeded its powers.

3. Count Six : Funding community schools and a thorough and efficient system

{¶ 35} Count six of the complaint alleges that the funding method used to support community schools diverts funds from city school districts, depriving them of the ability to provide a thorough and efficient system of common schools. Once again, as this claim is a constitutional challenge to R.C. Chapter 3314 as applied, the appellants must present clear and convincing evidence that R.C. Chapter 3314 is unconstitutional. *State v. Renalist, Inc.* (1978), 56 Ohio St.2d 276, 279, 10 O.O.3d 408, 383 N.E.2d 892.

{¶ 36} Appellants argue that the community schools have made urban districts more reliant on local property taxes because when a student leaves a district for a community school, the state reduces the state funding that the district receives for the student. Nothing in the Constitution, however, prohibits the General Assembly from reducing funding because a school district's enrollment decreases. If a child moves out of the district altogether, the state is permitted to reduce its funding to that child's district because state money follows the child. For example, if a child leaves a school district to attend private school, or to be schooled at home, the state is required to reduce its funding to that district. [8] The same thing occurs when a child opts to attend a community

school. R.C. 3314.08. Whenever a student leaves, for any reason, the school district's funding is decreased, and the district continues to receive state funding based on the ***579** students actually attending. Traditional ****1160** schools still receive the full amount of state funds for the actual number of students enrolled.

{¶ 37} The state adjusts its level of funding to a school district based on enrollment, but the local share works differently, as a constant. The local share of funding remains the same no matter who attends the district school. If district enrollment decreases, the local share, being constant, constitutes a higher percentage of district funding. On the other hand, if district enrollment increases, the local share constitutes a lower percentage of district funding. In dissent, Justice Pfeifer argues that community schools unconstitutionally increase reliance on local funding for district schools, invoking *DeRolph v. State.* The dissent's citation of *DeRolph* is a red herring. *DeRolph* focused on R.C. Chapter 3317, the School Foundation Program, for the allocation of state basic aid. The School Foundation Program conditioned the receipt of state aid on the levy of local property tax revenues. R.C. 3317.01(A). What the *DeRolph* majority found so egregious was Ohio's public schools' heavy dependence upon local property taxes for their support. That simply is not the case here. Community schools do not rely on local property taxes, as they are funded entirely by the state, under an entirely different formula, set forth in a different statute. Community schools cannot levy or spend local taxes. Furthermore, Ohio's traditional school system is not made more reliant on local taxes because of community schools. The state treats community-school students in the same way it has treated any student who has ever left a school district. It reduces its per-pupil funding to the school district, just as it does when students leave for private schools, for other school districts, or for home schooling.

{¶ 38} The mere increase or decrease in the local share *percentage* does not violate the Thorough and Efficient Clause, because the district still receives state funding for the children actually attending the district traditional schools. Community schools never receive any local tax money. In fact, the Legislative Office of Education Oversight stated that "it should be clarified that community schools do *not* take locally-generated tax dollars away from districts * * *." (Emphasis sic.) LOEO, Community Schools in Ohio: Second–Year Implementation Report, Volume I: Policy Issues (Apr. 2001) 27. It explained that "[o]nce the local share is subtracted from the total base cost funding, the state is responsible for providing any amount thereafter." In other words, the state still fulfills its obligation to fund each student at a specific level according to the statutory formula.

{¶ 39} Section 2, Article VI expressly provides that the General Assembly shall make provisions to secure a thorough and efficient system of common schools. The General Assembly has the exclusive authority to spend tax revenues to further a statewide system of schools compatible with the Constitution. Exercising ***580** its discretion, the General Assembly made provisions for community schools when it directed that the state would be the sole source of funding for community schools for their base formula amounts. R.C. 3314.08. Community schools cannot levy local taxes or charge tuition. R.C. 3314.08(H) and (I). When a student leaves a traditional school to attend a community school, the state funds follow the student. Accordingly, we find that R.C. Chapter 3314, as applied, is constitutional. The appellants have not presented clear and convincing evidence that community schools are raiding local funds that school districts are otherwise entitled to receive.

****1161** {¶ 40} The next claim that we will examine contains two constitutional provisions: one dealing with the authority of city school boards, and the other with the levy of local taxes.

D. Count Four: Section 3, Article VI and Section 5, Article XII authority of city school boards and diversion of local tax money

{¶ 41} Count four of the third amended complaint is a facial challenge to the statutes, claiming that R.C. Chapter 3314 violates local citizens' rights under Section 3, Article VI because community schools within city school districts are not under the control of local voters or of school boards. Count four also contends that the statute offends Section 5, Article XII because local tax dollars are in effect diverted to community schools. To overcome the presumption of constitutionality, the appellants must prove that the statute is unconstitutional beyond a reasonable doubt, the highest standard of proof. *State ex rel. Dickman v. Defenbacher,* 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus.

1. Authority of city school boards

{¶ 42} Section 3, Article VI of the Ohio Constitution provides:

{¶ 43} "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

{¶ 44} Under R.C. 3314.01(B), a community school is a "public school, independent of any school district." The appellants argue that citizens of cities have the exclusive right to exercise authority over public education through the election of school boards and approval of local school tax levies, and because community schools are not authorized or governed by city school boards, this constitutional right of local educational self-determination is usurped.

***581** {¶ 45} This court has held that the General Assembly has the power to create and modify school districts. In *State ex rel. Core v. Green* (1953), 160 Ohio St. 175, 51 O.O. 442, 115 N.E.2d 157, the court stated, "The General Assembly has the power to provide for the creation of school districts, for changes and modifications thereof, and for the methods by which changes and modifications may be accomplished." Id. at paragraph two of the syllabus. An Ohio federal court recognized the General Assembly's authority to provide for the modification of school districts when it approved the creation of a new classification of school districts called "municipal school districts." *Spivey v. Ohio*, 999 F.Supp. at 997. In *Spivey,* the legislation under review gave the mayor of Cleveland authority to appoint members of the Cleveland City School District Board of Education, and local voters were not given the opportunity to preapprove any changes in the school board. R.C. 3311.71 et seq.

{¶ 46} In analyzing this specific issue in the case before us, the Court of Appeals for Franklin County opined that the plain language of Section 3, Article VI "does not give those [local] voters more power than the General Assembly to create policy and organize and administer a system of public education throughout the state." 2004-Ohio-4421, ¶ 39. We agree with this statement.

{¶ 47} Voters in city school districts have the right to vote on the number of members and the organization of their city school boards. In turn, the school boards have authority over the districts ****1162** they are elected to serve. Section 3, Article IV governs questions of size and organization, not the power and authority, of city school boards. In *Marion Local School Dist. Bd. of Edn. v. Marion Cty. Bd. of Edn.* (1958), 167 Ohio St. 543, 545, 5 O.O.2d 216, 150 N.E.2d 407, this court held that "[b]oards of education have only such powers as are conferred by statute." A board of education is "a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state." *Cincinnati Bd. of Edn. v. Volk* (1905), 72 Ohio St. 469, 485, 74 N.E. 646. By choosing to create community schools as part of the state's program of education but independent of school districts, the General Assembly has not intruded on the powers of city school boards. Applying the facial-challenge standard, we hold that the appellants have not proved, beyond a reasonable doubt, that the powers of city school districts have been usurped, rendering R.C. Chapter 3314 unconstitutional. Section 3, Article VI of the Ohio Constitution does not prevent the General Assembly from creating additional schools that are located within city school districts but are not part of the district.

2. Diversion of local tax money

{¶ 48} Count four also alleges that R.C. Chapter 3314 violates Section 5, Article XII of the Ohio Constitution by diverting local tax dollars to community schools, a ***582** contention similar to the constitutional claim asserted under the Thorough and Efficient Clause.

