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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

MEMORANDUM OF LAW IN SUPPORT OF PARENT INTERVENOR-DEFENDANTS' RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS (*McEWEN*)

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INTRODUCTION

Through this litigation, McEwen Plaintiffs seek to eliminate the Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 *et seq.* ("ESA Program" or "ESA Statute"). The ESA Program expands educational options for elementary and secondary aged children trapped in Tennessee public schools that have failed them, including the children of Intervenor-Defendants Natu Bah, Builguissa Diallo, and Star Brumfield ("Parents" or "Parent-Intervenors"). Opting for the ESA Program provides a way for low- and middle-income families to afford a better educational environment, including a private school. *See Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 145 (Tenn. 2022) (describing program). Before Plaintiffs can extinguish the ESA Program, however, they must first state a claim upon which relief can be granted.

This McEwen Plaintiffs have failed to do. Below, Parents address all six counts in Plaintiffs' amended complaint: Cause No. 1 under Article I, § 8 and Article XI, §§ 8, 12; Cause No. 2 under Article XI, § 12 ("Education Clause"); Cause No. 3 under Tenn. Code Ann. §§ 49-3-351 *et seq.* ("BEP Statute"); Cause Nos. 4 and 5 challenging the ESA Program's 2022–23 implementation under the ESA statute and Tennessee's Uniform Administrative Procedures Act, Tenn. Code. Ann. §§ 4-5-101 *et seq.* ("UAPA"); and Cause No. 6 under Tenn. Const. Article II, § 24 and Tenn. Code Ann. § 9-4-601 ("Appropriations Provisions"). The Court should grant Parents' motion for judgment on the pleadings because the ESA Program fully complies with the Tennessee Constitution and its implementation in 2022–23 does not violate the ESA Statute or UAPA.

BACKGROUND

This brief summary of the ESA Program offers context for the arguments made below. Tennessee's ESA Program offers a lifeline to families who would like to leave public schools that do not meet their children's needs, but who lack the financial resources to

afford doing so. The Program makes educational savings accounts ("ESAs") available to low-income and middle-income children who are being educated in school districts that have "consistently had the lowest performing schools on a historical basis," which include both the state's Achievement School District (ASD) and those school districts that have ten or more schools that have been identified as "priority schools" by Tennessee's accountability system or ranked "[a]mong the bottom ten percent (10%) of schools, as identified by the department [of education]." Tenn. Code Ann. §§ 49-6-2602(3)(C); 49-6-2611(a)(1). Under the ESA Program, eligible students receive an ESA containing funds that can offset the cost for a wide array of eligible educational expenses, including tuition, textbooks, and tutoring services.[1] *Id.* § 49-6-2603(a)(4)(A)–(L). The ESA Program can aid 5,000 qualified students in its first year, and up to 15,000 students by 2025. Tenn. Code Ann. § 49-6-2604(c).

STANDARD OF REVIEW

Courts resolving motions for judgment on the pleadings under Rule 12.03 of the Tennessee Rules of Civil Procedure "use the same standard of review" governing motions to dismiss for failure to state a claim under Rule 12.02(6). *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (citing *Waller v. Bryan*, 16 S.W .3d 770, 773 (Tenn. Ct. App. 1999)). To decide the issues presented, Tennessee courts accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion for judgment on the pleadings. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004) (internal quotation marks omitted). "Conclusions of law," however, "are not admitted." *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991).

[1] The ESA Program provides ESAs for each eligible student with his or her per pupil expenditure of state funds from the Basic Education Program (BEP), as well as the required minimum match in local funds, to create an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a).

ARGUMENT

The Court should grant Parents' motion for judgment on the pleadings. The ESA Program does not violate the constitutional or statutory provisions raised in McEwen Plaintiffs' Amended Complaint. In Part I, Parents show that Plaintiffs have failed to state a claim upon which relief can be granted under Article I, § 8 and Article XI, §§ 8, 12 of the Tennessee Constitution. In Part II, Parents explain why Plaintiffs have failed to state a claim under the Tennessee Constitution's Education Clause. Parents next turn to addressing Plaintiffs' failure to state a claim under the BEP Statute (Part III) and the Appropriations Provisions (Part IV). In Part V, Parents show why Plaintiffs have failed to state claims under the ESA Statute and UAPA to challenge the 2022–23 implementation.

I. Plaintiffs Have Failed to State a Claim for Violations of the Education and Equal Protection Clauses Under Article I, § 8 and Article XI, §§ 8, 12.

Plaintiffs' first claim alleges that the ESA Program violates Article I, § 8 and Article XI §§ 8, 12 because it will deprive them of resources that would otherwise go to the public schools they attend. McEwen Pls.' Am. Compl. ¶¶ 112–18. According to Plaintiffs, they will not receive substantially equal educational opportunities or an adequate education as a result. *Id.*

But Plaintiffs' allegations do not demonstrate that the ESA Program results in the loss of substantially equal educational opportunities. Plaintiffs, like all others residing in LEAs located within Shelby County and Davidson County, have an equal opportunity to attend a public school or use the ESA Program if their assigned public school fails to meet their needs.

At the outset, Parents observe that Plaintiffs are trying to use their first cause of action to litigate the adequacy of public-school financing in Tennessee. *See* McEwen Pls.' Am. Compl. ¶ 117 (alleging that the "current funding provided by the General Assembly . . .

is "inadequate"). But such an attempt is misplaced. Unlike the public-school funding system invalidated in *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"), the ESA Program is simply an additional educational option for children assigned to some of Tennessee's most poorly performing public schools. *See* Tenn. Code Ann. §§ 49-6-2601 *et seq*.

Plaintiffs, in claiming that it is wrong for the General Assembly to provide such additional educational opportunities, are trying to stretch the holding in *Small Schools I* to mean that the State can only offer to each student *identical* educational opportunities—and that any difference whatsoever constitutes an equal protection violation. Stretching *Small Schools I* in this manner—that is, transforming "substantial equality" into "exactly identical"—is the only way that Plaintiffs' allegations can be read to state a claim. Put another way, Plaintiffs' claim fails because all they have alleged, at most, is that the ESA Program's financial implications could result in the denial of exactly identical educational opportunities.

To accept Plaintiffs' reading of *Small Schools I* would effectively bar the General Assembly from engaging in innovative education policy—including existing policies that go well beyond the ESA Program. In *Small Schools I*, the Court specifically recognized the importance of innovation in education: "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." 851 S.W.2d at 156. After all, children have different opportunities, costing different amounts of money, than their peers in a variety of educational settings—charter schools, magnet schools, reading/math programs, etc. If the rule of law McEwen Plaintiffs advance were adopted, the impact on Tennessee's education system would be radical. There could be no tailoring of education to meet individual students' specific needs. No programs designed to provide additional assistance to those children who need it. No way to try to

create "substantial equality" by addressing deficiencies in the current system using additional opportunities like the ESA Program. *Small Schools I* should not be read to paralyze Tennessee's education system in this manner. Because Plaintiffs' allegations under their first cause of action rest upon such a reading, they fail to state a claim.[2]

The ESA Program does not violate the promise of an equal educational opportunity. If McEwen Plaintiffs choose a public school for their children, that choice will trigger the full BEP allotment for the district. Tenn. Code Ann. § 49-3-307(a)(1). And if Plaintiffs choose to instead utilize the educational opportunities under the ESA Program, they will receive their BEP allotment to help afford an educational environment that meets their needs. Tenn. Code Ann. § 49-6-2605(a). As Parents explain in Part II, *infra*, the Education Clause of Article XI, § 12, does not require the General Assembly to *exclusively* support a system of free public schools and nothing more—rather, it may use its plenary power to provide Tennessee children with educational options *in addition to* a system of free public schools. The ESA Program is such an educational option. And nobody, including McEwen Plaintiffs, are deprived of an equal educational opportunity under the Program.

If Plaintiffs choose public schools for *their* children, the Tennessee Constitution does not entitle them to force *other parents'* children to also attend public schools. As noted in footnote 2 of this brief, Tennessee children are not mere funding units for school districts. While fluctuation in public school enrollment figures may occur as a result of private

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[2] Plaintiffs' first claim asks this Court to apply the Tennessee Constitution in a manner that treats children as mere conduits for the flow of money into Tennessee's public school system. *See* McEwen Pls.' Am. Compl. ¶¶ 115–18. But Tennessee's public school system is constitutionally required to serve children, not the other way around. *See Small Schools I*, 851 S.W.2d at 156 (the "mandated result" is "a public school system that provides substantially equal educational opportunities to the school children of Tennessee."); *see also* Tenn. Const. art. I, § 8 ("[N]o man shall be . . . disseized of his . . . liberties or privileges . . . ."). The Court should reject Plaintiffs' invitation to turn the state charter on its head.

parental choice, the fact is that enrollment adjustments are part of the public-school funding process, and that has been the case long before the ESA Program ever came into existence. Parents may decide to leave their assigned public school for many reasons. A parent might decide to home school her children. Families of children with special needs may opt for the ESAs available under Tennessee's Individualized Education Act, *see* Tenn. Code Ann. §§ 49-10-1401 *et seq.* Or a family may move to another district—or even out of state. No matter why a student leaves, the reality is that providing parents and children with educational options does not cause unequal educational opportunities for Tennessee children. After all, a school district continues to get full funding for every student they educate. The same is true here.

For the foregoing reasons, Plaintiffs have failed to state a claim for unequal educational opportunity and the Court should render judgment in Parents' favor.

II. Plaintiffs Have Failed to State a Claim Under the Education Clause.

McEwen Plaintiffs' second claim fares no better. Plaintiffs allege that the ESA Program runs afoul of Article XI, § 12, because the legislature's duty to create a public-school system as required by the Education Clause is both a mandate to create public schools *and* a straitjacket on the General Assembly's plenary power that bars it from supporting Tennesseans' education with *additional* educational options. 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.

McEwen Plaintiffs' Education Clause claim fails for two reasons. First, the plain text of the Education Clause imposes no bar to the ESA Program because it does not restrict the General Assembly from supporting education with programs *in addition to* Tennessee's

system of free public schools (Part A). Second, the Clause encourages the support of education including with innovative educational options like the ESA Program (Part B).

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

Plaintiffs frame their claim by casting the Education Clause as prohibiting the General Assembly from supporting Tennesseans' education beyond its mandate to support "a system of free public schools." McEwen Pls.' Am. Compl. ¶ 120 (emphasis omitted). 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 theory that McEwen Plaintiffs advance proceeds not from the text of the Education Clause. It departs from it.

Parents agree that the General Assembly is required to establish and support a public-school system. But Plaintiffs are wrong that the plain language of the Constitution, and the caselaw interpreting it, imposes a ceiling that prohibits the state from creating other educational options in addition to providing public schools. Plaintiffs' implausible interpretation would mean that the state's mandate to create a public-school system operates to also restrict the General Assembly's plenary power in the area of education. But if the framers wanted to include exclusivity language in the Education Clause, they knew how to do it. *See, e.g.*, Tenn. Const. art. XI, § 9, para. 5 (Tennessee's Home Rule Amendment, stating that "[t]he General Assembly shall by general law provide the *exclusive* methods by which municipalities may be created[.]" (emphasis added)). But there is no exclusivity language in the Education Clause and, as a result, 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 to use the *Small Schools* line of cases to erect one. *See, e.g.*, McEwen Pls.' Am. Compl. ¶¶ 26, 29–30. But these cases do no such thing. 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 *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) ("*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. *Id.* at 738. And in *Tenn. Small Sch. Sys. v. McWherter* 91 S.W.3d 232 (Tenn. 2002) ("*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 constitution. *Id.* at 235.

In *none* of these cases did the Supreme Court advance the idea that McEwen Plaintiffs attempt to advance here with their Education Clause claim—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. *See* McEwen Pls.' Am. Compl. ¶ 120. 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 public schools.[3] Because Tennessee students remain free to attend a public school if they so desire—and Plaintiffs have not alleged otherwise—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[4] in their respective constitutions as establishing 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 of Ohio's

[3] 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).

[4] *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.").

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.").

The sole outlier is *Bush v. Holmes*, in which the Florida Supreme Court was interpreting a unique provision that imposes a "paramount duty" on the State, *see* Fla. Const. art. IX, § 1(a), and that is absent from the Tennessee Constitution (as well as many other state constitutions). 919 So. 2d 392 (Fla. 2006). 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.[5]

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[5] *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-

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 opportunity in addition to that system.

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 McEwen Plaintiffs, the passage of the ESA Program simply recognizes that there is no one-size-fits-all approach to educating Tennessee children. The framers could have easily inserted exclusivity language into the Clause if they wanted to—but they chose not to. 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. *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."). The Court should reject McEwen Plaintiffs' invitation to rewrite the Education Clause.

B. The Education Clause Encourages Innovations Like ESAs.

The Tennessee Constitution's Education Clause "recognizes the inherent value of education and encourages its support"—in other words, it urges innovation, not paralysis.

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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, *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.

Tenn. Const. art. XI, § 12. One way the General Assembly has chosen to "encourage[] its support," is through educational options in addition to the traditional public school system, including charter schools, the 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").

McEwen Plaintiffs recite the many ways that private school curricula and admissions standards differ from the public school system in support of this claim. *See* McEwen Pls.' Am. Compl. ¶¶ 123–27. Plaintiffs do so because they believe the ESA Program establishes a parallel, non-uniform public school system "that do[es] not comply with the requirements of a single system of public schools." *Id.* ¶ 121. But this assertion relies on the assumption that private schools' participation in the ESA Program somehow transforms them into private schools. This assumption is false. As virtually every state high court to decide this issue has held, private schools participating in educational-choice programs like the ESA Program remain private—they do not become part of the public-school system. *Meredith*, 984 N.E.2d at 1224 ("[T]he voucher-program statute does not alter the structure or components of the public school system . . . ."); *Jackson*, 578 N.W.2d at 627 (holding that a school choice program "does not transform" private schools into district schools); *Davis*, 480 N.W.2d at 474 ("In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school.").

Under the 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" through additional means. Tenn. Const. art. XI, § 12. The ESA Program is just one way that the General Assembly is supporting the education of Tennessee children.[6] This Court should thus render judgment on Plaintiffs' second cause of action in Parents' favor.

III. Plaintiffs Have Failed to State a Claim Under the BEP Statute.

The ESA Program does not—and cannot—violate the Basic Education Program statute. Plaintiffs' third cause of action alleges that the ESA Program is invalid because it violates the BEP Statute, which is the "statutory formula by which the General Assembly determines and appropriates the funds required to maintain and support Tennessee's system of free public schools." McEwen Pls.' Am. Compl. ¶ 130. According to Plaintiffs, the ESA Program's distribution of BEP funds directly to parents is illegal because "[t]he BEP's statutory provisions provide for the determination, allocation, and apportionment of BEP funds to public school districts only." *Id.* ¶ 131.

In Part A, Parents show that by elevating school districts above the parents and students those districts serve, Plaintiffs flip the BEP Statute on its head. In Part B, Parents show why Plaintiffs' claim assumes that a previously enacted statute (the BEP Statute) invalidates a subsequent one (the ESA Program), and, as a result, they eviscerate

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[6] Other state high courts have reached the same conclusion when reviewing the constitutionality of educational choice programs. *See, e.g.*, *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."); *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 debate and decide.").

foundational principles of legislative power and statutory interpretation. For these reasons, Plaintiffs have failed to state a claim under the BEP Statute and the Court should render judgment in Parents' favor.

A. The BEP Statute Serves Students and Parents, Not School Districts.

Tennessee's BEP Statute[7] was enacted in 1992 in response to years of protracted litigation challenging the constitutionality of the state's then existing educational-funding regime, called the Tennessee Foundation Program ("TFP"). *See Small Schools I*, 851 S.W.2d at 142; *see also Small Schools III*, 91 S.W.3d at 235–38 (describing the history of the BEP). In *Small Schools I*, the Tennessee Supreme Court held that the TFP deprived "*students*, on whose behalf the suit was filed" equal educational opportunities. 851 S.W.2d at 141 (emphasis added). The BEP was specifically designed to correct the flaws of the TFP—in short, "to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students" as required by the Tennessee Constitution. *Small Schools II*, 894 S.W.2d at 734.

In other words, the BEP Statute funds school districts as a means to an end: providing substantially equal educational opportunities to Tennessee *students*. "The means whereby this obligation is accomplished[] is a legislative prerogative." *Small Schools I*, 851 S.W.2d at 141. Here, the legislature determined that the ESA Program could serve that same end by distributing those funds directly to students. Interpreting the BEP Statute to forbid this kind of direct funding, as Plaintiffs urge, is to lose sight of the forest for the trees.

[7] 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. The transition to this new funding formula has no effect on the interaction between the state funding formula and the ESA Program. It merely replaces references to the BEP formula with references to the TISA formula throughout the Tennessee Code. *See id.*

B. The ESA Program, as a Subsequent Enactment, Cannot Violate the BEP Statute.

Even if Plaintiffs are correct that distributing BEP funds directly to parents under the ESA Program contradicts the BEP Statute—which they are not—it does not follow that the ESA Program is invalid. Rather, it is a bedrock principle of statutory interpretation that where two enactments conflict, the subsequent enactment generally controls. *See Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs . . . ."); *see also, e.g.*, *Haley v. State*, 299 S.W. 799, 800 (Tenn. 1927) ("No principle of law is better settled than that a statute purporting to cover an entire subject repeals all former statutes upon the same subject, either with or without a repealing clause, and notwithstanding it may omit material provisions of the earlier statutes."); *Taylor v. State*, No. M2005-00560-CCA-R3-CO, 2005 WL 3262935, at *2 (Tenn. Crim. App. Dec. 1, 2005) ("[A]s between two conflicting statutes enacted at different points in time, . . . 'the later enactment will normally control.'" (quoting 82 C.J.S. Statutes § 354 (1999))).

To hold otherwise would permit one legislature to bind subsequent legislatures by mere statutory enactment. But as United States Supreme Court Chief Justice Marshall explained over two centuries ago: "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). "The correctness of this principle, so far as respects general legislation," he asserted, "can never be controverted." *Id.* The Court should reject Plaintiffs' attempt to do so here.

IV. Plaintiffs Have Failed to State a Claim Under Tennessee's Appropriations Provisions—Article II, § 24 and Tenn. Code Ann. § 9-4-601.

Plaintiffs' cause of action under the constitutional and statutory Appropriations Provisions fares no better. McEwen Plaintiffs allege that the ESA Program is invalid because it violates Article II, § 24 of the Tennessee Constitution, which requires that the

legislature appropriate first-year funding to an act during the session in which that act was passed. McEwen Pls.' Am. Compl. ¶¶ 146–54. Plaintiffs also allege that, to the extent that the Tennessee Department of Education ("TDOE") funded administration of the program via a contract with ClassWallet, it illegally misappropriated funds in violation of the statutory appropriations provisions in Section 9-4-601(a)(1) of the Tennessee Code, which requires money drawn from the state treasury be made by appropriations duly authorized by law. *Id.* Plaintiffs' allegations are wholly unsupported and fail as a matter of law. In Part A, Parents explain why Article II, § 24 of the Tennessee Constitution is not a limit on the General Assembly's power, but rather a procedural balanced-budget provision. In Part B, Parents show how the General Assembly and TDOE complied with the constitutional and statutory Appropriations Provisions.

A. Article II, § 24 Is a Procedural Balanced-Budget Provision, Not a Limit on the General Assembly's Power.

Article II, § 24 of the Tennessee Constitution provides that "[n]o public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenue and reserves . . . for that year." Pursuant to that overall objective, it also provides that "[a]ny law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding." Tenn. Const. art. II, § 24. Collectively, these procedural provisions were "intended to prevent deficit spending and to force the legislature to fund any new programs that it implements." Tenn. Op. Att'y Gen. No. 04-142, 2004 WL 2326699, at *2 (citing *Journal and Debates of the 1977 Limited Constitutional Convention*, 1112–13 (Report on the Limitations on State Spending Committee, remarks by Mr. Burson)).

Consequently, cases interpreting the provisions have given the legislature a wide berth by construing the provisions liberally. "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly as well as expressly, and in general as well as in specific terms." *State ex rel. Noonan v. King*, 67 S.W. 812, 813 (Tenn. 1902) (citation omitted)[8]; *see also Joyner v. Priest*, 117 S.W.2d 9 (Tenn. 1938) (upholding an act against an appropriations challenge); *cf. Clover Bottom Hosp. & Sch. v. Townsend*, 513 S.W.2d 505, 508 (Tenn. 1974) (approving State liability for monetary damages in an FLSA action over the defense that damages amounted to an unauthorized "appropriation" of State funds). As discussed below, viewed through this lens, it is clear that both the General Assembly and the TDOE complied with both the constitutional and statutory Appropriations Provisions.

B. The General Assembly and Department of Education Complied with the Appropriations Provisions.

As an initial matter, the General Assembly did, in fact, appropriate state funds toward implementing the ESA Program in the 2019–20 budget. Governor Lee's proposed budget, which was presented to the General Assembly prior to the ESA Program's passage, included an appropriation of $25,450,000 for program implementation. *See* State of Tennessee, The Budget Document FY2019-20, at A-37 and B-78;[9] *see also* McEwen Pls.'

[8] In *King*, the Court examined the precursor to modern Article II, § 24 of the Tennessee Constitution, which was ratified in 1978. At the time *King* was decided, Article II, § 24 read: "No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at the rise of each stated session of the General Assembly." Tenn. Const. (1870). The 1978 Amendments kept both original provisions.

[9] Available online at https://www.tn.gov/content/dam/tn/finance/budget/documents/2020BudgetDocumentVol1.pdf.

Am. Compl. ¶¶ 7, 53, 151 (alleging that the proposed budget failed to include proper appropriations).[10] This proposed budget was incorporated into the final appropriations act. *See* 2019 Tenn. Pub. Acts ch. 405, at 52 ("From the appropriations made in this act, there hereby is appropriated a sum sufficient for implementation of any legislation cited . . . in the Budget Document transmitted by the Governor . . . ."). [11] Because the timeline for implementing the program had changed since Governor Lee's proposed budget had been presented, the General Assembly included an amendment in the final appropriations act reducing Governor Lee's proposed appropriation by $24,678,700. *See* Pub. Ch. 405, 111th General Assembly, at 100 ("SB 795 / HB 939 - Education Savings Accounts - NR Reduction"). The remaining funds—$771,300—went to implementing the program in its first year.

The TDOE similarly complied with the appropriations provisions when it entered into its contract with ClassWallet using funds previously appropriated for the Tennessee Career Ladder program.[12] As an initial matter, Plaintiffs do not allege that the funds used

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[10] This Court may take judicial notice of public records, including the proposed budget along with the final budget and committee hearing cited *infra*, without transforming this motion into a motion for summary judgment. *See Athena of S.C., LLC v. Macri*, No. E2016-00224-COA-R3-CV, 2016 WL 5956984, at*5 (Tenn. Ct. App. Oct. 14, 2016) ("Courts may also consider matters that the complaint incorporates by reference, items subject to judicial notice, orders, and matters of public record without converting a motion to dismiss into a motion for summary judgment."); *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (explaining that "when 'a document is referred to in the complaint and is central to the plaintiff's claim,'" the defendant may "submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment" (citation omitted)); *see also Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 762–63 (M.D. Tenn. 2016) (relying upon "hearing testimony and a number of affidavits and arrest warrants, which Plaintiffs submitted in support of their Motion for a Preliminary Injunction" to resolve Defendants' motion to dismiss where "Defendants have not disputed the factual accuracy of any of these submissions").

[11] Available online at https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf.

[12] That program was enacted in 1985 to provide teachers, principals, and supervisors who received outstanding evaluations with pay supplements. The General Assembly

for the ClassWallet contract were improperly appropriated to the TDOE in the first instance—in other words, Plaintiffs have not alleged that the TDOE ordered the disbursement of state funds belonging to another department or state entity. This fact alone satisfies the constitutional appropriations provision, which concerns balancing the budget and separation of powers, not matters of administrative accounting.

The ClassWallet contract was also "duly authorized by law." Tenn. Code Ann. § 9-4-601(a)(1). The 2019-20 Budget specifically authorized departments to utilize budget surpluses within the department as needed. *See* 2019 Tenn. Pub. Acts ch. 405, at 53 ("[I]f the head of any department . . . of the state government finds that there is a surplus . . . under such entity, and a deficiency in any other division . . . then in that event the head of such department . . . may transfer such portion of such funds as may be necessary for the one division . . . where the surplus exists to the other . . . ."). And at the very same committee hearing where Plaintiffs allege that the TDOE deputy commissioner admitted to "divert[ing]" funds improperly from the Career Ladder program, *see* McEwen Pls.' Am. Compl. ¶ 55, the deputy commissioner explained that the Career Ladder program had "sunset" and that the funds were therefore no longer needed. *See* General Assembly Joint Government Operations Committee Hearing (Jan. 27, 2020), at 1:01:30–52.[13] McEwen Plaintiffs do not allege that the funds taken from the Career Ladder program were needed by that program to function or did not otherwise constitute surplus. Given that the Career Ladder program was repealed in 2013 and was only being funded on an expiring basis,

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repealed the program in 2013, but with instructions to the Tennessee Department of Education to continue providing supplements to the remaining participants in the program for the rest of their tenure. *See* 2013 Tenn. Pub. Acts, ch. 214, § 1.

[13] Video available online at http://tnga.granicus.com/MediaPlayer.php?view_id=424&clip_id=21304.

reallocating excess funds from the program to facilitate the ClassWallet contract was authorized by law in accordance with state statute.

The ESA Program fully complies with the Appropriations Provisions and the Court should thus render judgment in Parents' favor.[14]

V. Plaintiffs Have Failed to State Claims Under the Tennessee UAPA and ESA Statute Challenging the ESA Program's Implementation in 2022–23.

McEwen Plaintiffs' remaining two claims challenge how the ESA Program is being implemented for the 2022–23 school year—they invoke the ESA Statute itself and Tennessee's UAPA. *See* McEwen Pls.' Am. Compl. ¶¶ 133–45. The crux of Plaintiffs' two claims is the same: They allege that because the ESA Program requires eligible expenses be paid using funds in a student's ESA account, it violates the ESA Statute, *id*. ¶¶ 133–139, and constitutes a "rule" subject to the UAPA, *id*. ¶¶ 140–45, for TDOE itself to reimburse an ESA student's eligible expenses. *Id*. ¶¶ 133–139. Plaintiffs' claims rely on the ESA Program's webpage on TDOE's website, which they allege reflects that TDOE itself plans to administer the ESA accounts and process eligible expenses in 2022–23. *Id*. ¶¶ 135, 140.