{¶ 49} Section 5, Article XII of the Ohio Constitution provides:

{¶ 50} "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

{¶ 51} In support of this claim of diversion of local tax dollars, the appellants maintain that the community-school funding scheme violates voters' rights by taking the locally voted property taxes approved for the local school districts and giving them to community schools. While the appellants admit that "the money given to community schools comes from the State's bank account," they contend that deducting the full per-pupil formula amount from the school district's money when a student leaves for a community school is equivalent to taking local tax money.

{¶ 52} Community schools are funded differently than are traditional schools. Funding for traditional schools is set forth in R.C. 3317.012; funding for community schools is set forth

in R.C. 3314.08. Community schools are primarily funded by a per capita subsidy taken from the state's basic aid to the school districts that the students in community schools are entitled to attend. R.C. 3314.08 clearly confirms that funding for community schools comes from state funds pursuant to the funding formula. Funds raised by local school districts, such as funds derived from local levies, are never sent from the local school district to the community schools, nor are any funds from the local school district to the state ever redirected to the community schools.

{¶ 53} Funding formulas for traditional and community schools are complex, although we may summarize them by saying that state money follows the student. In general, under both formulas, the state guarantees a basic minimum level of funding for each student, called the "formula amount." R.C. 3317.02. The General Assembly has determined the formula amount for both school districts and community schools, and these amounts have been codified in separate sections of the ****1163** Revised Code. For community schools, the formula amount of R.C. 3314.03 can never exceed the traditional schools' amount of R.C. 3317.02(B). Community schools must set forth this amount in their annual financial plans under R.C. 3314.03(A)(15). Each district and each community school also has a cost-of-doing-business factor assigned to it, which varies from county to county. R.C. 3317.02(N) and 3314.08(A)(2) and (C)(1)(a).

{¶ 54} Under the school districts' formula, they are funded from a combination of state and local tax dollars. To reach the state and local amount for a school district, the state multiplies the formula amount by the cost-of-doing-business factor to reach a preliminary amount. R.C. 3317.022.

***583** {¶ 55} The "charge-off amount," representing the local tax dollars raised, comes into play next in the formula. Local property-tax contributions are not determined on a per-student basis, but are instead determined by property wealth and the tax rate within a district. Each district is assumed to contribute 23 mills times the value of local tax base to its funding level, R.C. 3317.022, and as stated earlier, this local district share is a constant amount that does not fluctuate based upon student population. The charge-off amount is then subtracted from the preliminary amount. Once the charge-off amount is deducted, the remaining funding comes from the state in order to reach the formula amount specified in R.C. 3317.12 by the General Assembly.

{¶ 56} In using the formula for community schools,[9] the ODE multiplies the number of students enrolled in a community school times the base formula amount times the cost-of-doing-business factor. R.C. 3314.08(D). For each student, the state then deducts the formula amount, adjusted by the cost-of-doing-business factor, from the funding for the school district that the student would have attended. R.C. 3314.08(C). Consequently, when a student transfers to a community school from a school district, the district loses as much funding as it would if the student leaves for another school district, for a private school, or to be home schooled.

{¶ 57} The appellants argue that because the state deducts the entire formula amount for any student who leaves a traditional school for a community school, the deduction has the effect of increasing school districts' local share. However, a change in the number of students does not affect the amount of the school district's local share, because local tax dollars are contributed by the district's taxpayers and do not depend upon the number of students attending the school. R.C. 3314.08 and 3317.022. The full amount of the local tax money will continue to be available to the local school district. In other words, state funds follow the student; local funds do not.

{¶ 58} We are not persuaded by appellants' argument that local tax money is diverted to community schools under the funding formula. Certain traditional schools may rely more on local tax dollars, but students who leave the district leave with their own per-student allocation of state money, so this means that local tax dollars are never actually paid to community schools. Under the funding provisions of R.C. 3314.08(D), the tax dollars that fund community schools come entirely from the state.

***584** {¶ 59} The appellants are concerned that students are leaving traditional schools for community schools and that traditional schools are bearing the burden ****1164** of competition. Community-school opponents point to certain community schools that have experienced financial and operational issues as reason for rejection of the whole concept. Today's question, however, is not whether particular schools are operating within the law but whether R.C. Chapter 3314, as enacted, satisfies the Constitution. Any allegations about the manner in which certain community schools are run are properly addressed in the appellants' second cause of action, pending in the trial court. School funding continues to be an educational policy matter of immense concern and heated debate. Educational policy matters, however, are best left to the General Assembly, which is charged with

enacting legislation that reflects the policy choices of the state's constituents.

{¶ 60} We are now considering only the constitutional challenges in this case, and from a constitutional perspective, we conclude that appellants have not proved a violation of the prohibition in Section 5, Article XII against the application of local taxes, because local tax dollars are not diverted to the state-funded community schools.

{¶ 61} The final claim at issue in this case deals with the financial relationship between the state and community schools under two constitutional provisions.

E. Count Seven: Sections 4 and 5, Article VIII: Community schools and state credit and loans

{¶ 62} Count seven of the third amended complaint alleges that R.C. 3314.08(J), which permits community schools to borrow money from the state, and R.C. 3318.50 and 3318.52, which provide loan guarantees to community schools, are unconstitutional.

1. Extending state credit to community schools

{¶ 63} Section 4, Article VIII of the Ohio Constitution provides:

{¶ 64} "The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever."

{¶ 65} The provisions of the statutes at issue here, R.C. 3314.08(J), 3318.50, and 3318.52, allow community schools to borrow money in anticipation of state funding, establish a classroom-facilities loan-guarantee program, and establish a community-school loan-guarantee fund. Citing Section 4, Article VIII, the appellants contend that guaranteeing loans and funding to community schools constitutes an unconstitutional lending of the state's credit to aid individual associations or corporations. In challenging the statute on its face, they must prove its constitutional defect beyond a reasonable doubt. *State ex rel. Dickman v.* ***585** *Defenbacher,* 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus.

{¶ 66} Section 4, Article VIII has generally been interpreted to prohibit lending the state's credit to private business enterprises, but not to organizations created for a public purpose, even if they are corporations. *State ex rel. Kauer v. Defenbacher* (1950), 153 Ohio St. 268, 282, 41 O.O. 278, 91 N.E.2d 512. In opposing the appellants' argument, the appellees argue that community schools are not private business enterprises, so statutory provisions for the state's guarantee of loans to community schools are constitutional. The plain language of R.C. 3314.03(A)(1) does not permit for-profit entities to become community schools. Community schools ***1165** may be organized only as nonprofit corporations or as public-benefit corporations. R.C. 3314.03(A)(1).

{¶ 67} We have held that Section 4, Article VIII is satisfied where the state's credit is used by a public organization to advance a "public purpose." *State ex rel. Kauer v. Defenbacher,* 153 Ohio St. at 282, 41 O.O. 278, 91 N.E.2d 512 ("whether it is a corporation or not, the turnpike commission is * * * a public organization created for a public purpose," and so advancement of state funds to the commission is constitutional). See *State ex rel. Dickman v. Defenbacher,* 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59 (state grants to veterans' organizations are constitutional); *State ex rel. Leaverton v. Kerns* (1922), 104 Ohio St. 550, 554, 136 N.E. 217 (county grant to a county agricultural fair is constitutional because it is "a public institution designed for public instruction"); *Perkins v. Stockert* (1975), 45 Ohio App.2d 211, 74 O.O.2d 334, 343 N.E.2d 340 (funding of legislatively created "new community authorities" to assist private entities in community development is constitutional because each authority is created for a public purpose). In *State ex rel. Dickman v. Defenbacher,* we held that under Section 4, Article VIII, the legislature could validly appropriate public funds to a private entity for a public purpose. 164 Ohio St. at 151, 57 O.O. 134, 128 N.E.2d 59.

{¶ 68} Community schools were developed to further the state's public school system of education. We cannot imagine a greater public purpose than educating our state's children. Applying the facial-challenge standard to R.C. 3314.08(J), 3318.50, and 3318.52, we hold that the appellants have not established that the statutes are unconstitutional beyond a reasonable doubt.