As an initial matter, McEwen Plaintiffs have not alleged that they have suffered any injury whatsoever from the actions they assert constitute violate the ESA Statute and the UAPA. In the absence of such an allegation, they have failed to show that they have standing to bring this claim. *See ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006) (calling "indispensable" to standing the requirement that "a plaintiff must show a distinct and palpable injury"); s*ee also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, given that their aim is to enjoin State Defendants from implementing the

[14] Plaintiffs also allege that TDOE's disbursement of ESA funds to participating private schools violates the Appropriations Provisions. McEwen Pls.' Am. Compl. ¶ 155. For the reasons discussed below, *see infra* Section V, that allegation is meritless.

statute creating the Program, they could not have plausibly alleged that they are injured by an alleged failure of the TDOE to implement it in the manner required by that statute.

Even if McEwen Plaintiffs had alleged an injury, which they have not, their claims still fail because TDOE's implementation of the Program neither violates the ESA Statute nor the UAPA. It is still the families with ESAs who direct TDOE where to send their ESA funds. As a result, TDOE's implementation does not violate the ESA Statute. For much the same reason, it also is not a rule subject to the UAPA's rulemaking requirements because it does not affect families' entitlements under the Program. Rather, it is a "policy" that is exempt from UAPA rulemaking because it "concern[s] only the internal management of state government and not . . . private rights." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311 (Tenn. 2005) (quoting Tenn. Code Ann. § 4-5-102(10)(A)).[15]

As the ESA Statute explains, "[ESA] funds awarded . . . are the entitlement of the participating student . . . under the supervision of the participating student's . . . parent." Tenn. Code Ann. § 49-6-2605(b)(1). TDOE, in turn, must "adopt policies or procedures necessary for the administration of the program," *id.* § 49-6-2605(g), and actively "oversee[ ] the funds and administer[ ] the program," *id.* § 49-6-2605(h). McEwen Plaintiffs make a lot of hay out of the ESA funds going directly from TDOE to the educational option a parent chooses, rather than from TDOE to the student to the chosen educational option.[16] But functionally, this is a distinction without a difference. TDOE still sets aside ESA funds for

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[15] The UAPA's rulemaking requirement apply only to rules. *See, e.g.*, Tenn. Code Ann. § 4-5-202. The statute expressly excludes policies from the definition of rules, *see id.* § 4-5-102(12), and it defines policies to include "any statement, document, or guideline concerning only the internal management of state government that does not affect private rights, privileges, or procedures available to the public," *id.* § 4-5-102(10).

[16] Plaintiffs also allege that TDOE's reimbursement to private schools violates the ESA Statute's requirement that TDOE "preapprove[ ]" expenses. McEwen Pls.' Am. Compl. ¶ 138. Notably, however, they do not allege that TDOE will reimburse funds that it does not first approve.

each participating family, and those families choose how that money is spent when they attend the private school of their choice. The ESA funds still belong to the student, and in administering the ESA Program, TDOE relies on parents to choose where their child's ESA is spent. In other words, TDOE leaves parents' entitlement under the ESA untouched. That is a policy—not a rule—that is both consistent with the ESA Statute and exempt from the UAPA's rulemaking requirements.

Simply, McEwen Plaintiffs fail to show injury sufficient to confer standing, and their claims fails for that reason. But even if they had standing, which they do not, their claims challenging the ESA Program's 2022–23 implementation ignore that the Program is a benefit for parents and children that the TDOE is required to administer so that families can use ESAs to pay for eligible expenses. For these reasons, Plaintiffs have failed to state claims under the ESA Statute and UAPA and the Court should thus render judgment in Parents' favor.

CONCLUSION

The ESA Program fully complies with the Tennessee Constitution and its implementation in 2022–23 does not violate the UAPA or ESA Statute. None of the six counts raised in McEwen Plaintiffs' amended complaint states a claim upon which relief can be granted. For these reasons, the Court should grant Parent-Intervenors' motion for judgment on the pleadings.

Dated: August 19, 2022.

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APPENDIX

1. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006)
2. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992)
3. *Fletcher v. Peck*, 10 U.S. 87 (1810)
4. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507 (6th Cir. 1999)
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. *Lockhart v. United States*, 546 U.S. 142 (2005)
9. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
10. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013)
11. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)
12. *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016)
13. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)

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.

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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.

All Citations

919 So.2d 392, 206 Ed. Law Rep. 756, 31 Fla. L. Weekly S1, 31 Fla. L. Weekly S65

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).

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?

6 Cranch 87
Supreme Court of the United States

FLETCHER
v.
PECK.

February Term, 1810

**1 If the breach of covenant assigned be, that the *state* had no authority to sell and dispose of the land, it is not a good plea in bar to say that the *governor* was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substantial breach.

The court will not declare a law to be unconstitutional; unless the opposition between the constitution and the law be clear and plain.

The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

Where a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state. A *grant* is a *contract*, executed.

A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain in 1763 did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to be absolutely repugnant to seisure in fee on the part of the state.

ERROR to the circuit court for the district of Massachusetts, in an action of covenant brought by Flecher against Peck.

The *first* count of the declaration states that Peck, by his deed of bargain and sale dated the 14th of May, 1803, in consideration of 3,000 dollars, sold and conveyed to Fletcher, 15,000 acres of land lying in common and undivided in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude a due east course to the Tombigby river, thence up the said Tombigby river to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude a due west course to the Mississippi; thence down the said river, to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed dated the 27th of February, 1796, and of which the said Phelps conveyed four fifths to Benjamin Hichborn, and the said Peck by deed dated the 8th of December, 1800; the said tract of 500,000 acres, being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew M'Allister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters patent under the great seal of the state of Georgia, and the signature of George Matthews, Esq. governor of that state, dated the 13th of January, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew M'Allister, and George **88 Walker and their associates, and their heirs and assigns in fee-simple, under the name of the Georgia company; which patent was issued by virtue of an act of the legislature of Georgia, passed the 7th of January, 1795, entitled 'An act supplementary to an act for appropriating part of the unlocated territory of this state for the payment of the late state troops, and for other purposes therein mentioned, and declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes.'

That Peck, in his deed to Fletcher, covenanted 'that the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof, (entitled as aforesaid,) legally seised in fee of the soil thereof, subject only to the extinguishment

of part of the Indian title thereon. And that the legislature of the said state at the time of passing the act of sale aforesaid, had good *right* to sell and dispose of the same in manner pointed out by the said act. And that the governor of the said state had lawful authority to issue his grant aforesaid, by virtue of the said act. And further, that all the title which the said state of Georgia ever had in the aforegranted premises has been legally conveyed to the said John Peck by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the state of Georgia, and finally vested in the said Peck, has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said state of Georgia.'

****2** The breach assigned in the first count was, that at the time the said act of 7th of January, 1795, was passed, 'the said legislature had no *authority* to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act.'

The 2d count, after stating the covenants in the deed as stated in the first count, averred, that at *Augusta*, in the said state of Georgia, on the 7th day of January, 1795, the said James Gunn, Mathew M'Allister ***89** and George Walker, promised and assured divers members of the legislature of the said state then duly and legally sitting in general assembly of the said state, that if the said members would assent to and vote for the passing of the act of the said general assembly, entitled as aforesaid, the same then being before the said general assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, M'Allister and Walker, and their associates, should purchase of the said state by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence did then and there vote for the passing the said bill into a law; by reason whereof the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; *and that the title which the said state of Georgia had* in the aforegranted premises at any time whatever *was never legally conveyed to the said Peck, by force of the conveyances aforesaid*.'

The *third* count, after repeating all the averments and recitals contained in the *second*, further averred, that after the passing of the said act, and of the execution of the patent aforesaid, the general assembly of the state of Georgia, being a legislature of that state subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta, in the said state, did, on the 13th of February, 1796, because of the undue influence used as aforesaid, in procuring the said act to be passed, and for other causes, pass another certain act in the words following, that is to say, 'An act declaring null and void a certain usurped act passed by the last legislature of this state at Augusta, the 7th day of January, 1795, under the pretended title of 'An act supplementary to an act entitled an act for appropriating a part of the unlocated ***90** territory of the state for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of this state to the unappropriated territory thereof for the protection of the frontiers, and for other purposes' and for expunging from the public records the said usurped act, and declaring the right of this state to all lands lying within the boundaries therein mentioned.'

****3** By which, after a long preamble, it is enacted, 'That the said usurped act passed on the 7th of January, 1795, entitled, &c. be, and the same is hereby declared, null and void, and the *grant* or grants right or rights, claim or claims, issued, deduced, or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also anulled, rendered void, and of no effect; and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this state, or the people thereof, but is and are to be considered, both *law* and *grant*, as they ought to be, *ipso facto*, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the state, subject only to the right of treaty of the United States to enable the state to purchase under its pre-emption right, the Indian title to the same.'

The 2d section directs the enrolled law, the grant, and all deeds, contracts, &c. relative to the purchase, to be expunged from the records of the state, &c.

The 3d section declares that neither the law nor the grant, nor any other conveyance, or agreement relative thereto, shall be received in evidence in any court of law or equity in the state so far as to establish a right to the territory or any part thereof, but they may be received in evidence in private actions between individuals for the recovery of money paid upon pretended sales, &c.

The 4th section provides for the repayment of money, funded stock, &c. which may have been paid into the treasury, provided it was then remaining ***91** therein, and provided

the repayment should be demanded within eight months from that time.

The 5th section prohibits any application to congress, or the general government of the United States for the extinguishment of the Indian claim; and

The 6th section provides for the promulgation of the act.

The count then assigns a breach of the covenant in the following words, viz. 'And by reason of the passing of the said last-mentioned act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void.'

The 4th count, after reciting the covenants as in the first, assigned as a breach, 'that at the time of passing of the act of the 7th of January, 1795, the United States of America were seised in fee-simple of all the tenements aforesaid, and of all the soil thereof, and that at that time the State of Georgia was not seised in fee-simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.'

The defendant pleaded four pleas, viz.

1st plea. As to the breach assigned in the first count, he says,

****4** That on the 6th of May, 1789, at Augusta, in the State of Georgia, the people of that state by their delegates, duly authorized and empowered to form, declare, ratify, and confirm a constitution for the government of the said state, did form, declare, ratify, and confirm such constitution, in the words following:

Here was inserted the whole constitution, the 16th section of which declares, that the general assembly hall have power to make all laws and ordinances ***92** which they shall deem necessary and proper for the good of the state which shall not be repugnant to this constitution. The plea then avers, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said state were seised, among other large parcels of land, and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof in absolute sovereignty, and in fee-simple; (subject only to the extinguishment of the Indian title to part thereon;) and that upon the confirmation and ratification of the said constitution, and by force thereof, the said State of Georgia became seised in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said state, and the same state continued so seised in fee-simple, until the said tenements and soil were conveyed by letters patent under the great seal of the said state, and under the signature of George Matthews, Esq. governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further saith, that on the 7th of January, 1795, at a session of the general assembly of the said state duly holden at Augusta within the same, according to the provisions of the said constitution, the said general assembly, then and there possessing all the powers vested in the legislature of the said state by virtue of the said constitution, passed the act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which act is in the words following, that is to say, 'An act supplementary,' &c.

Here was recited the whole act, which, after a long preamble, declares the jurisdictional and territorial rights, and the fee-simple to be in the state, and then enacts, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, 'The Georgia Company,' 'The Georgia Mississippi Company,' 'The Upper Mississippi Company,' and 'The Tennessee Company.'

The tract ordered to be sold to James Gunn and ***93** others, (the Georgia Company,) was described as follows: 'All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile bay where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay to the mouth of lake *Tensaw;* thence up the said lake Tensaw to the Alabama river, including Curry's, and all other islands therein; thence up the said Alabama river to the junction of the Coosa and Oakfushee rivers; thence up the Coosa river above the big shoals to where it intersects the latitude of thirty-four degrees north of the equator; thence a due west course to the Mississippi river; thence down the middle of the said river to the latitude 32 deg. 40 min.; thence, a due east course to the Don or Tombigby river; thence down the middle of the said river to its junction with the Alabama river; thence down the middle of the said river to Mobile bay; thence down the Mobile bay to the place of beginning.

****5** Upon payment of 50,000 dollars, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being 200,000 dollars, payable on the first of November, 1795.

The plea then avers, that all the tenements described in the first count are included in, and parcel of, the lands in the said act to be sold to the said Gunn, M'Allister, and Walker and their associates, as in the act is mentioned.

And that by force and virtue of the said act, and of the constitution aforesaid, of the said state, the said *Matthews*, governor of the said state, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee-simple by the said patent under the seal of the said state, and under his signature, according to the terms, limitations, and conditions in the said act mentioned. And all this he is ready to verify; wherefore, &c. ***94**

To this plea there was a general demurrer and joinder.

2d plea. To the second count the defendant, 'protesting that the said Gunn, M'Allister, and Walker did not make the promises and assurances to divers members of the legislature of the said state of Georgia, supposed by the said Fletcher in his second count, for plea saith, that until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he the said defendant, nor the said Prime, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, M'Allister and Walker, or either of them, to any of the members of the legislature of the said State of Georgia, as is supposed by the said Fletcher in his said second count, and this he is ready to verify,' &c.

To this plea also there was a general demurrer and joinder.

3d plea to the third count was the same as the second plea, with the addition of an averment that Greenleaf, Prince, Phelps, Hichborn and the defendant were, until and after the purchase by Greenleaf, on the 22d of August, 1795, and ever since have been, citizens of some of the United States other than the State of Georgia.

To this plea also there was a general demurrer and joinder.

4th Plea. To the fourth count, the defendant pleaded that at the time of passing the act of the 7th of January, 1795, the State of Georgia was seised in fee-simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he puts himself *on the country*, and the plaintiff likewise. ***95**

Upon the issue joined upon the fourth plea, the jury found the following special verdict, viz.

That his late majesty, Charles the second, King of Great Britain, by his letters patent under the great seal of Great Britain, bearing date the thirtieth day of June, in the seventeenth year of his reign, did grant unto Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton, and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that province, territory, or tract of ground, situate, lying and being in North America, and described as follows: extending north and eastward as far as the north end of Carahtuke river or gullet, upon a straight westerly line to Wyonoahe creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west in a direct line as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west in a direct line as far as the South Seas, (which territory was called Carolina,) together with all ports, harbours, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named; that the said lords proprietors, grantees aforesaid, afterwards, by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defence.

****6** And the jury further find, that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid; that afterwards, on the twenty-sixth day of July, in the ***96** third year of the reign of his late majesty George the second, King of Great Britain, and in the year of our Lord one thousand, seven hundred and twenty-nine, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the second, and the heirs and representatives of the said grantees, in conformity to an act of the parliament of said kingdom of Great Britain, entitled, 'An act for establishing an agreement with seven of the lords proprietors of Carolina for the surrender of their title and interest in that province to his

majesty,' for and in consideration of the sum of twenty-two thousand five hundred pounds of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors, by the said agent of the said king, sold and surrendered to his said majesty, King George the second, all their right of soil, and other privileges to the said granted territory; which deed of indenture was duly executed and was enrolled in the chancery of Great Britain, and there remains in the chapel of the rolls. That afterwards, on the ninth day of December, one thousand, seven hundred and twenty-nine, his said majesty, George the second, appointed Robert Johnson, Esq. to be governor of the province of South Carolina, by a commission under the great seal of the said kingdom of Great Britain; in which commission the said Governor Johnson is authorized to grant lands within the said province, but no particular limits of the said province is therein defined.

And the jury further find, that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolina under the commission aforesaid, claiming to have jurisdiction by force thereof as far southward and westward as the southern and western bounds of the aforementioned grant of Carolina, by King Charles the second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who at divers times ***97** had actual possession of the southern and western parts aforesaid. That afterwards the right honourable Lord Viscount Percival, the honourable Edward Digby, the honourable George Carpenter, James Oglethorpe, Esq. with others, petitioned the lords of the committee of his said majesty's privy council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that province, to procure there a livelihood by their industry, and to be incorporated for that purpose; that the lords of the said privy council referred the said petition to the board of trade, so called, in Great Britain, who, on the seventeenth day of December, in the year of our Lord one thousand seven hundred and thirty, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of 'The Corporation for the purpose of establishing charitable colonies in America, with perpetual succession.' And the said report further recommended, that his said majesty be pleased 'to grant to the said petitioners and their successors for ever, all that tract of land in his province of South Carolina, lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest branches of the Savannah, and the most southerly branch of the Alatamaha.' And that they should be separated from the province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the twenty-second day of December, one thousand seven hundred and thirty-one, the said board of trade reported further to the said lords of the privy council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the second to the late lords proprietors of Carolina, whereby that province was to extend westward in a direct line as far as the South Seas. That afterwards, on the ninth day of June, in the year of our Lord one thousand seven hundred and thirty-two, his said majesty, George the ***98** second, by his letters patent, or royal charter, under the great seal of the said kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of 'The trustees for establishing the colony of Georgia, in America, with perpetual succession;' and did, by the same letters patent, give and grant in free and common socage, and not *in capite*, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina in America, which lies from a northern stream of a river there commonly called the Savannah, all along the sea-coast to the southward unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas, and all the lands lying within said boundaries, with the islands in the sea lying opposite to the eastern coast of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges, and pre-eminences within the said territories. That afterwards, in the same year, the right honourable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the colony of Georgia in America, for valuable consideration therein mentioned, did give, grant, bargain and sell unto the said trustees for establishing the colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole into eight equal parts to be divided) of, in, and to the aforesaid territory, seven undivided eight parts of which had been before granted by his said majesty to said trustees.

****7** And the jury further find, that one eighth part of the said territory, granted to the said lords proprietors, and called Carolina as aforesaid, which eighth part belonged ***99** to Sir George Carteret, and was not surrendered as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq. one of the said corporation, for and in the name of and as agent to the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, *made a treaty with some of the native Indians within said territory*, in which, for and in behalf of said corporation, he made *purchases of said Indians of their native rights to parts of said territory*, and erected forts in several places to keep up marks of possession. That afterwards, on the sixth day of September, in the year last mentioned, on the application of said corporation to the said board of trade, they the said board of trade, in the name of his said majesty, sent instructions to said Robert Johnson, then Governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settling of the said colony of Georgia, by being aiding and assisting to any settlers therein: and further requiring him to cause to be registered the aforesaid charter of the colony of Georgia, within the said province of South Carolina, and the same to be entered of record by the proper officer of the said province of South Carolina.

And the jury further find, that the Governor of South Carolina, after the granting the said charter of the colony of Georgia, did exercise jurisdiction south of the southern limits of said colony of Georgia, claiming the same to be within the limits of his government; and particularly that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of our Lord one thousand seven hundred and fifty-two, by deed of indenture made between his said majesty, George the second, of the one part, and the said trustees for establishing the ***100** colony in America of the other part, they the said trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender, and yield up to his said majesty, George the second, his heirs and successors, their said letters patent, and their charter of corporation, and all right, title and authority, to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, pre-eminences and privileges therein, or thereby granted or conveyed to them; and did also grant and convey to his said majesty, George the second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven eighth parts thereof, granted as aforesaid by his said majesty's letters patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminences, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises; and which grant and surrender aforesaid, was then accepted by his said majesty for himself and his successors; and said indenture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation by affixing the common seal of said corporation thereunto, and on the part of his said majesty by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the sixth day of August, one thousand seven hundred and fifty-four, his said majesty, George the second, by his royal commission of that date under the great seal of Great Britain, constituted and appointed John Reynolds, Esq. to be captain-general and commander in chief in and over said colony of Georgia in America, with the following boundaries, viz. lying from the most northerly stream of a river there commonly called Savannah, all along the sea coast to the southward unto the most southern stream of a certain other great water or river called the Alatahama, and westward from the heads of the said rivers respectively, in straight lines to the South Seas, and all the space, circuit and precinct of ***101** land lying within the said boundaries, with the islands in the sea lying opposite to the eastern coast of said lands within twenty leagues of the same. That afterwards, on the tenth day of February, in the year of our Lord one thousand seven hundred and sixty-three, a definitive treaty of peace was concluded at Paris, between his catholic majesty, the King of Spain, and his majesty, George the third, King of Great Britain; by the twentieth article of which treaty, his said catholic majesty did cede and guaranty, in full right to his Britannic majesty, Florida, with fort St. Augustin, and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the south east of the river Mississippi, and in general all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the catholic king and the crown of Spain had till then over the said countries, lands, places, and their inhabitants; so that the catholic king did cede and make over the whole to the

said king and said crown of Great Britain, and that in the most ample manner and form.

****8** That afterwards, on the seventh day of October, in the year of our Lord one thousand seven hundred and sixty-three, his said majesty, George the third, King of Great Britain, by and with the advice of his privy council, did issue his royal proclamation, therein publishing and declaring, that he, the said King of Great Britain, had, with the advice of his said privy council, granted his letters patent, under the great seal of Great Britain, to erect within the countries and islands ceded and confirmed to him by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada; in which proclamation the said government of West Florida is described as follows, viz. Bounded to the southward by the gulf of Mexico, including all islands within six leagues of the coast from the river Apalachicola to lake Pontchartrain, to the westward by the said lake, the lake Maurepas, and the river Mississippi; to the northward by ***102** a line drawn due east from that part of the river Mississippi which lies in thirty one-degrees of north latitude, to the river Apalachicola or Catahouchee; and to the castward by the said river. And in the same proclamation the said government of East Florida is described as follows, viz. bounded to the westward by the gulf of Mexico and the Apalachicola river; to the northward by a line drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean; and to the east and south by the Atlantic Ocean and the gulf of Florida, including all islands within six leagues of the sea coast. And in and by the same proclamation, all lands lying between the rivers Alatamaha and St. Mary's were declared to be annexed to the said province of Georgia; and that in and by the same proclamation, it was further declared by the said king as follows, viz. 'That it is our royal will and pleasure *for the present*, as aforesaid, to reserve under our sovereignty, protection and dominion for the use of the said Indians all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, *as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid;* and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.'

And the jury find, that the land described in the plaintiff's declaration *did lay to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid*. That afterwards, on the twenty-first day of November, in the year of our Lord one thousand seven hundred and sixty-three, and in the fourth year of the reign of said King George the third, he the said king, by his royal commission under the great seal of Great Britain, did constitute and appoint ***103** George Johnstone, Esq. captain-general and governor in chief over the said province of West Florida in America; in which commission the said province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the twentieth day of January, in the year of our Lord one thousand seven hundred and sixty-four, the said King of Great Britain, by his commission under the great seal of Great Britain, did constitute and appoint James Wright, Esq. to be the captain-general and governor in chief in and over the colony of Georgia, by the following bounds, viz. *bounded on the north by the most northern stream of a river there commonly cailed Savannah, as far as the heads of the said river; and from thence westward as far as our territories extend; on the east, by the sea coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary;* (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof;) *and from thence westward as far as our territories extend by the north boundary line of our provinces of East and West Florida*.

****9** That afterwards, from the year one thousand seven hundred and seventy-five, to the year one thousand seven hundred and eighty-three, an open war existed between the colonies of New-Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and his said majesty, George the third, King of Great Britain, on the other part. And on the third day of September, in the year of our Lord one thousand seven hundred and eighty-three, a definitive treaty of peace was signed and concluded at Paris, by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers; by the first article of which treaty, the said King George the third, by the name of his Britannic majesty, acknowledged the aforesaid United ***104** States to be free, sovereign and independent states; that he treated with them as such, and for

himself, his heirs and successors, relinquishes all claim to the government, propriety and territorial rights of the same, and every part thereof; and by the second article of said treaty, the western boundary of the United States is a line drawn along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouchee; thence along the middle thereof to its junction with the Flint river; thence straight to the head of St. Mary's river; and thence down along the middle of St. Mary's river to the Atlantic Ocean.

And the jury further find, that in the year of our Lord one thousand seven hundred and eighty-two, the Congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid, that they should claim in this negotiation, respecting the boundaries of the United States, that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground that that was the southern boundary of the colony of Georgia; and that the river Mississippi should be agreed to be the western boundary of the United States, on the ground that the colony of Georgia and other colonies, now states of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that on those grounds the said southern and western boundaries of the United States were agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the legislature of the state of Georgia passed an act, declaring her right, and proclaiming her title to all the lands lying within her boundaries to the river Mississippi. And in the year of our Lord, one thousand seven hundred ***105** and eighty five, the legislature of the said state of Georgia established a county, by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory; that thereupon a dispute arose between the state of South Carolina and the state of Georgia, concerning their respective boundaries, the said states separately claiming the same territory; and the said state of South Carolina, on the first day of June, in the year of our lord one thousand seven hundred and eighty-five, petitioned the congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the state of Georgia, agreeably to the ninth article of the then confederation and perpetual union between the United States of America; that the said congress of the United States did thereupon on the same day resolve, that the second Monday in May then next following should be assigned for the appearance of the said states of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said state of Georgia, by serving the legislature of said state with an attested copy of said petition of the state of South Carolina, and said resolve of congress. That afterwards, on the eighth day of May, in the year of our lord one thousand seven hundred and eighty-six, by the joint consent of the agents of said states of South Carolina and Georgia, the congress resolved that further day be given for the said hearing, and assigned the fifteenth day of the same month for that purpose. That afterwards, on the eighteenth day of May aforesaid, the said congress resolved, that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the states of Carolina and Georgia attended in pursuance of the order of congress aforesaid, and produced their credentials, which were read in congress, and there recorded, together with the acts of their respective legislatures; which acts and credentials authorized the said agents to settle and compromise all the differences ***106** and disputes aforesaid, as well as to appear and represent the said states respectively before any tribunal that might be created by congress for that purpose, agreeably to the said ninth article of the confederation. And in conformity to the powers aforesaid, the said commissioners of both the said states of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of our Lord one thousand seven hundred and eighty-seven, met at Beaufort, in the state of South Carolina, and then and there entered into, signed, and concluded a convention between the states of South Carolina and Georgia aforesaid. By the first article of which convention it was mutually agreed between the said states, that the most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers then called Tugaloo and Keowee; and from thence the most northern branch or stream of said river Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo, to Georgia; but if the head, spring, or source of any branch or stream of the said river Tugaloo does not extend to the north boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head, spring, or source of the said branch or stream of Tugaloo river, which extends to the highest northern latitude, shall for ever thereafter form the separation, limit, and boundary

between the states of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said states of South Carolina and Georgia, that the said state of South Carolina should not thereafter claim any lands to the eastward, southward, south-eastward, or west of the said boundary above established; and that the said state of South Carolina did relinquish and cede to the said state of Georgia all the right, title, and claim which the said state of South Carolina had to the government, sovereignty, and jurisdiction in and over the same, and also the right and pre-emption of soil from the native Indians, and all the estate, property, and claim which the said state of South Carolina had in or to the said lands. ***107**

****10** And the jury further find, that the land described in the plaintiff's declaration is situate south-west of the boundary line last aforesaid; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in seventeen hundred and sixty-three, as aforesaid; and within the bounds of the United States, as agreed and settled by the treaty of peace in seventeen hundred and eighty-three, as aforesaid; and north of a line drawn due east from the mouth of the said river Yazoos, where it unites with the Mississippi aforesaid. That afterwards, on the ninth day of August, in the year of our lord one thousand seven hundred and eighty-seven, the delegates of said state of South Carolina in congress moved, that the said convention, made as aforesaid, be ratified and conformed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said states of South Carolina and Georgia; which motion was by the unanimous vote of congress committed, and the same convention was thereupon entered of record on the journals of congress; and on the same day John Kean and Daniel Huger, by virtue of authority given to them by the legislature of said state of South Carolina, did execute a deed of cession on the part of said state of South Carolina, by which they ceded and conveyed to the United States, in congress assembled, for the benefit of all the said states, all their right and title to that territory and tract of land included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary line of the state of North Carolina; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river to the said mountains, and thence to run a due west course to the river Mississippi; which deed of cession was ***108** thereupon received and entered on the journals of congress, and accepted by them.