2. Funding community schools through loan guarantees

{¶ 69} Under this claim, the appellants assert that the loan guarantees for community schools allowed by R.C. 3318.50

and 3318.52 violate the provisions of the Constitution that prohibit the state's assumption of the debt of any corporation unless certain exceptions apply. Section 5, Article VIII of the Ohio Constitution provides:

***586** {¶ 70} "The state shall never assume the debts of any county, city, town, or township, or of any corporation whatever, unless such debt shall have been created to repel invasion, suppress insurrection, or defend the state in war."

{¶ 71} Turning to the plain language of the Constitution, the appellants highlight the statement "The state shall never assume the debts * * * of any corporation whatever." Because community schools must be formed as nonprofit or public-benefit *corporations,* R.C. 3314.03(A)(1), they argue that the statute offends this constitutional provision.

{¶ 72} Ohio's school districts are not included within this provision's prohibition, for Section 5, Article VIII does not forbid the state's assumption of the debt of political subdivisions that are not of the types named. *Butler Cty. Transp. Improvement Dist. v. Tracy* (1997), 120 Ohio App.3d 346, 359, 697 N.E.2d 1089 (Section 5, Article VIII does not apply to many types of political subdivisions in Ohio, such as school districts, regional water and sewer authorities, solid waste authorities, or transportation-improvement districts). The appellees argue that community schools are regarded as school districts because they are required to comply with certain Ohio laws as if they were school districts. See, e.g., R.C. 3314.03(A)(11)(d) and 3314.08(F). Earlier in this opinion, we concluded that community schools belong ****1166** to the state's system of common schools. By statute, they are "part of the state's program of education." R.C. 3314.01(B). Like traditional schools, community schools are funded by the state, cannot charge tuition, and are charged with educating Ohio children. As a result, they are not private business corporations the debt of which the state is prohibited from assuming under Section 5. Therefore, community schools are also exempt from this provision. Accordingly, we do not find a constitutional violation beyond a reasonable doubt under Section 5, Article VIII of the Ohio Constitution.

IV. Conclusion

{¶ 73} We hold that the appellants in this case have not shown constitutional defects in R.C. Chapter 3314, on its face or as applied. When the General Assembly enacted Ohio's Community–Schools Act, it was entrusted with making complicated decisions about our state's educational policy. These policy decisions are within the purview of its legislative responsibilities, and that legislation is entitled to deference. *Brady v. Safety–Kleen Corp.* (1991), 61 Ohio St.3d 624, 632, 576 N.E.2d 722 (a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislature). The General Assembly always has the prerogative to determine that Ohio's community schools are not meeting the purpose for which they were established and, consequently, has the ongoing opportunity to modify or dismantle them. After full consideration, we cannot say that the concept of community schools itself violates the Ohio Constitution.

***587** {¶ 74} We therefore affirm the decision of the Court of Appeals for Franklin County to dismiss part of count four, as community schools do not violate Section 3, Article VI of the Ohio Constitution. We reverse the court of appeals' decision to remand the remaining constitutional claims under Section 5, Article XII; Section 2, Article VI; Section 4, Article VIII; and Section 5, Article VIII for further proceedings. As there were no disputed issues of fact, we hold as a matter of law that R.C. Chapter 3314, relating to the establishment of community schools as part of the state's educational system, is constitutional both on its face and as applied.

Judgment affirmed in part and reversed in part.

MOYER, C.J., LUNDBERG STRATTON and O'CONNOR, JJ., concur.

RESNICK and PFEIFER, JJ., dissent.

O'DONNELL, J., dissents and would dismiss the appeal as having been improvidently accepted.

ALICE ROBIE RESNICK, J., dissenting.

{¶ 75} In my opinion, R.C. Chapter 3314, the Ohio Community-Schools Act, violates Section 2, Article VI of the Ohio Constitution because it produces a hodgepodge of uncommon schools financed by the state. Rather than "add[ing] to the traditional school system," ¶ 30, or "providing for community schools within that system" of common schools, as the majority postulates, ¶ 34, R.C. Chapter 3314 effects a schismatic educational program under which an assemblage of divergent and deregulated privately

owned and managed community schools competes against public schools for public funds.

{¶ 76} Section 2, Article VI provides:

{¶ 77} "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state * * *."

**1167 {¶ 78} Since this provision does not prescribe a specific method for securing a system of common schools, it necessarily grants the General Assembly broad discretion in fulfilling its obligation. Accordingly, I agree with the majority that "the General Assembly has the authority to set the standards and requirements for a system of common schools." ¶ 34.

{¶ 79} But the General Assembly's discretion under Section 2, Article VI is not unlimited. "To state that the General Assembly must be granted wide discretion and that it is not the function of this court to question the wisdom of the statutes, is not to say that the General Assembly's discretion in this area is absolute." *588 *Cincinnati City School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 386, 12 O.O.3d 327, 390 N.E.2d 813.

{¶ 80} Specifically, the General Assembly does not have the authority under Section 2, Article VI to establish something other than a system of common schools. It is empowered to do only what it is charged with doing, which is to secure a thorough and efficient system of common schools throughout the state. Thus, as the court explained in *Simmons–Harris v. Goff* (1999), 86 Ohio St.3d 1, 11, 711 N.E.2d 203, "It can be argued that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state."

{¶ 81} Nor does Section 2, Article VI displace the power of judicial review. While the General Assembly has the exclusive authority and duty to establish a system of common schools, it is for the courts to determine the constitutional criteria against which the exercise of that power is to be measured. We may act with deference to legislative pronouncements,[1] but we are still obliged to make an independent determination of what constitutes a system of common schools. Defining the parameters of legislative power under Section 2, Article VI, and ensuring conformity thereto, remains a judicial function. See *Walter,* 58 Ohio St.2d at 382–387, 12 O.O.3d 327, 390 N.E.2d 813.

{¶ 82} While the majority describes some of the history leading to the adoption of the Thorough and Efficient Clause, it nevertheless treats the mandate for a system of common schools as standardless, denoting any schooling arrangement that the General Assembly decides to support by general taxation. Yet the formative history of Section 2 discloses that the common-schools requirement does impose an articulable and meaningful standard upon the legislature and that R.C. Chapter 3314 recreates much of the mischief that the clause was intended to avoid.

{¶ 83} As generally explained by Molly O'Brien and Amanda Woodrum, The Constitutional Common School (2004), 51 Clev.St.L.Rev. 581:

{¶ 84} "Recent school reform initiatives have adopted the mechanisms of vouchers and charters to provide public funding for parental choice of schools. * * * Virtually all of these programs, however, envision a proliferating variety of available schools, competition among schools for tax support, and attendance by parental selection, rather than by public assignment. Even though charter and voucher schools are prohibited from discriminating in admissions on the basis of religion, by statute and by the federal Constitution, they permit like-minded *589 people to flock together. They permit parental choice of a school based on the parents' unique set of **1168 values and priorities, biases and prejudices.

{¶ 85} " * * *

{¶ 86} "The constitutional 'common school' has specific meaning that must be referenced in the evaluation of school reform programs. Central to that meaning is the requirement that the publicly-supported school system educate children of all classes, religions, and ethnic backgrounds together. * * * For the framers of the Ohio Constitution's education clauses, the only education worthy of public support was a 'common' education, not in the sense that it was provided for the common folks, but in the sense that it would bring diverse people together. They chose the common school concept to promote social harmony, create a sense of national identity, and develop affinity. * * *

{¶ 87} "Moreover, in choosing to mandate the creation of a system of common schools, the constitutional framers rejected the idea of simply subsidizing the existing diverse,

parent-initiated and tuition-based schooling arrangements in favor of creating state organization and oversight. They viewed the diversity of the existing arrangements as an impediment to educational progress. The constitutional framers rejected the proliferation of diverse schools in favor of a single system. They also rejected the idea of competition among school districts and a variety of sectarian schools, viewing competition as inefficient, divisive, and ineffective. The rivalry among schools was seen as the greatest impediment to the advancement of education. Indeed, the problems created by the continuing disparities and competition among local districts generated further constitutional amendments in 1912. These amendments [i. e., Sections 3 and 4, Article VI] centralized state oversight of the system of public schools by creating a state superintendent; they further provided for public oversight of the districts through election. Thus, programs that create competition among schools for public funds or remove schools from state and public oversight also run counter to the constitutional vision and mandate." (Emphasis sic; footnotes omitted.) Id. at 638–641.