The jury further find, that the congress of the United States did, on the sixth day of September, in the year of our lord one thousand, seven hundred and eighty, recommend to the several states in the union having claims to western territory, to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the union. That afterwards, on the ninth day of August, in the year of our lord one thousand seven hundred and eighty-six, the said congress resolved, that whereas the states of Massachusetts, New-York, Connecticut, and Virginia had, in consequence of the recommendation of congress on the sixth day of September aforesaid, made cessions of their claims to western territory to the United States in congress assembled, for the use of the United States, the said subject be again presented to the view of the states of N. Carolina, S. Carolina and Georgia, who had not complied with so reasonable a proposition; and that they be once more solicited to consider with candour and liberality the expectations of their sister states, and the earnest and repeated applications made to them by congress on this subject. That afterwards, on the twentieth day of October, one thousand seven hundred and eighty-seven, the congress of the United States passed the following resolve, viz. that it be and hereby is represented to the states of North-Carolina and Georgia, that the lands, which have been ceded by the other states in compliance with the recommendation of this body, are now selling in large quantities for public securities; that the deeds of cession from the different states have been made without annexing an express condition, that they should not operate till the other states, under like circumstances, made similar cessions; and that congress have such faith in the justice and magnanimity of the states of North Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will fell those obligations which will induce similar cessions, and justify that confidence which has been ***109** placed in them. That afterwards, on the first day of February, one thousand seven hundred and eighty-eight, and legislature of said state of Georgia, then duly convened, passed an act for ceding part of the territorial claims of said state to the United States; by which act the state of Georgia authorized her delegates in congress to convey to the United States the territorial claims of said state of Georgia to a certain tract of country bounded as follows, to wit: beginning at the middle of the river Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and

from thence due north one hundred and forty miles, thence due west to the river Mississippi; thence down the middle of the said river to where it intersects the thirty-first degree of north latitude, and along the said degree to the place of beginning; annexing the provisions and conditions following, to wit: That the United States in congress assembled, shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the federal constitution of the United States; secondly, that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares, or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly, that the sum of one hundred and and seventy-one thousand and twenty-eight dollars, forty-five cents, which has been expended in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted in payment of the specie requisition of that state's quotas that have been or may be required by the United States. Fourthly, that in all cases where the state may require defence, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the articles of confederation. Fifthly, that congress shall guaranty and secure all the remaining territorial rights of the state, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention between the said ***110** state and the state of South Carolina, entered into the twenty-eighth day of April, in the year of our lord one thousand seven hundred and eighty-seven, and the clause of an act of the said state of Georgia, describing the boundaries thereof, passed the seventeenth day of February, in the year one thousand seven hundred and eighty-three, which act of the said state of Georgia, with said conditions annexed, was by the delegates of said state in congress presented to the said congress, and the same was, after being read, committed to a committee of congress; who, on the fifteenth day of July, in the said year one thousand seven hundred and eighty-eight, made report thereon to congress, as follows, to wit: 'The committee, having fully considered the subject referred to them, are of opinion, that the cession offered by the state of Georgia cannot be accepted on the terms proposed; first, because it appears highly probable that on running the boundary line between that state and the adjoining state or states, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded, and that lately ceded by South Carolina, will be retained by the said state of Georgia; and therefore the land which the state now offers to cede must be too far removed from the other lands hitherto ceded to the union to be of any immediate advantages to it. Secondly, because there appears to be due from the state of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or condition before recited; and it is improper in this case to allow a charge against the specie requisitions of congress which may hereafter be made, especially as the said state stands charged to the United States for very considerable sums of money loaned. And, thirdly, because the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by congress to any state, and which, considering the spirit and meaning of the confederation, must be unnecessary and improper. But the committee are of opinion, that the first, second, and fourth provisions, before recited, and also the third, with some variations, may be admitted; and that, should the said state extend the bounds of her cession, ***111** and vary the terms thereof as herein after mentioned, congress may accept the same. Whereupon they submit the following resolutions: That the cession of claims to western territory, offered by the state of Georgia, cannot be accepted on the terms contained in her act passed the first of February last. That in case the said state shall authorize her delegates in congress to make a cession of all her territorial claims to lands west of the river Apalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said act, and shall so far vary the proviso respecting the sum of one hundred and seventy-one thousand four hundred and twenty-eight dollars, and forty-five cents, expended in quieting and resisting the Indians, as that the said state shall have credit in the specie requisitions of congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, congress will accept the cession.' Which report being read, congress resolved, that congress agree to the said report.

****11** The jury further find, that in the year of our lord one thousand seven hundred and ninety-three, Thomas Jefferson, Esq. then secretary of state for the United States, made a report to the then President of the United States, which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were then in dispute between the King of Spain and the government of the United States; one of which points in dispute was, the just boundaries between West Florida and the southern line of the United States. On this point, the said secretary of state, in his report aforesaid, expresses himself as follows, to wit: 'As to boundary, that between

Georgia and West Florida is the only one which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions within the state of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several states now composing the United ***112** States of America were, from their first establishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments the executive magistrate who presided over the one they had left, and thereby secured in effect a constant amity with the nation. In this stage of their government their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in question, was established at the thirty first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, &c. Secondly, on the proclamation of the British king, in one thousand seven hundred and sixty-three, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, &c. That afterwards, on the seventh day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to wit: 'In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the King of Great Britain, their chief magistrate, in the year one thousand seven hundred and sixty-three, at a time when to other power pretended any claim whatever to any part of the country through which it run. The boundary of Georgia was thus established: to begin in the Missisippi, in latitude thirty-one north, and running eastward to the Apalachicola,' &c. From what has been said, it results, first, that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year seventeen hundred and sixty-three. Secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it.'

****12** That atterwards, on the tenth day of August, in the year 1795, Thomas Pinckney, Esq. minister plenipotentiary ***113** of the United States at the court of Spain, in a communication to the prince of peace, prime minister of Spain, agreeably to his instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to wit: 'Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England, that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form; by which he established between them precisely the same limits that, near twenty years after, he declared to be the southern limits of the United States, by the treaty which the same King of England concluded with them in the month of November, seventeen hundred and eighty two.'

That afterwards, on the 27th day of October, in the year seventeen hundred and ninety-five, a treaty of friendship, limits and navigation was concluded between the United States and his catholic majesty the King of Spain; in the second article of which treaty it is agreed, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the north-ernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the river Apalachicola or Catahouchee, thence along the middle thereof to its junction with the Flint, thence straight to the head of St. Mary's river, and thence down the middle thereof to the Atlantic ocean.'

But whether, upon the whole matter, the state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title ***114** to part thereof, the jury are ignorant, and pray the advisement of the court thereon; and if the court are of opinion, that the said state of Georgia was so seised at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth coun of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

****13** But if the court are of opinion that the said state of Georgia was not so seised at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count

of his declaration, was not seised of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof; and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same; and assess damages for the plaintiff, for the breach thereof, in the sum of three thousand dollars, and costs of suit.

Whereupon it was considered and adjudged by the court below, thaton the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled; and on the last issue, on which there is a special verdict, that the state of Georgia was seised, as alleged by the defendant, and that the defendant recover his costs.

The plaintiff sued out his writ of error, and the case was twice argued, first by *Martin*, for the plaintiff in error, and by *J. Q. Adams*, and *R. G. Harper*, for the ***115** defendant, at February term, 1809, and again at this term by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant.

Attorneys and Law Firms

Martin, for the plaintiff in error.

The first plea is no answer to the first count. The breach of the covenant complained of is, that 'the *legislature had no authority to sell and dispose of*' the land, but the plea is, that '*the said Matthews, governor of the said state*, was fully and legally empowered to *sell and convey*' the land. Although the *governor* had authority to sell, *non constat* that the *legislature* had.

The same objection applies to the second plea; it is an answer to the inducement, not to the point of the plea. The breach assigned in the second count is, 'that the title which the state of Georgia at any time had in the premises was never legally conveyed to the said Peck by force of the conveyances aforesaid.'

The improper influence upon the members of the legislature was only inducement.

The plea is, the defendant had no notice nor knowledge of the improper means used. It is no answer to the breach assigned.

The same objection applies also to the third plea.

It appears upon the special verdict that the state of Georgia never was seised in fee of the lands. They belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the state of Georgia.

When the colonies of North Carolina and South Carolina were royal colonies, the king limited the boundaries, and disannexed these lands from Georgia.

****14** Argument for the defendant in error.

The first fault of pleading is in the declaration. ***116** The breach of the covenant is not well assigned in the first count. The covenant is, that the legislature had good *right* to sell. The breach assigned is, that the legislature had no *authority* to sell. Authority and right, are words of a different signification. Right implies an interest: authority is a mere naked power.

But if the breach be well assigned, the plea is a substantial answer to it, for if the governor derived full power and authority from the legislature to sell, the legislature must have had that power to give. The plea shows the title to be in the state of Georgia.

The objection is only to the form of the plea, which cannot prevail upon a general demurrer.

Two questions arise upon the issue joined upon the 4th plea.

1st. Whether the title was in the state of Georgia; and, 2d. Whether it was in the United States.

At the beginning of the revolution the lands were within the bounds of Georgia. These bounds were confirmed by the treaty of peace in 1783, and recognised in the treaty with Spain in 1795, and by the cession to the United States in 1802.

The United States can have no title but what is derived from Georgia.

The title of Georgia depends upon the facts found in the special verdict.

The second charter granted by George the 2d in 1732, includes these lands, the bounds of that grant being from the Savannah to the Alatamaha, and from the heads of those rivers respectively, in direct lines, to the South Sea.

It is not admitted that the king had a right to enlarge or diminish the boundaries even of royal provinces. ***117**

The exercise of that right, even by parliament itself, was one of the violation of right upon which the revolution was founded; as appears by the declaration of independence, the

address to the people of Quebec, and other public documents of the time.

This right, claimed by the king, was denied by Virginia and North Carolina in their constitutions. See the article of the *constitution of Virginia* respecting the limits of that state, and the 25*th section of the declaration of rights of North Carolina*. 1 *Belsham's Hist. of Geo.* 3*d. The Quebec Act*, and the *Collection of State Constitutions, p.* 180.

The right was denied by the commissioners on the part of the United States, who formed the treaty, and was given up by Great Britain when the present line was established.

But the proclamation of 1763 did not profess or intend to disannex the western lands from the province of Georgia. The king only declares that it is his royal will and pleasure *for the present, 'as aforesaid*,' to reserve under his sovereignty, *protection and dominion, for the use* of the Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west; and he thereby forbids his subjects from making purchases or settlements, or taking possession of the same.

****15** This clause of the proclamation cannot well be understood without the preceding section to which it refers, by the words '*as aforesaid*.'

The preceding clause is, 'that no governor or commander in chief of our other colonies or plantations in America, *i. e.* (other than the colonies of Quebec, East Florida and West Florida,) do presume for the present *and until our further pleasure be known*, to grant warrants of surveys, or pass patents for any lands beyond the heads or sources of any of the rivers, which fall into the Atlantic ocean from the west or north-west; or upon any lands whatever which, not having been ***118** ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.'

Then comes the clause in question, which is supposed to have disannexed these lands from Georgia, as follows: 'And we do further declare it to be our royal will and pleasure for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid,' &c.

It was a prohibition to *all* the governors of *all* the colonies, and a reservation of *all* the western lands attached to *all* the colonies. But it was only a temporary reservation for the use of the Indians.

If this proclamation disannexed these lands from Georgia, it also disannexed all the western lands from all the other colonies. But if they were disannexed by the proclamation, they were reannexed three months afterwards by the commission to Governor Wright, on the 20th of January, 1764.

It appears by the report of the attorney-general, as well as by Mr. Chalmers's observations, that it never was the opinion of the British government that these lands were disannexed by the proclamation.

If they were not reannexed before, they certainly were by the treaty of peace.

At the commencement of the revolution, the lands then belonged to and formed a part of the province of Georgia.

By the declaration of independence the several states were declared to be free, sovereign and independent states; and the sovereignty of *each*, not of the whole, was the principle of the revolution; there was no connection between them, but that of necessity and self defence, and in what manner each should contribute to the ***119** common cause, was a matter left to the discretion of each of the states. By the second article of the confederation the sovereignty of each state is confirmed, and all the rights of sovereignty are declared to be retained which are not by that instrument expressly delegated to the United States in congress assembled. It provides also that no state shall be deprived of territory for the benefit of the United States.

On the 25th of February, 1783, the legislature of Georgia passed an act declaring her boundaries, before the definitive treaty of peace. This declaration of Georgia was not contradicted by the United States in any public act.

****16** In 1785, Georgia passed an act erecting the county of Bourbon in that territory; this produced a dispute with South Carolina, which ended in the acknowledgment of the right of Georgia to these lands. (See the third article of the convention between South Carolina and Georgia.)

The same boundaries are acknowledged by the United States in their instructions, given by the secretary of state, Mr. Jefferson, in 1793, to the commissioners appointed to settle the dispute with Spain respecting boundaries.

The United States certainly had no claim at the commencement of the revolution, nor at the declaration of independence, nor under the articles of confederation.

During the progress of the revolution a demand was made by two or three of the states, that crown lands should be appropriated for the common defense. But congress never asserted such a right. They only recommended that *cessions* of territory should be made by the states for that purpose.

The journals of congress are crowded with proofs of this fact. See journals of congress, 16*th September*, 1776, *vol.* 2. *p.* 336. 30*th of October*, 1776. 15*th* ***120** *October*, 1777, *vol.* 3. *p.* 345. 27*th October*, 1777, *vol.* 3. *p.* 363. 22*d June*, 1778, *vol.* 4. *p.* 262. 23*d and* 25*th June*, 1778. *p*, 269. 1779, *vol.* 5. *p.* 49. 21*st May*, 1779, *vol.* 5. *p.* 158. 1*st March*, 1781, *Resolution of* 1780, *vol.* 6. *p.* 123. 12*th February*, 1781, *vol.* 7. *p.* 26. 1*st March*, 1781. 29th *October*, 1782, *vol.* 8. *p.* ——.

At the treaty of peace, there was no idea of a cession of land to the United States, by Great Britain. The bounds of the United States were fixed as the bounds of the several states had been before fixed. The United States did not claim land for the United States as a nation; they claimed only in right of the individual states. Great Britain yielded the principle of the royal right to disannex lands from the colonies, and acquiesced in the principle contended for by the United States, which was the old boundary of the several states. See Chief Justice Jay's opinion in the case of *Chisholm* v. *The State of Georgia*, reported in a pamphlet published in 1793.

The United States then had no title by the treaty of peace. She has since (viz. in 1788) declined accepting a cession of the territory from Georgia, not because the United States had already a title, but because the lands were too remote, &c.

There is nothing in the constitution of the United States, which can give her a title. By the third section of the fourth article the claims of particular states are saved.

The public acts since the adoption of the new constitution are the instructions to the commissioners in 1793, to settle the boundaries with Spain. The treaty with Spain, 27th October, 1795. The act of congress of 7th April, 1798, vol. 4. p. 90. The act of 10th of May, 1800. The remonstrance of Georgia, in December, 1800. And the cession by Georgia to the United States in 1802. All these public acts recognised the title to be in Georgia. ***121**

****17** If then Georgia had good title on the 7th of January, 1795, the next question is, had the legislature of that state a right to sell?

By the revolution, all the right and royal prerogatives devolved upon the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to the state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. The sale itself was not a legislative act. It was not an act of severeignty, but a mere conveyance of title. 2 *Tucker's Bl. Com.* 53. 57. *Montesquieu, b.* 26. *c.* 15. 2 *Dal.* 320.2 *Dal.* 320. 4 *Dal.* 14.4 *Dal.* 14. *Cooper* v. *Telfaire*. Constitution of Georgia, Art. 1. § 16. Digest of Georgia Laws of 7th June, 1777, 1780, 1784, 1785, 1788, 1789, and 1790. These show the universal practice of Georgia in this respect.

A doubt has been suggested whether this power extends to lands to which the Indian title has not been extinguished.

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. *Vattel, b.* 1. § 81. *p.* 37. and § 209. *b.* 2. § 97. *Montesquieu, b.* 18. *c.* 12. *Smith's Wealth of Nations, b.* 5. *c.* 1. It is a right not to be *transferred* but *extinguished*. It a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Although the power to extinguish this right by treaty, is vested in congress, yet Georgia had a right to sell subject to the Indian claim. The point has never been decided in the courts of the United States, because it has never before been questioned.

The right has been exercised and recognised by all the states. ***122**

There was no objection to the sale arising from the constitution of Georgia. With regard to *state* constitutions, it is not necessary, that the powers should be *expressly* granted, however it may be with the constitution of the United States. But it is not constitutional doctrine even as it applies to the legislature of the United States.

The old articles of confederation limited the powers of congress to those *expressly* granted. But in the constitution of the United States, the word *expressly* was purposely rejected.

See the Federalist, and Journals of House of Rep. 21*st August*, 1789. *Journal of Senate*, 7*th September*, 1789.

But if the legislature of Georgia could only exercise powers *expressly* given, they had no power to abrogate the contract.

A question has been suggested from the bench whether the right which Georgia had before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple?

****18** The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. Even *Penn* claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. Hence the feudal tenures in this country. All the treaties with the Indians were the effect of conquest. All the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the land until it should be wanted for the use of the conquerors. Hence the acts of legislation ***123** fixing the lines and bounds of the Indian claims; hence the prohibition of individual purchasers, &c.

The rights of governments are allodial. The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege which does not affect the allodial right.

The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary to say what the law *is*, or what it *was*. The legislature can only say what it *shall be*.

The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contract. A grant is a contract executed, and it creates also an implied *executory* contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

The validity of a law cannot be questioned because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal in disregarding the law.

This would open a source of litigation which could never be closed. The law would be differently decided by different juries; innumerable perjuries would be committed, and inconceivable confusion would ensue.

But the parties now before the court are innocent of the fraud, if any has been practised. They were *bona fide* purchasers, for a valuable consideration, without notice of fraud. They cannot be affected by it. ***124**
Martin, in reply.

Opinion

All the western lands of the royal governments were wholly disannexed from the colonies, and reserved for the use of the Indians. Georgia never had title in those lands. It is true that Great Britain did undertake to extend the bounds of the royal provinces. The right was not denied, but the *purpose* for which it was executed.

****19** By the proclamation, if offenders should escape into those territories, they are to be arrested by the military force and sent *into the colony* for trial.

In Governor Wright's commission the western boundary of the colony is not defined. The jury has not found whether the lands were within Governor Wright's commission.

As to the Indian title.

The royal provinces were not bodies politic for the purpose of holding lands. The title of the lands was in the crown. There is no law authorizing the several states to transfer their right subject to the Indian title. It was only a right of pre-emption which the crown had. This right was not by the treaty ceded to Georgia, but to the United States. The land when purchased of the Indiana is to be purchased for the benefit of the United States. There was only a possibility that the United States would purchase for the benefit of Georgia. But a mere possibility cannot be sold or granted.

The declarations and claims of Georgia could not affect the rights of the United States.

An attempt was made in congress to establish the principle that the land belonged to the United States; but the advocates of that doctrine were overruled by a majority. This, however, did not decide the question of right. ***125**

The states which advocated that principle did not think proper to refuse to join the confederacy because it was not inserted among the articles of confederation, but they protested against their assent to the union being taken as evidence of their abandonment of the principle.

Nor is the assent of congress to the commission for settling the bounds between South Carolina and Georgia, evidence of an acknowledgment, on the part of the United States, that either of those states was entitled to those lands.

March 11, 1809.

MARSHALL, Ch. J. delivered the opinion of the court upon the pleadings, as follows:

In this cause there are demurrers to three pleas filed in the circuit court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant.

To support this judgment, this court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words; 'that the legislature of the said state, (Georgia,) at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act.'

The breach of this covenant is assigned in these words; 'now the said Fletcher saith that, at the time when the said act of the legislature of Georgia, entitled an act, &c. was passed, the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act.'

****20** ***126** The plea sets forth the constitution of the state of Georgia, and avers that the lands lay within that state. It then sets forth the act of the legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said act; and that the *governor* was legally empowered to sell and convey the premises.

To this plea the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted that he has not denied it. The breach alleged is, that the legislature had not authority to sell. The bar set up is, that the governor had authority to convey. Certainly an allegation, that the principal has no right to give a power, is not denied by alleging that he has given a proper power to the agent.

It is argued that the plea shows, although it does not, in terms, aver, that the legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative.

Had the plaintiff tendered an issue in fact upon this plea, that the governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration; for the count to which this plea is intended as a bar alleges no want of authority in the governor. He was therefore under the necessity of demurring.

But it is contended that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective.

The defect alleged in the declaration is, that the ***127** breach is not assigned in the words of the covenant. The covenant is, that the legislature had a *right* to convey, and the breach is, that the legislature had no *authority* to convey.

It is not necessary that a breach should be assigned in the very words of the covenant. It is enough that the words of the assignment show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the legislature had no *authority* to convey, it had no *right* to convey.

It is, therefore, the opinion of this court, that the circuit court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought therefore to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration.

The cause having been again argued at this term,

March 16, 1810,

MARSHALL, Ch. J. delivered the opinion of the court as follows:

****21** The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach ***128** in the second covenant contained in the deed. The covenant is, 'that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act.' The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the ***129** year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

****22** The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c. and so the title of the state of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

***130** That corruption should find its way into the governments of our infant republies, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights required, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means much be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

****23** If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by ***131** this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The ***132** count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

****24** To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus

in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cases to be obligatory.

It is, however, to be recollected that the people can ***133** act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribuhals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse ***134** between man and man would be very seriously obstructed, if this principle be overturned.

****25** A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this; that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that ***135** guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might

have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

****26** When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

***136** To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object ***137** of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

****27** If, under a fair construction the constitution, grants are comprehended under the terms contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, ***138** the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. ***139** This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

****28** The argument in favour of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seised in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon.

***140** The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this court the defendant pleads, that the state of Georgia *was seised;* and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles second to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George 2d in the year 1729, who appointed a Governor of South Carolina.

That, in 1732, George the 2d granted, to the Lord Viscount Percival and others, seven eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia.

****29** That the Governor of South Carolina continued to exercise jurisdiction south of Georgia.

That, in 1752, the grantees surrendered to the crown.

That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great ***141** Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola.

That, in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha, and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That, in November, 1763, a commission was issued to the Governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states.

That in April, 1787, a convention was entered into between the states of South Carolina and Georgia settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the proclamation ***142** of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

****30** The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected ***143** by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Judgment affirmed with costs.

JOHNSON, J.

In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

***144** As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

****31** The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification, had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well-known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, 'acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and *effect* of contracts,' is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word 'contract,' given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word 'obligation,' ***145** which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision, yet

where to draw the line, or how to define or limit the words, 'obligation of contracts,' will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

****32** The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count we are ***146** called upon substantially to decide, 'that the state of Georgia, at the time of passing the act of cession, was legally seised in fee of the soil, (then ceded,) subject only to the extinguishment of part of the Indian title.' That is, that the state of Georgia was seised of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favour of it, but to me it appears that the facts in the case are sufficient to support the opinion that the state of Georgia had not a *fee-simple* in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is, whether it can be correctly predicated of the interest or estate which the state of Georgia had in these lands, 'that the state was seised thereof, in fee-simple.'

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possessibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them ***147** acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

****33** I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, ***148** however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

10 U.S. 87, 3 L.Ed. 162

All Citations

6 Cranch 87, 10 U.S. 87, 1810 WL 1558, 3 L.Ed. 162

177 F.3d 507
United States Court of Appeals,
Sixth Circuit.

Peggy GREENBERG and Pamela Rossmann,
Individually and on behalf of others
similarly situated, Plaintiffs–Appellants,
v.
THE LIFE INSURANCE COMPANY
OF VIRGINIA, Defendant–Appellee.

No. 98–3156.

Argued March 10, 1999.

Decided May 19, 1999.

Rehearing and Suggestion for Rehearing
En Banc Denied July 2, 1999.

Synopsis

Owners of life insurance policies brought putative class action against life insurer, alleging various claims in connection with their purchase of purported "single-premium" policies. The United States District Court for the Southern District of Ohio, Sandra S. Beckwith, J., dismissed complaint for failure to state a claim upon which relief could be granted, and owners appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) district court was not required to convert motion to dismiss into motion for summary judgment; (2) owners stated claims for fraud, negligent misrepresentation, negligent training and supervision, breach of contract, and breach of duty of good faith and fair dealing; but (3) owners failed to state claim for breach of fiduciary duty.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

***510** Ron Parry (argued and briefed), David A. Baker (briefed), Arnzen, Parry & Wentz, Covington, KY, for Plaintiffs–Appellants.

David G. Hetzel, LeBoeuf, Lamb, Greene & MacRae, Hartford, CT, Robin E. Harvey (briefed), Baker & Hostetler, Cincinnati, OH, Watson B. Tucker (argued and briefed), Chicago, IL, for Defendant–Appellee.

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

Peggy Greenberg and Pamela Rossmann appeal from the district court's dismissal of their putative class action lawsuit filed against The Life Insurance Company of Virginia ("Life of Virginia"). Their complaint alleged six causes of action under Ohio law relating to their 1984 purchases of what they understood to be "single-premium" life insurance policies. Life of Virginia filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. After concluding that Greenberg and Rossmann had failed to state a claim upon which relief could be granted, the district court granted the motion to dismiss. For the reasons set forth below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** the case for further proceedings consistent with this opinion.

I. BACKGROUND

Greenberg and Rossmann are sisters. Before purchasing life insurance policies from Life of Virginia, the sisters owned three paid-up life insurance policies on the life of their father. Rossmann owned one of the policies in the face amount of $25,000, which was issued by Continental Assurance Company. Greenberg owned the other two policies. One of these policies was also issued by Continental in the face amount of $25,000, and the other was issued by Travelers Insurance Company in the face amount of $10,000.