{¶ 88} Community schools under R.C. Chapter 3314 are nonprofit or public-benefit corporations that operate independently of any school district. R.C. 3314.01(B) and 3314.03(A)(1). They are governed by the terms of their individual contracts, have their own governing authorities, and are directly accountable to their sponsors. R.C. 3314.02(D) and (E), 3314.03(D), 3314.04, and 3314.07. Any qualified tax-exempt entity under Section 501(c)(3) of the Internal Revenue Code that has been in operation for five years, has assets of $500,000, and is considered by the Department of Education to be an education-oriented entity may sponsor up to 50 community schools (potentially more for some sponsors) and receive from each an "oversight and monitoring" fee of up to three percent of the ***590** payments for operating expenses that the school receives from the state. See R.C. 3314.015(B)(1), 3314.02(C)(1)(f), and 3314.03(C).

{¶ 89} Community schools were originally introduced in Ohio on a limited basis through a pilot project in the Lucas County area. 1997 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. They have since grown at a steady rate. According to a preliminary report on community schools in Ohio that was issued on April 11, 2002, by the Legislative Office of Education Oversight (established by R.C. 3301.68), "Since 1998, the number of community schools in Ohio has increased annually, from the first 15 that began operating during the 1998–1999 school year to 92 schools during the 2001– ****1169** 2002 school year. The number of participating students has grown tenfold from 2,245 to over 23,000 during these years." Based on the listings in the March 2005 School Directory issued by the Office of Community Schools (see R.C. 3311.11) and information contained in a research bulletin published by the Ohio Education Association ("OEA") in March 2005, there were over 62,000 students enrolled in approximately 250 community schools throughout Ohio during the 2004–2005 school year.

{¶ 90} Community schools receive state funds that are deducted from payments to the school districts in which the enrolled students are entitled to attend school. R.C. 3314.08. In an affidavit filed on behalf of appellants in the trial court, William P. Driscoll, a former Ohio Deputy Tax Commissioner from 1985 to 1991, calculated that community-school deductions in fiscal year 2002 amounted to more than $133 million. According to Ohio Department of Education records, state funding for community schools for fiscal year 2005 totals over $400 million. In its March 2005 research bulletin, OEA calculated that "[b]y the end of the current [2004–2005] school year, Ohio's charter schools will have received over $1.2 billion * * * in funding since the inception of the state's charter school program."

{¶ 91} Yet community schools are exempt from the bulk of state standards and regulations that govern the operation of public schools. In fact, the stated purpose of R.C. Chapter 3314 is to establish "independent community schools throughout the state * * * in a deregulated setting." 1997 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. Accordingly, R.C. 3314.04 provides:

{¶ 92} "Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents."

{¶ 93} On October 23, 2003, the Legislative Service Commission issued a research memorandum, No. R–125–1824, on the "Laws from Which Community Schools Are Exempt and Specifically Not Exempt." The memo enumerates over ***591** 150 state measures from which community schools are exempt, which run the gamut of education laws from curriculum and enrollment requirements to discipline policies and building standards. These are not random exclusions from insubstantial provisions. The

exemptions are pervasive, extensive, and diffused throughout the entirety of Title 33 of the Revised Code. See Appendix B.

{¶ 94} Largely unregulated and privately operated, community schools are free to adopt their own specific instructional approaches, educational goals, and philosophical agendas. Indeed, they are exempt from the provisions of R.C. 3313.602(B) and (C), which require public schools to ensure that "the principles of democracy and ethics are emphasized and discussed wherever appropriate in all parts of the curriculum" and to encourage all employees to be aware of their roles "in instilling ethical principles and democratic ideals in all district pupils."

{¶ 95} Section 2, Article VI was intended to bring order to the chaos of individualized approaches that resulted from the nascent mélange of loosely regulated and diverse schooling arrangements by mandating the creation and funding of a uniform and coherent body of governmentally controlled schools. R.C. Chapter 3314 contravenes that intent by reversing the process. It creates a jumble of ad hoc community schools that flourish on state funds otherwise inuring to the account of district schools.

**1170 {¶ 96} Although I disagree with the majority's view of Section 2, Article VI on a fundamental level, our differences are primarily grounded in constitutional analysis. However, I find the following passage in the majority's opinion to be questionable:

{¶ 97} "Throughout time, new educational movements have faced opponents and detractors. But just as the common-school movement of the 1800s increasingly gained supporters throughout the United States, so too has the charter-school movement." ¶ 27.

{¶ 98} This court's function is to determine the constitutionality of charter schools as established by statute in Ohio, not to promote their cause. Whether the "charter-school movement" has truly gained supporters or opponents, nationally or in Ohio, is a subject of social discourse for the political branches of our government. I also point out that the common-school movement of the 1800s resulted in a constitutional amendment, i.e., Section 2, Article VI and eventually also Sections 3 and 4, Article VI. That is not the case with charter schools.

{¶ 99} I respectfully dissent.

PFEIFER, J., dissenting.

*592 {¶ 100} Although I agree with the main premise of the majority opinion, that the Ohio Constitution does not prohibit the establishment of charter schools, I write separately because I conclude that charter schools as currently established are unconstitutional.

{¶ 101} To many, the establishment of an alternative to public schools is a noble experiment, designed to enable students to escape failing public schools. Sadly, in many instances, the cure is worse than the disease. An August 16, 2006 article in the Columbus Dispatch indicates that 50 percent of the charter schools in Franklin County received the lowest possible rating: emergency. Presumably, most of the students attending charter schools in Franklin County left the Columbus School District, the largest school district in Franklin County and the school district that met the lowest percentage of state standards: 20 percent. In aggregate, the charter schools in Franklin County met even fewer state standards: 18.5 percent. In Franklin County, only three charter schools that met more than one state standard met 50 percent of the standards that were calculated: Graham School met nine of 12 standards, Great Western met five of six, and Upper Arlington I.B. met six of six. The other 33 charter schools in Franklin County met only 12.4 percent of state standards.

{¶ 102} Whether charter schools are the answer to failing public schools has not been settled, though the early results are not especially encouraging. Still, the Ohio Constitution does not prohibit the establishment of charter schools. What the Ohio Constitution does prohibit is an excessive reliance on locally raised funds to finance public schools. *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733; *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993; and *DeRolph v. State,* 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529. Irrespective of the noble intentions of charter-school legislation, one undeniable effect is that public schools receive less state money than they would in the absence of charter schools. The mathematically unavoidable result is that public schools receive a greater percentage of their funding from local sources, which is unconstitutional pursuant to our *DeRolph* decisions.

{¶ 103} Finally, if charter schools are to be part of a thorough and efficient system of common schools—as they must—then they should be held to the same standards as public schools. Though the General Assembly has taken steps in that direction, **1171 it is clear, as the majority opinion concedes and as Justice Resnick's dissenting opinion explains

in detail, that charter schools are currently exempt from many standards that public schools are required to meet.

{¶ 104} I respectfully dissent.

***593** O'DONNELL, J., dissenting.

{¶ 105} In my view, this court has prematurely accepted review over a very limited but important constitutional issue regarding the establishment and operation of community schools statewide, and the majority has considered it on a scant record. Even a cursory reading of the majority and dissenting opinions reveals the complexity of the issue and the divergent positions taken by the members of the judiciary who have reviewed it at all levels. Regrettably, appellants have not fully developed this record, as the trial court originally bifurcated the case into the legal issues, which are allegedly before us, and the remaining factual issues, which are still before the trial judge.

{¶ 106} The better course would have been to deny review and later accept the case in its entirety. The majority opinion states, "The appellants have not presented clear and convincing evidence that community schools are raiding local funds that school districts are otherwise entitled to receive." ¶ 39. Justice Resnick's opinion assumes the point, stating that R.C. Chapter 3314 "creates a jumble of ad hoc community schools that flourish on state funds otherwise inuring to the account of district schools." ¶ 95.

{¶ 107} I cannot understand how a constitutional review of a legal issue may be resolved on a yet-to-be-developed record of whether local or state tax money is or is not being diverted to community schools under the funding formula. This appears to me to be a factual question capable of being resolved by presentation of evidence, and the court of appeals, at least in part, so held.

{¶ 108} I did not vote to accept this case, because I believed the record needed development, despite the entreaties from both parties to resolve the constitutional issue. I still believe that to be the correct course for this court to follow, i.e., to dismiss this appeal as having been improvidently accepted, to await further record development, and to approach the entire case on a complete record.

{¶ 109} I would therefore dismiss this appeal as having been improvidently accepted.

APPENDIX A

{¶ 110} According to the Legislative Service Commission memorandum No. R–125–1824, community schools are *not* exempt from the requirements of the following Revised Code sections:

{¶ 111} "9.90 and 9.91 Provision regarding insurance benefits for educational employees.

***594** {¶ 112} "Chapter 102 Ohio Ethics Law (except that a member of a community school governing board specifically may also be an employee of the board and may have an interest in a board-executed contract that is not a contract with a for-profit firm for the operation of management of a school under the auspices of the governing board (R.C. 3314.03(A)(11)(e)).

{¶ 113} "109.65, 3313.672, and 3313.96 Requirements for missing children reporting, information, and student fingerprinting.

{¶ 114} "Chapter 117. State fiscal auditing requirements.

{¶ 115} "121.22 The Public Meetings ('Sunshine') law.

{¶ 116} "149.43 The Public Records Law.

****1172** {¶ 117} "Chapter 1347. Ohio Privacy Law.

{¶ 118} "2151.358 Procedures pertaining to school records of adjudicated delinquents after their court records are expunged.

{¶ 119} "2151.421 Child abuse reporting requirements.

{¶ 120} "2313.18 Employment protection for employees on jury duty.

{¶ 121} "Chapter 2744. The Sovereign Immunity Law for public employees.

{¶ 122} "3301.0710 and 3301.0711 Statewide achievement testing.

{¶ 123} "3301.0712 Phase-in of achievement tests.

{¶ 124} "3301.0714 Education Management Information System (EMIS) requirements (as prescribed by Department of Education rules adopted under R.C. 3314.17).

{¶ 125} "3301.0715 Administration and scoring of statewide diagnostic assessments and provision of intervention services.

{¶ 126} "3302.04 Requirement to develop a continuous improvement plan for certain schools that fail to meet annual yearly progress and to take other actions (such as installing a new curriculum and reconstituting schools) for schools that persistently do not demonstrate improvement, to the extent and manner prescribed in R.C. 3314.03(A)(24).

{¶ 127} "Chapter 3307. State Teachers Retirement System.

{¶ 128} "Chapter 3309. School Employees Retirement System.

{¶ 129} "3313.205 Requirement to adopt a policy on notification of a parent when the parent's child is absent from school.

{¶ 130} "3313.375 Authorization and procedures for entering into lease-purchase contracts for the acquisition of facilities (in the same manner as school districts and educational service centers).

{¶ 131} "3313.450 Requirement to adopt a policy on parent involvement in schools.

***595** {¶ 132} "3313.50 Record requirements relating to student hearing and vision testing.

{¶ 133} "3313.602(D) Requirement that each school devote one hour to observance of Veteran's [sic] Day.

{¶ 134} "3313.608 'Third grade reading guarantee.'

{¶ 135} "3313.6012 Requirement to have policy on academic 'prevention/intervention' services.

{¶ 136} "3313.61, 3313.611, 3313.614, and 3313.615 Requirement to award diploma to students meeting the testing criteria and completing the high school curriculum. (Community schools are not subject to the Revised Code's curriculum requirements. They set their own curricula.)

{¶ 137} "3313.643 Requirement that students and teachers wear industrial eye protection in certain industrial courses or activities.

{¶ 138} "3313.648 Prohibition on offering monetary payment of other in-kind gift to a student or a student's parent or guardian as an incentive for that student to enroll in a school.

{¶ 139} "3313.66, 3313.661, and 3313.662 Student suspension, expulsion, and permanent exclusion requirements.

{¶ 140} "3313.67 Requirement to keep records of student immunizations.

{¶ 141} "3313.671 Prohibition against allowing a student to remain in school longer than 14 days without submitting immunization records or evidence that immunization is in progress (except that the parental right to excuse a child from immunization for religious reasons applies).

****1173** {¶ 142} "3313.672 Requirement to request records from a child's previous school.

{¶ 143} "3313.673 Screening of new kindergartners and first-graders in hearing, vision, speech and communication, and health.

{¶ 144} "3313.69 Requirement to include hearing and vision screening if school opts to have any dental and medical screening.

{¶ 145} "3313.71 Tuberculin testing requirements.

{¶ 146} "3313.712 Requirement to provide the parent of every enrolled student a statutorily prescribed blank emergency medical authorization form.

{¶ 147} "3313.716 Requirement that public schools permit students to self-administer asthma medication.

{¶ 148} "3313.80 Requirement to display the national flag.

{¶ 149} "3314.011 Community school fiscal officer education requirements.

***596** {¶ 150} "3314.03(A)(6)(b) Requirement that a community school automatically withdraw from enrollment any student who has failed without legitimate excuse to

participate in 105 consecutive hours of offered learning opportunities.

{¶ 151} "3314.031 Requirement that 'Internet and other computer-based community schools' use a filtering device or software to block access to materials that are obscene or harmful to juveniles on all computers provided to students for instructional use.

{¶ 152} "3314.032 Requirement that an 'Internet and other computer-based community schools' provide one computer to each student enrolled in the school unless a parent with more than one child from the parent's household enrolled in the school waives that right.

{¶ 153} "3314.041 Requirement that each community school distribute to parents of students at the time the students enroll in school a written statutorily-prescribed statement explaining that the school is a public school and that students are subject to achievement testing and other statutory requirements.

{¶ 154} "3319.073 Requirement for teacher in-service training in child abuse prevention.

{¶ 155} "3319.22 to 3319.30 and 3319.301 Teacher licensing requirements.

{¶ 156} "3319.321 Requirements for confidentiality of student information.

{¶ 157} "3319.39 Requirements for criminal records checks of job applicants.

{¶ 158} "3321.01 Requirements relating to admittance of children to kindergarten and first grade.

{¶ 159} "3321.13 Reporting requirements related to a child withdrawing from school; requirement to report certain withdrawn students to the Registrar of Motor Vehicles.

{¶ 160} "3321.14, 3321.17, 3321.18, 3321.19, and 3321.191 Compulsory School Law enforcement requirements.

{¶ 161} "Chapter 3323. Requirements related to special education.

{¶ 162} "3327.10 School bus driver qualifications.

{¶ 163} "Chapter 3365. Requirement to participate in Post–Secondary Enrollment Options Program.

{¶ 164} "3365.041 Requirement that governing authority of a community school that expels a student notify the pertinent higher education institution that the student attends under the Post–Secondary Enrollment Options Program.

**1174 {¶ 165} "Chapter 3742. Requirements to take actions to prevent lead poisoning and to control lead hazard in schools.