In 1984, Life of Virginia agent Ronald Klein advised Greenberg and Rossmann that it would be financially advantageous for them to surrender their existing life insurance policies in order to purchase new ***511** policies from Life of Virginia. According to Greenberg and Rossmann, Klein represented to them that the new policies would require only a "single-premium" payment. Klein told Rossmann that, for a $29,000 single payment, she could obtain an $80,000 life insurance policy on the life of her father, with no additional premium payments required to maintain that death benefit during her father's lifetime. Similarly, Klein represented to Greenberg that, for a $38,940

single payment, she could obtain a $150,000 life insurance policy on the life of her father, with no additional premium payments due.

In reliance upon Klein's representations, Greenberg and Rossmann surrendered their previous policies, obtained the cash values, and applied the cash toward the purchase of the purported single-premium policies from Life of Virginia. Twelve years later, they discovered that Life of Virginia would require substantial additional premium payments to keep their policies in force.

Based on diversity jurisdiction under 28 U.S.C. § 1332, Greenberg and Rossmann filed suit in the district court against Life of Virginia in May of 1997. Their complaint raised the following six claims: (1) fraud, (2) negligent misrepresentation, (3) negligent training and supervision, (4) breach of contract, (5) breach of the duty of good faith and fair dealing, and (6) breach of fiduciary duty.

Instead of filing an answer, Life of Virginia moved to dismiss all of the claims, arguing that the complaint failed to state a claim upon which relief could be granted. For the purposes of its motion to dismiss, Life of Virginia accepted all of Greenberg and Rossmann's factual allegations as true. Attached to Life of Virginia's motion were copies of the following three documents: (a) the life insurance policy that it had issued to Greenberg, including the application form, (b) the life insurance policy that it had issued to Rossmann, including the application form, and (c) an illustration that Klein allegedly presented to Greenberg and Rossmann before they purchased the policies from Life of Virginia.

Before the district court ruled on Life of Virginia's motion to dismiss, Greenberg and Rossmann moved to convert the motion into a motion for summary judgment. They claimed that Life of Virginia's attachment of documents constituted materials outside of the pleadings, warranting a conversion of the motion. The district court denied Greenberg and Rossmann's motion to convert on the basis that it perceived no impediment to the sisters' responding substantively to the motion to dismiss and including any challenges that they had regarding the authenticity of the attachments.

After receiving an extension of time, Greenberg and Rossmann filed a memorandum in opposition to Life of Virginia's motion to dismiss. One week later, they requested leave to file a second amended complaint. The district court subsequently granted Life of Virginia's motion to dismiss the first amended complaint, and denied the sisters' motion for leave to amend, ruling that the amendment would be futile because it failed to cure any of the previous complaint's defects.

The sisters then filed a motion to alter, amend, or vacate the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. They contemporaneously moved to file the deposition of agent Klein. He corroborated the sisters' claim that they had applied for single-premium policies. The district court neither ruled on the sisters' motion to file Klein's deposition nor considered it for any purpose. After the district court denied their motion to alter, amend, or vacate the judgment of dismissal, Greenberg and Rossmann filed the instant appeal.

On appeal, they contend that (1) the district court erred in refusing to convert Life of Virginia's motion to dismiss into a motion for summary judgment, given that the district court considered materials beyond the pleadings, and (2) the district ***512** court's analysis was tainted by its erroneous factual finding that Greenberg and Rossmann knew or should have known that they had applied for and purchased life insurance policies that provided for the possibility of additional premium payments beyond the initial premium.

II. ANALYSIS

A. The district court's refusal to convert the dismissal motion into a summary judgment motion

1. The attachments

Life of Virginia attached three exhibits to its motion to dismiss. One was a copy of the insurance policy issued to Greenberg, consisting of a cover letter, the application form, a policy data sheet, and the boilerplate language of the policy. Another was a copy of the insurance policy issued to Rossmann, consisting of the same component parts. The final exhibit was an illustration of projected values and benefits based on the life of the insured, Charles A. Phillips. Life of Virginia's agent Klein allegedly showed the illustration to Greenberg and Rossmann, but this is denied by the sisters. Because the illustration is a matter beyond the pleadings and raises a disputed issue of fact, the district court properly declined to consider the document in ruling on Life of Virginia's motion to dismiss.

The face page of both insurance policies reads as follows:

Please read your policy carefully. You, the owner, have benefits and rights described in this policy. We will pay the cash value, if any, to you on the maturity date if the insured is living on that date.

The insured is named below. The beneficiary is as named in the attached application, unless later changed. We will pay the proceeds of this policy when we receive due proof that the insured died while the policy was in effect.

SCHEDULE OF BENEFITS

LIFE INSURANCE

PLANNED PERIODIC PREMIUM

_____

NOTE: MATURITY DATE SHOWN IS THAT ELECTED BY THE OWNER. IT IS POSSIBLE THAT COVERAGE WILL EXPIRE PRIOR TO THE MATURITY DATE SHOWN WHERE EITHER NO PREMIUMS OR SUBSEQUENT PREMIUMS ARE INSUFFICIENT TO CONTINUE COVERAGE TO SUCH DATE.

. . . . .

Page 3 of Rossmann's policy includes the identical information except for the amount of the single payment.

Included with both insurance policies were the application forms, which are incorporated into Life of Virginia's definition of the term "policy." In response to the planned periodic premium requested, both application forms state "–0–." For the type of "premiums payable," Greenberg's application form has a line crossed through the terms "Premiums payable." In addition, on the copy of her form submitted by Life of Virginia, there is an "X" with a line through it next to "Annually," with no other markings, but on the copy of the same form submitted by Greenberg, the application form also has an "X" marked ***513** next to "Single Premium." On Rossmann's form, there is an "X"

You may return this policy within 20 days after its delivery for a refund of any premium paid. If you do, we will treat the policy as if it had never been issued. Return it to our home office, or to our agent or agency.

The policy data sheet found on page 3 of Greenberg's policy includes the following information:

SCHEDULE OF PREMIUMS

AMOUNT PAYABLE

$38,940.00 SINGLE PAYMENT

placed next to "Annually" and another "X" placed next to "Single Premium" in the box below "Premiums Payable."

Finally, both policies include the following pertinent provisions in the "boilerplate" portion of the documents:

INTRODUCTION

This is a *flexible premium adjustable life insurance policy.* The first premium is due on the policy date. Subsequent premiums may be paid at any time before the maturity date. In return for these premiums and the insurance application, we provide certain benefits.

. . . . .

The Policy and Its Parts

Policy means this policy with the attached application, any riders and endorsements. We will not use any statement in the application to deny a claim unless a copy of the application was attached to this policy when issued.

The policy is a legal contract. It is the entire contract between you and us. An agent cannot change this contract. Any change to it must be in writing and approved by us. Only our President or one of our Vice–Presidents can give our approval. READ YOUR POLICY CAREFULLY

. . . . .

When This Policy Will Terminate

All coverage under this policy will terminate when:

-you request that coverage terminate and you return this policy;

-the insured dies;

-this policy matures; or

-the grace period ends without sufficient premiums being paid.

. . . . .

This policy's first premium is due on the policy date.

Premiums After The First Premium

Any premium payments after the first premium may be made under a periodic plan or at any time while the policy is in effect.

. . . . .

Grace Period

During the first five policy years, if (1) the surrender value on the day before a monthly anniversary date is not sufficient to cover the next monthly deduction, and (2) the continuation amount has not been paid, we will allow a 61–day grace period to pay premium sufficient to keep the policy in effect.

. . . . .

If sufficient premium is not paid by the end of the grace period, this policy will terminate without value. We will mail you notice of the sufficient premium.

. . . . .

How We Determine Cash Value

To determine the cash value on a monthly anniversary day, we add (a), (b) and (c) and subtract (d); where

(a) is the cash value on the preceding monthly anniversary day; and

(b) is one month's interest on the cash value as of the preceding monthly anniversary day; and

(c) is (1) multiplied by (2), where:

(1) is all premiums received since the preceding monthly anniversary day; and

(2) is the net premium factor; and

(d) is the monthly deduction for the following month.

. . . . .

The cash value on the policy date is (1) the first premium, multiplied by (2) the Net Premium Factor, less (3) the monthly deduction for the first policy month.

Interest. The guaranteed interest rate on cash value is .32737% compounded ***514** monthly. This equals a rate of 4% compounded yearly....

. . . . .

Monthly Deduction.

The monthly deduction is a charge made against the cash value each policy month. It is determined by adding the cost of insurance, the cost of additional benefits provided by rider, and the Monthly Policy Charge.

. . . . .

Continuation of Coverage

If periodic premium payments are not made as planned, this policy and any riders will remain in effect as long as the cash value less the surrender charge and less any policy debt covers the monthly deduction.

. . . . .

Annual Statement

On each policy anniversary, we will send you an annual statement. The statement will show the amount of insurance, the cash value, the surrender value, interest earned and policy debt. The statement will also show premiums paid and charges made during the policy year.

(All emphasis in original).

2. The district court did not err in refusing to convert the motion

Rule 12(b) of the Federal Rules of Civil Procedure provides that if "matters outside the pleadings are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Under certain circumstances, however, a document that is not formally incorporated by reference or attached to a complaint may still be considered part of the pleadings. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.30[4] (3d ed.1998). This occurs when "a document is referred to in the complaint and is central to the plaintiff's claim...." *Id.* In such event, "the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Id.; see, e.g.,* *Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir.1997) (considering pension plan documents that defendant attached to the motion to dismiss part of the pleadings because the documents were referred to in the complaint and were central to plaintiff's claim for benefits under the plan).

In the present case, Greenberg's and Rossmann's insurance policies that were attached to Life of Virginia's motion to dismiss are not "matters outside the pleadings." First, the insurance policies are referred to throughout the complaint. Second, the policies are central to the sisters' claims. Each of their six causes of action relates to and arises from the two life insurance policies in question. The district court's consideration of the policies, therefore, did not require conversion of Life of Virginia's motion to dismiss into a motion for summary judgment. *See* *Weiner,* 108 F.3d at 89.

On the other hand, Life of Virginia's attachment of the illustration that agent Klein allegedly presented to Greenberg and Rossmann is a "matter [ ] outside the pleadings." But the district court did not consider the illustration in making its Rule 12(b)(6) decision to dismiss the complaint, so no harm was done.

B. The district court's dismissal of Greenberg and Rossmann's claims under Rule 12(b)(6)

1. Standard of review

A district court's dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo. See* *Weiner v. Klais & Co.,* 108 F.3d 86, 88 (6th Cir.1997). All well-pled allegations of the complaint are taken as ***515** true. *See id.* "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." *Id.* In sum, we conduct essentially the same analysis as the district court in that "we take the plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then ... dismissal is proper." *Id.* (internal quotation marks omitted) (ellipses in original).

2. Fraud

In order to prove common law fraud in Ohio, a plaintiff must show (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with reckless disregard for its truth or falsity, (4) upon which the plaintiff justifiably relied, and (5) a resulting injury proximately caused by the reliance. *See* *Burr v. Board of County Comm'rs. of Stark County,* 23 Ohio St.3d 69, 491 N.E.2d 1101, 1102 (1986).

Greenberg and Rossmann allege two theories of fraudulent behavior. The first involves a deceptive insurance sales practice known as "churning." Under the churning theory, the sisters claim that they were fraudulently induced to surrender their paid-up existing policies to purchase replacement insurance policies issued by Life of Virginia without being informed of the true costs of the transaction. According to Greenberg and Rossmann, the "costs of the transaction include the following: a large commission to the selling agent, a series of front-loaded charges and fees, new risks such as suicide exclusion clause, new contestability periods, and more expensive insurance due to higher insurable age."

Their second theory of fraud involves the sale of "vanishing-premium" policies or "single-premium" policies. Under this second theory, Greenberg and Rossmann contend that Life of Virginia's agent, using misleading policy illustrations, falsely represented to them that no further premium payments would be required for their policies beyond the single initial premium payment, and that their policies would remain in force for the life of the insured.

The alleged misrepresentation apparently stems from the fact that Life of Virginia's sales projections incorporated a presumed interest rate of at least 11%, whereas the policy's guaranteed interest rate on cash value is only 4%. Although 11% rates of return were attainable in the high-inflation atmosphere of the early 1980s, they have dropped

dramatically in recent years. Greenberg and Rossmann contend that they were neither advised that a drop in interest rates would adversely affect the "single-premium" nature of their new policies nor were they shown the policy illustration that Life of Virginia attached to its motion to dismiss. Furthermore, the policy illustration in question shows that, even at an 11% interest rate, the policies would lapse prior to maturity. Any material questions of fact raised by the illustration, however, must be resolved on remand at the summary judgment phase or at trial.

Under both theories of fraudulent behavior, the sisters allege that Life of Virginia knew, but failed to disclose, that the sales presentations being made by its agents were false. They further contend that in reliance upon the agent's false representations of material facts, they surrendered their existing life insurance policies to purchase new Life of Virginia "single-payment" policies. Finally, they claim that they did not discover until 1996 that substantial additional premium payments would be required to keep their policies in force.

Even though Greenberg and Rossmann's allegations in their complaint appear to state a claim for fraud under Ohio law, the district court concluded otherwise. It did so on the basis of the boilerplate ***516** language in the Life of Virginia insurance policies that were issued to the sisters. The district court found that Greenberg and Rossmann sufficiently alleged that agent Klein made material representations about the single-premium status of the policies, and that Klein "acted with knowledge of the falsity of his representations that no further payments would be required or with such utter disrespect and recklessness as to whether it was true that knowledge may be inferred." This analysis is supported by substantial evidence in the record. But the district court agreed with Life of Virginia that the sisters could not show "justifiable reliance" as a matter of law.