{¶ 166} "4111.17 Ohio Equal Pay Law (anti-discrimination related to wages).

*597 {¶ 167} "Chapter 4112. Ohio Civil Rights Act.

{¶ 168} "4113.52 Ohio Whistleblower Law.

{¶ 169} "Chapter 4117. The state Collective Bargaining Law (as prescribed in R.C. 3314.10(A)(2) and (3)).

{¶ 170} "Chapter 4123. Workers' Compensation Law.

{¶ 171} "Chapter 4141. Unemployment Compensation Law.

{¶ 172} "Chapter 4167 State Occupational Safety and Health Law.

{¶ 173} "5705.391 Requirements for five-year projections of school district revenues and expenditures.

{¶ 174} "In addition, community schools must comply with any laws or rules that 'grant certain rights to parents' [R.C. 3314.04] and with health and safety standards established by law for school buildings [R.C. 3314.05]." (Footnotes omitted.)

{¶ 175} "It should be noted that community schools are subject to any and all federal laws which apply to schools and employers generally—for example, FERPA [the Family Educational Rights and Privacy Act, Section 1232g, Title 20, U.S.Code] and the various federal anti-discrimination laws. Moreover, as public schools, community schools are subject to all the constitutional constraints that apply to governmental bodies—for example, the obligation to recognize freedom of speech and association, and to provide due process and equal protection of the laws. It is also important to recognize that community schools are subject to the federal law

relating to the education of children with disabilities (IDEA) [Sections 1401 et seq., Title 20, U.S.Code] and to have the primary responsibility for providing a free appropriate public education (FAPE) [Sections 1401(8) and 1412(a)(1), Title 20, U.S.Code] for such children under the provisions of that law." (Footnotes omitted.) Carey, Anderson's Ohio School Law Guide (2006) 48, Section 2.27.

APPENDIX B

{¶ 176} According to Legislative Service Commission memorandum No. R–125–1824, community schools are exempt from the following requirements:

{¶ 177} "124.01 et seq. Civil Service Law (related to nonteaching employees in city school districts.)

{¶ 178} "133.01 et seq. Uniform Public Securities Law (However, other than borrowing for facilities acquisition under loans guaranteed by the state, community schools may not issue notes with a duration longer than one fiscal year.)

{¶ 179} "Chapter 135. Uniform Depository Act.

{¶ 180} "149.351 and 149.41 Requirements on retention of school records and establishing a records commission.

***598** {¶ 181} "3301.07 State Board of Education minimum standards covering the assignment of professional personnel according to training and qualifications; instructional materials and equipment, including library facilities; proper organization, administration, and supervision of schools; buildings and grounds (other than any building health and safety standards); admission and promotion of students; driver education courses; phonics instruction; instruction in energy and resource conservation; and reporting requirements.

{¶ 182} "3301.072 Training requirements for school treasurers and business managers.

****1175** {¶ 183} "3301.073 Required receipt of State Board technical assistance in school budgeting and finances.

{¶ 184} "3301.078 25-pupil class size limit for bilingual multicultural classes.

{¶ 185} "3301.0719 Required receipt of services under any educational service center plan of service.

{¶ 186} "3301.16 School chartering requirements.

{¶ 187} "3301.17 Driver education course standards.

{¶ 188} "3301.52 to 3301.59 Preschool program standards and licensing (other than parental access rights).

{¶ 189} "Chapter 3302. Performance indicators for school districts, except that community schools 'to the extent possible' must comply with R.C. 3302.04, which requires continuous improvement plans and other actions and sanctions for schools that fail to meet annual yearly progress, in the manner prescribed in R.C. 3314.03(A)(24).

{¶ 190} "Chapter 3311. Requirements related to the formation and territory of school districts and educational service center financing districts.

{¶ 191} "3311.29 Requirement to maintain grades kindergarten through twelve.

{¶ 192} "3313.01 to 3313.17 and 3313.18 Requirements related to the membership, organization, and operation of school boards.

{¶ 193} "3313.174 Requirement to appoint a business advisory council.

{¶ 194} "3313.20 Requirement to make rules necessary for the governing of employees, students, and other persons entering a school; to post the school entry rules; and to have a written policy on employees' attendance at professional meetings.

{¶ 195} "3313.201 Requirement to purchase liability insurance (though the community schools law has its own provision requiring a community school to purchase liability insurance (3314.03(11)(b)).)

{¶ 196} "3313.202 Requirements related to the provision of life, health, accident, and legal insurance benefits for school district employees.

***599** {¶ 197} "3313.208 and 3313.209 Latchkey program operating requirements.

{¶ 198} "3313.211 Requirement to pay full-time employees while on jury duty.

{¶ 199} "3313.22 to 3313.32 Requirements related to the appointment, conduct, and duties of school district treasurers.

{¶ 200} "3313.35 Requirements concerning who is legal counsel for school boards.

{¶ 201} "3313.372 Requirements related to installment payment contracts for energy conservation measures for school facilities.

{¶ 202} "3313.373 Requirements related to shared-savings contracts for energy savings measures for school facilities.

{¶ 203} "3313.41 Disposal of real and personal property requirements.

{¶ 204} "3313.44 Real and personal property tax exemption for school districts.

{¶ 205} "3313.46 (and related sections in Chapter 153) Competitive Bidding Law regarding school building projects.

{¶ 206} "3313.47 Vesting of management and control of schools in the board of education.

{¶ 207} "3313.471 Prohibition of nonuniform restrictions on the presentation of career information to students.

{¶ 208} "3313.48 Standards for minimum school year and minimum school day (although community schools are required to provide 920 hours of instruction annually (R.C. 3314.03(A)(11)(a))); requirement that education be provided free of charge **1176 (though a community school is prohibited from charging tuition (R.C. 3314.08(I))).

{¶ 209} "3312.481 Requirements related to alternative calendars for schools.

{¶ 210} "3313.482 Contingency plan requirement for making up calamity days.

{¶ 211} "3313.483, 3313.487 to 3313.4810 Prohibition against closing schools for financial reasons; requirements and procedures related to school financial crises and resulting loans.

{¶ 212} "3313.49 Student assignment requirements when a school is suspended.

{¶ 213} "3313.51 Check writing and deposit requirements related to school treasurers.

{¶ 214} "3313.53 Requirements related to employing certificated persons for pupil-activity programs.

{¶ 215} "3313.531 and 3313.532 Adult high school continuation program requirements.

{¶ 216} "3313.534 Requirement for 'zero-tolerance' discipline policies; requirement that Big 8 and certain other school districts establish alternative schools.

*600 {¶ 217} "3313.536 Requirement to adopt comprehensive school safety plan.

{¶ 218} "3313.55 Requirements related to schooling for persons with epilepsy.

{¶ 219} "3313.56 Part-time schooling requirements for programs provided to students with age and schooling certificates.

{¶ 220} "3313.60 School course of study requirement (except that the parental rights to excuse a child from certain instructional topics and to examine instructional materials and other documents apply.)

{¶ 221} "3313.601 Prohibition against barring teachers from providing periods for programs or meditation on moral, philosophical, or patriotic themes (except that the parental right to excuse a child from these programs applies.)

{¶ 222} "3313.602(A) Requirement to have a policy regarding the recitation of the pledge of allegiance to the flag.

{¶ 223} "3313.602(B) and (C) Requirement that the 'principles of democracy and ethics' are emphasized and discussed in appropriate parts of the curriculum and to encourage a school's employees to be cognizant of their roles to instill in students 'democratic and ethical ideals'.

{¶ 224} "3313.603 High school curriculum requirements.

{¶ 225} "3313.604 Recognition of American Sign Language as a foreign language in schools.

{¶ 226} "3313.605 Implementation requirements for school districts electing to offer community service. education programs under federal law.

{¶ 227} "3313.609 Requirements to retain certain chronic truants.

{¶ 228} "3313.6011 Requirement that venereal disease education, which is a component of health education, emphasize sexual abstinence.

{¶ 229} "3313.613 Requirement to award high school credit to a student for successful completion of a post-secondary course outside of regular school hours.

{¶ 230} "3313.62 Definitions of 'school year,' 'school month,' and 'school week'.

{¶ 231} "3313.63 Specification of school holidays.

{¶ 232} "3313.64 and 3313.65 School admission requirements related to the payment of tuition; tuition payment and charging requirements between school districts.

{¶ 233} "3313.642 Requirement for certain districts to furnish needy students with materials used in a course of instruction **1177 other than the necessary textbooks or electronic textbooks.

{¶ 234} "3313.646 Requirements and prohibitions related to establishment of preschool programs.

*601 {¶ 235} "3313.70 Prohibition against appointment of a school board member as school physician, dentist, or nurse.

{¶ 236} "3313.713 Requirements related to administering prescription drugs to students (except that the parental right to have a school administer prescription drugs to a child only after requesting it in writing applies.)

{¶ 237} "3313.714 Requirement, upon request from the Department of Job and Family Services, to operate a 'healthcheck' program for students covered by Medicaid (except that the parental right to excuse a child from a healthcheck examination applies.)

{¶ 238} "3313.75 Prohibition against renting or leasing a school building so as to interfere with the public schools of the district or for any purpose other than authorized by law.

{¶ 239} "3313.751 Prohibition against students smoking in any area controlled by a school board; requirement that a school board have a disciplinary policy to enforce the smoking prohibition.

{¶ 240} "3313.752 Requirement that a warning about anabolic steroids be posted in school locker rooms.

{¶ 241} "3313.76 to 3313.79 Requirements related to the use of school buildings by the public when not being used for school purposes.

{¶ 242} "3313.81 Requirements related to food service operations and meals for the elderly.

{¶ 243} "3313.811 Prohibition against the sale of anything for profit on school premises unless all profits are used for a school purpose or for a school activity.

{¶ 244} "3313.813 State Board of Education standards for school food programs (except that any health or safety standards related to school facilities apply.)

{¶ 245} "3313.814 Requirement for school boards to have a policy governing the types of food sold on school premises.

{¶ 246} "3313.815 Requirement to have an employee trained in the Heimlich Maneuver during periods food is being served to students.

{¶ 247} "3313.841 and 3313.842 Requirements related to sharing certain services cooperatively with other districts and operating joint education programs.

{¶ 248} "3313.843 Requirements related to receiving services provided by educational service centers.

{¶ 249} "3313.85 Requirement that the probate court, or in some cases the educational service center, perform functions that a school board fails to perform.

{¶ 250} "3313.871 Fee limits for school district participation in accrediting associations.

*602 {¶ 251} "3313.90, 3313.91, and 3313.911 Vocational education requirement.

{¶ 252} "3313.92 Requirements related to joint construction projects between school districts.

{¶ 253} "3313.93 Prohibition against students being paid for work in a school district occupational work adjustment laboratory from being considered employees for purposes of school employee retirement law, nonteaching employee contract law, unemployment compensation law, and workers' compensation law (apparently meaning that students in such a program operated by a community school are considered employees and, therefore, presumably **1178 are subject to whatever law is applicable to other community school employees.)

{¶ 254} "3313.941 Requirement to include a 'multiracial' category in any statistics on race gathered for state or school district purposes.

{¶ 255} "3313.95 Contract requirements for police services in alcohol and drug prevention programs.

{¶ 256} "3313.97 Intradistrict open enrollment requirements (except the requirement that parents receive information about the program—presumably in the district in which the community school is located—applies.)

{¶ 257} "3313.98, 3313.981, 3313.982, and 3313.983 Interdistrict open enrollment requirements (except the requirement that parents receive information about the program applies.)

{¶ 258} "3315.02 to 3315.05 Requirements related to the administration of funds for bond indebtedness (other than bonds secured by tax revenues, which community schools are prohibited from issuing (R.C. 3314.08(H))).

{¶ 259} "3315.062 Requirements related to the provision and funding of student activity programs.

{¶ 260} "3315.07 Requirements related to the publishing of school materials for the public; prohibition against using public funds to support or oppose the passage of a school levy or bond issue or to compensate any district employee for time spent on supporting or opposing a levy or bond issue.

{¶ 261} "3315.08 Requirements related to the payment of employee salaries and the administration of a payroll account.

{¶ 262} "3315.09 Limitation of only a one-year contract with a college or museum for the provision of instructional programs to students.

{¶ 263} "3315.091 Requirements and limitations related to contracting with a driver training school for the provision of driver education.

{¶ 264} "3315.10 Requirements related to the management and control of certain property held in trust for educational purposes.

*603 {¶ 265} "3315.11 to 3315.14 Requirements related to establishing and administering a school building replacement fund.

{¶ 266} "3315.15 Requirements related to school board service funds for paying school board members' expenses in the performance of their duties.

{¶ 267} "3315.17 and 3315.171 Requirement to maintain a Textbook and Instructional Materials Fund.

{¶ 268} "3315.18 and 3315.181 Requirement to maintain a Capital and Maintenance Fund.

{¶ 269} "3315.19 Requirements regarding election of set-aside amounts.

{¶ 270} "3315.29 to 3315.31 (and related 501.01 to 501.14) Requirements related to common school funds.

{¶ 271} "3315.37 Requirements related to school district teacher education loan programs.

{¶ 272} "3315.40 to 3315.42 Requirements related to establishing and maintaining a school district education foundation fund.

{¶ 273} "3317.01 Requirements for the receipt of state education funds, including levying 20 mills, providing instruction for the minimum number of school days, and paying teachers according to the state minimum teachers salary schedule; requirement to comply with all school law and State Board rules in order to participate in the state basic aid funding program.

**1179 {¶ 274} "3317.011 to 3317.0213 Requirements that school districts be paid specified amounts of state funds

(section 3314.08 establishes a method of calculating the amount of state funding for community schools.)

{¶ 275} "3317.022(C)(5) Requirement that a school district spend the total amount of per pupil state funding (formula and weighted additional amounts) it receives for disabled students on special education and related services for those students.

{¶ 276} "3317.023(B) and (C) Requirement that a school district's districtwide pupil to teacher ratio be no more than 25 to 1.

{¶ 277} "3317.023(D) Requirement that a school district employ five full-time-equivalent educational service personnel (including elementary school art, music, and physical education teachers, counselors, librarians, visiting teachers, school social workers, and school nurses) for each 1,000 pupils in the regular student population.

{¶ 278} "3317.029 Spending restrictions on disadvantaged pupil impact aid (DPIA).

{¶ 279} "3317.03 and 3317.033 Requirements related to reporting school average daily membership and maintaining school records (except that under ***604** R.C. 3314.08, in order to receive state payments, community schools must report the number of students enrolled.)

{¶ 280} "3317.04 Funding requirements related to the transfer of school district territory or the consolidation of districts.

{¶ 281} "3317.06 Funding, requirements, and prohibitions related to auxiliary services for chartered nonpublic schools.

{¶ 282} "3317.061 Requirement to annually report licensed employees to the State Board.

{¶ 283} "3317.07 Funding for school bus purchases.

{¶ 284} "3317.08 to 3317.082 Tuition calculation requirements.

{¶ 285} "3317.11 Requirements to receive services from an educational service center (formerly county school boards.)

{¶ 286} "3317.12 Nonteaching employee salary schedule requirement.

{¶ 287} "3317.13 State minimum teachers salary schedule requirement.

{¶ 288} "3317.14 School district teachers salary schedule requirement.

{¶ 289} "3317.15 Requirements specifying the number of speech-language pathologists and school psychologists a school district must hire.

{¶ 290} "3317.62 to 3317.64 Requirements related to loans from the lottery profits education fund under certain circumstances.

{¶ 291} "Chapter 3318. School Facilities Assistance Law (except for a program under which community school loans for classroom facilities may be guaranteed by the state for up to 15 years (R.C. 3318.50).)

{¶ 292} "3319.01 and 3319.011 Requirements related to school superintendent employment.

{¶ 293} "3319.02 Requirements related to employment of assistant superintendents, principals, assistant principals, and other administrators.

{¶ 294} "3319.03 to 3319.06 Requirements related to employment of school district business managers.

{¶ 295} "3319.07, 3319.08, and 3319.09 to 3319.111 Teacher employment and contract requirements.

{¶ 296} "3319.071 Prohibition against requiring teachers to participate in professional development programs.

****1180** {¶ 297} "3319.072 Teacher lunch period requirement.

{¶ 298} "3319.081 to 3319.087 Employment requirements for nonteaching employees.

{¶ 299} "3319.088 Educational aide employment requirements.

***605** {¶ 300} "3319.10 Substitute teacher employment requirements.

{¶ 301} "3319.12 Annual professional staff salary notice requirements; requirements related to the transfer of administrators to other positions.

{¶ 302} "3319.13 to 3319.143 Leave of absence requirements for teachers and nonteaching employees, including professional development leave, sick leave, military leave, personal leave, and assault leave.

{¶ 303} "3319.15 Teacher termination of contract requirements.

{¶ 304} "3319.16 and 3319.161 School board termination of teacher contract requirements.

{¶ 305} "3319.17 Reduction in teaching force requirements.

{¶ 306} "3319.171 Requirements related to administrative personnel suspension policy.

{¶ 307} "3319.18 and 3319.181 Requirements related to employment of teachers and nonteaching employees when school district territory is transferred or districts are consolidated.

{¶ 308} "3319.21 Prohibition against a school board participating in a contract employing a relative of a school board member; requirement that these contracts and any contracts in which a board member has a pecuniary interest are void.

{¶ 309} "3319.32 Student record keeping requirements.

{¶ 310} "3319.322 Student photograph requirements for student records.

{¶ 311} "3319.33 Statistical reporting requirements to the State Board.

{¶ 312} "3319.35 and 3319.37 Penalties and consequences for failure to submit reports to the State Board.

{¶ 313} "3319.36 Prohibition against paying a nonlicensed teacher (except R.C. 3314.03(A)(10) requires teachers in community schools to be licensed under sections 3319.22–3319.31.)

{¶ 314} "3319.41 School corporal punishment policy requirements and authorization.

{¶ 315} "3319.45 Requirement that school principal report certain offenses committed by students.

{¶ 316} "3321.02 to 3321.12 Requirements related to the enforcement of student compulsory attendance law; requirements related to students with age and schooling certificates.

{¶ 317} "Chapter 3324. Identification of gifted children and development of service plan.

{¶ 318} "3327.01 to 33276.05 Student transportation requirements (Sections 3314.09 and 3314.091 require a school district to transport its students to ***606** community schools in the same manner districts are required to transport students to other schools unless the district has entered into an agreement with a community school under which the community school provides student transportation.)

{¶ 319} "3327.06 Tuition collection requirements and provisions related to the unauthorized attendance of students.

{¶ 320} "3327.08 Competitive Bidding Law regarding school bus purposes

{¶ 321} "3327.09 Motor vehicle insurance requirement (though community ****1181** schools must provide for liability insurance (R.C. 3314.03(A)(11)(b))).

{¶ 322} "3327.11 Requirements related to paying the cost of a student's room and board in certain circumstances.

{¶ 323} "3327.13 Requirements related to leasing buses for transporting nonpublic school students to and from school activities.

{¶ 324} "3327.14 Requirements related to providing transportation for senior citizen and adult education group.

{¶ 325} "3327.15 Restrictions on use of school vehicles out of state.

{¶ 326} "3327.16 Requirements related to volunteer bus rider assistance programs; requirement to provide school bus rider instruction programs.

{¶ 327} "3329.01 to 3329.08 All requirements related to the selection and purchase of school textbooks and electronic textbooks.

{¶ 328} "3329.09 Requirements related to the accessibility and distribution of textbooks to students (except the parent's right to buy textbooks for a child at no more than 10% over the school district's cost applies.)

{¶ 329} "3329.10 Prohibition against a superintendent, supervisor, principal, or teacher acting as a school textbook sales agent.

{¶ 330} "Chapter 3331. Requirements related to the issuing and administration of age and schooling certificates (except the parental right, under 3331.13, to obtain a child's school records upon request for purposes of an age and schooling certificate applies.)

{¶ 331} "Title 35 (various sections) Elections Law related to school board elections and elections on tax levies and bond issues.

{¶ 332} "4104.05(A) and (B) Requirement to employ a licensed boiler operator under certain circumstances unless, this requirement is considered to be a facility safety issue.

{¶ 333} "5705.412 Requirement to attach certificate of available resources to school district appropriation measures, contracts, and purchase orders."

All Citations

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Footnotes

1 We acknowledge the amicus briefs filed in this matter.

2 Revisions to R.C. Chapter 3314 have included Am.Sub.S.B. No. 55, 147 Ohio Laws, Part III, 6542, 6567, which expanded the ability to create community schools; Am.Sub.H.B. No. 770, 147 Ohio Laws, Part III, 5609, 5638, which extended the maximum term of sponsorship contracts from three to five years; Am.Sub.H.B. No. 282, 148 Ohio Laws, Part I, 1956, 2020, which changed certain features of community schools, requiring them to have fiscal officers and requiring the ODE to issue an annual report card for each school; Am.Sub.H.B. No. 94, 149 Ohio Laws, Part III, 4126, 4555, which created a loan-guarantee program; 2002 Sub.H.B. No. 364, which made the ODE responsible for the oversight and approval of sponsors. This list is not comprehensive, but serves to show some of the amendments to charter-school legislation.

3 Had we waited to consider all issues as Justice O'Donnell suggests, the parties would have been back before this court later, with most of the same claims. (The court of appeals remanded most of the claims but affirmed the dismissal of two. If we had not accepted review of that appellate decision or if we dismissed the case now, the decision on those claims would remain standing as res judicata, and those claims would not be subject to further litigation on remand or a subsequent appeal.) The constitutional issues have been joined and have been fully briefed. With respect to those legal issues, there is no fact-finding to be done.

4 The court of appeals determined that res judicata did not bar litigation of counts 5 and 6 and remanded these counts to the trial court for further proceedings. The court of appeals also remanded count seven, advising that the trial court may at the same time examine the issues in this count, even if only as a part of the remaining claims.

5 Other states, like Michigan, California, Utah, and New Jersey, have considered similar claims under similar constitutional provisions and have rejected them. *Council of Orgs. & Others for Edn. about Parochiaid, Inc. v. Engler* (1997), 455 Mich. 557, 566 N.W.2d 208; *Wilson v. State Bd. of Edn.* (1999), 75 Cal.App.4th 1125, 89 Cal.Rptr.2d 745; *Utah School Bds. Assn. v. Utah State Bd. of Edn.* (Utah 2001), 17 P.3d 1125, 1129,

1131; and *In re Grant of CharterSchool Application of Englewood on the Palisades Charter School* (2000), 164 N.J. 316, 753 A.2d 687.

6 R.C. 3314.04 exempts community schools from most state laws and regulations dealing with public schools except the state laws that grant certain rights to parents and laws specified in the sponsor contract and in R.C. Chapter 3314 itself. See Appendix A for a list of those laws that community schools must still comply with.

7 Compare R.C. 3314.03(A)(11)(d) with the original 1997 version in Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 1190.

8 State funding of school districts depends on enrollment. R.C. 3317.022 and 3317.03.

9 R.C. 3314.08 offers many adjustments to the formula, including the possibility of proration in R.C. 3314.08(D), but for ease of discussion we have excluded the nuances and possible permutations to the formula.

1 The General Assembly declares in R.C. 3314.01(B), “A community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education.”