As correctly stated by the district court, Ohio law holds that a purchaser's reliance on a seller's fraudulent misrepresentation may be justified if the representation does not appear unreasonable on its face and if the purchaser has no apparent reason to doubt its veracity. *See, e.g.,* *Lepera v. Fuson,* 83 Ohio App.3d 17, 613 N.E.2d 1060, 1065 (1992). After considering the multiple excerpts from the insurance policies that refer to possible future premiums being due after the initial premium is paid, the district court found "inescapable the conclusion that [Greenberg and Rossmann] had ample reason to question the veracity of the alleged representations of Klein." Specifically, the district court concluded that, as a matter of law, the sisters "could not have justifiably relied upon the alleged representations of agent Klein in the face of language informing them that their policies might expire if no additional payments were made."

We disagree with the district court's conclusion for two reasons. First, Life of Virginia defined the term "policy" to include the application form. This form is thus part of the insurance contract, a fact not contested by either side. On both forms, as noted in Part II.A.1. above, there is evidence supporting Greenberg and Rossmann's contention that the policies were "single-premium" policies. In addition, the policy data information sheet provided on page three of both policies states under the heading of "premiums payable" that the policies are "single payment."

At oral argument, Life of Virginia claimed that the term "single" in the phrases "single payment" and "single premium" cannot be interpreted to mean that Greenberg and Rossmann would not be required to make additional premium payments. But the dictionary includes among the definitions for the term "single" the words "only," "sole," and "consisting of only one in number." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2123 (3d ed.1986). Furthermore, the phrase "single premium" is defined as "the sum that would meet in a single payment the cost of a life insurance policy for the entire policy term." *Id.* at 2124.

The policy language upon which the district court relied, on the other hand, was taken from the boilerplate language of the contract rather than from the information relating specifically to Greenberg and Rossmann that was on the application form and the policy data information sheet. In response, the sisters claimed that they did not believe that all of the boilerplate language applied to their contracts. Given the internal inconsistencies in the policy language and the evidence of single-premium status, we conclude that Greenberg and Rossmann have sufficiently alleged justifiable reliance.

Second, "[t]he question of justifiable reliance is one of fact and requires an inquiry into the relationship between the parties." *Lepera,* 613 N.E.2d at 1065. Yet the district court undertook to resolve this issue as a matter of law by concluding that certain language in the boilerplate portion of the policies trumps the more individualized language on the application forms and policy data information sheets.

The appropriate analysis, however, requires asking the less demanding question of whether, taking all of the well-pled allegations as true, the sisters can prove any ***517** set of facts in support of their claim that would entitle them to relief. *See* *Weiner,* 108 F.3d at 88. We find that Greenberg and Rossmann's allegations of justifiable reliance are sufficient to survive a motion to dismiss.

The final element of fraud under Ohio law is "a resulting injury proximately caused by the reliance." *See* *Burr,* 491 N.E.2d at 1105. Greenberg and Rossmann allege that in reliance on agent Klein's representations, they cashed in their existing policies and purchased the two Life of Virginia policies. They further claim that it was not until 1996 that they first learned that substantial additional premiums would be required in order to keep their policies in force. We find that they have sufficiently alleged injury under Ohio law to maintain an action for fraud.

For all of the reasons set forth above, we conclude that Greenberg and Rossmann have stated a claim for fraud upon which relief can be granted under Ohio law.

3. Negligent misrepresentation

Greenberg and Rossmann's negligent misrepresentation claim is based upon the same alleged false information that formed the basis of their fraud claim. The elements of a claim for negligent misrepresentation are as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F.Supp. 1031, 1040 (N.D.Ohio 1996) (quoting *Delman v. City of Cleveland Heights,* 41 Ohio St.3d 1, 534 N.E.2d 835, 838 (1989)).

The district court dismissed this claim because of its finding that Greenberg and Rossmann could not establish justifiable reliance as a matter of law. As discussed in Part II.B.2. above, we find that Greenberg and Rossmann sufficiently pled that they justifiably relied upon the allegedly false information that they received. The well-pled facts supporting their fraud claim are thus sufficient to support a claim of negligent misrepresentation.

4. Negligent training and supervision

Greenberg and Rossmann allege that Life of Virginia "breached its duty to [them] by failing to use reasonable care to train Life of Virginia's agents and to supervise their sales practices." They thus contend that Life of Virginia should be held liable for the losses caused by their reliance upon agent Klein's misrepresentations.

The Ohio Supreme Court has set forth the following key requirement for a claim of negligent training and supervision:

> It is axiomatic that for the doctrine of *respondeat superior* to apply, an employee must be liable for a tort committed in the scope of his employment. Likewise, an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.

Strock v. Pressnell, 38 Ohio St.3d 207, 527 N.E.2d 1235, 1244 (1988). Thus, in order to maintain an action against the employer, a third party must allege that one of the employees is individually liable for a tort.

In the present case, the district court dismissed Greenberg and Rossmann's claim for negligent training and supervision on the basis that they had failed to allege a tort against agent Klein that would survive the motion to dismiss. The ***518** district court reasoned that although the sisters alleged the

torts of fraud and negligent misrepresentation, they could prove no set of facts that would support their claims because of the absence of justifiable reliance. Without a viable tort claim against agent Klein, the negligent training and supervision claim necessarily failed.

As stated in Parts II.B.2. and II.B.3. above, however, we have concluded that Greenberg and Rossmann's claims for fraud and negligent misrepresentation are claims upon which relief can be granted. The district court's reasoning is therefore no longer valid. Greenberg and Rossmann have alleged sufficient facts regarding Life of Virginia's allegedly negligent training and supervision of agent Klein to survive the motion to dismiss. Accordingly, we conclude that the sisters have stated a claim for negligent training and hiring upon which relief can be granted.

5. Breach of contract

Greenberg and Rossmann allege that Life of Virginia, through agent Klein, offered guaranteed death benefits based on their father's mortality in exchange for the payment of a single-premium payment from each of them. They further allege that agent Klein convinced them to surrender their existing policies and pay a lump sum for the new policies. Greenberg and Rossmann did exactly that, and received what they believed were single-premium policies. They believed this not only because of the representations that Klein had made, but also because of the language on the application forms and on the policy data information sheets that indicated the single-premium nature of the Life of Virginia policies. The sisters accepted Life of Virginia's offer for single-premium insurance policies, and they paid their single premium with the cash values obtained from the surrender of their existing policies. They thus allege that Life of Virginia breached the parties' agreement by later requiring the payment of additional premiums to maintain coverage.

Life of Virginia argues that the "integration clause" of the parties' contract precludes Greenberg and Rossmann as a matter of law from asserting a claim based upon agent Klein's alleged oral representations and any policy illustrations that he provided them. Both policies contain the following integration clause:

> The policy is a legal contract. It is the entire contract between you and us. An agent cannot change this contract. Any change to it must be in writing and approved by us. Only our President or one of our Vice–Presidents can give our approval. READ YOUR POLICY CAREFULLY.

Based on the integration clause, the district court agreed with Life of Virginia's argument that Greenberg and Rossmann were precluded as a matter of law from maintaining a cause of action for breach of contract. In reaching this conclusion, the district court relied upon the following language from this court:

> We went on to explain that under Ohio law an integration clause must be given effect despite alleged earlier oral representations. We noted that the purpose of such a clause is to prevent either party from relying upon representations made prior to the execution of the agreement that were not included in the agreement. To allow evidence of promissory fraud in the face of a written integrated contract "would completely defeat the purpose of an integration clause."

Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 217 (6th Cir.1989) (discussing its holding from *Coal Resources, Inc. v. Gulf & Western Indus.*, 756 F.2d 443, 446–47 (6th Cir.1985)).

The district court's analysis, however, overlooks a key fact. Although it correctly summarized this court's position with regard to the superceding effect of an integration clause over earlier oral representations, it failed to consider the language in the application forms and the policy data ***519** information sheets. According to Life of Virginia's own definition of the word "policy," which is located directly above the integration clause, it includes "the attached application, any riders and endorsements." The language contained in the application forms and the policy data information sheets is therefore a part of the fully integrated insurance contracts. As previously set out in Part II.A.1. above, both of these documents indicate the single-premium nature of the policies in question.

If the notations on the application forms and Life of Virginia's categorizing the premiums as "single payment" on the policy data information sheets do not conclusively establish that Greenberg and Rossmann each entered into a contract for

a single-premium policy, they at a minimum demonstrate inconsistencies existing within the overall insurance contract. Specifically, the application forms by themselves contain inconsistencies, and further inconsistencies exist when one compares the boilerplate language indicating the possibility of future premiums to the application forms and the policy data information sheets that do not.

The Ohio Supreme Court has stated that when ambiguities exist in a contract, the court "should construe [the contract] most favorably to the one who had nothing to do with the preparation of the printed form of contract, and most strongly against that party to the contract who prepared the same...." *Farmers' Nat'l Bank v. Delaware Ins. Co.,* 83 Ohio St. 309, 94 N.E. 834, 839 (1911) (construing an insurance contract in favor of the bank and against the insurance company that drafted it). Ohio law also holds that when there exists a conflict between specific information and general boilerplate language in a contract, precedence must be given to the specific information or language. *See Loblaw, Inc. v. Warren Plaza, Inc.,* 163 Ohio St. 581, 127 N.E.2d 754, 759 (1955).

Given these general rules of contract construction, we find that the district court erred in ruling as a matter of law that the contracts were not in fact single-premium-payment policies. Because Life of Virginia demanded further premium payments in order to keep the policies in force, Greenberg and Rossmann have stated a claim for breach of contract upon which relief can be granted. To hold otherwise would require resolving factual disputes in favor of Life of Virginia, a practice that should play no part in ruling on a Rule 12(b)(6) motion to dismiss.

6. Breach of the duty of good faith and fair dealing

Greenberg and Rossmann contend that "[e]very contract imposes on each party the duty of good faith and fair dealing." They allege that "Life of Virginia was obligated to exercise good faith in performing its contracts with [them] so as not to deny them the bargained-for benefits of their contracts with Life of Virginia." Life of Virginia allegedly breached this duty "by engaging in a dishonest and deceitful course of conduct."

Life of Virginia counters that Ohio has not recognized a claim for breach of the duty of good faith and fair dealing under these circumstances. But the Ohio Supreme Court has held that "an insurer has a duty to act in good faith in the settlement of a third-party claim" and that "an insurer has the duty to act in good faith in the handling and payment of the claims of its insured." *Hoskins v. Aetna Life Ins. Co.,* 6 Ohio St.3d 272, 452 N.E.2d 1315, 1319 (1983); *see also Buckeye Union Ins. Co. v. State Farm Mutual Automobile Ins. Co.,* 1997 WL 180278, at *3–*7 (Ohio Ct.App. April 16, 1997) (acknowledging that Ohio recognizes the cause of action, although it granted summary judgment in favor of the insurer in the case before it).

As the district court stated, however, no Ohio court has directly addressed whether this duty applies in the context of a plaintiff who alleges that the insurance agent engaged in dishonest practices when selling the policies. But Greenberg and ***520** Rossmann claim that the district court too narrowly construed this count of their complaint. They not only allege that the agent engaged in dishonest practices when selling the policies, but also claim that Life of Virginia failed to live up to its obligation to deliver to them the benefit of their bargain. Despite receiving what they believed to be single-premium policies, Greenberg and Rossmann allege that Life of Virginia sought to charge substantial additional premiums many years after the issuance of the insurance contracts. They assert their claim for breach of the duty of good faith and fair dealing because they did not receive the benefits that they reasonably believed would flow from their policies. *See Buckeye Union,* 1997 WL 180278, at *7. ("[T]he duty functions to ensure that the insurer's conduct does not impair the insured's right to receive the benefits that the insured reasonably might have expected to flow from their contractual relationship.").

The district court based its dismissal of this cause of action on the ground that Greenberg and Rossmann did not identify "a single decision in which a court applying Ohio law has recognized a claim for breach of the duty of good faith and fair dealing when a plaintiff has alleged that an insurer or its agent was dishonest and deceitful in selling an insurance policy." We disagree with the district court's analysis for two reasons. First, the district court did not analyze Greenberg and Rossmann's theory that Life of Virginia breached the duty of good faith and fair dealing by withholding the benefits that the sisters expected would flow from the contracts. Second, the lack of a published Ohio opinion does not automatically preclude Greenberg and Rossmann from establishing a basis in law for their claim. *See Bailey v. V. & O Press Co., Inc.,* 770 F.2d 601, 604 (6th Cir.1985) (explaining that in diversity cases the federal court must apply the law of the state's highest court and, when the state's highest court has not spoken on an

issue, "the federal court must ascertain from all available data what the state law is and apply it").

The sisters rely upon the unpublished opinion of the Ohio Court of Appeals in *Buckeye Union,* 1997 WL 180278, where the court stated as follows:

> The law imposes upon an insurer a duty of good faith and fair dealing in attending to the claims of its insured or to the claims of a third party against its insured. *Hoskins v. Aetna Life Ins. Co.,* [6 Ohio St.3d 272, 452 N.E.2d 1315 (1983);] *Hart v. Republic Mut. Ins. Co.,* [152 Ohio St. 185, 87 N.E.2d 347 (1949)]. An insurer's breach of this duty gives rise to a cause of action in tort, irrespective of any liability that might arise from a breach of the underlying insurance contract. *Staff Builders, Inc. v. Armstrong,* [37 Ohio St.3d 298, 525 N.E.2d 783 (1988)].
>
> . . . . .
>
> The duty operates to ensure that the insurer's performance or its refusal to perform under the insurance contract does not impair the insured's right to receive the benefits that the insured reasonably might have expected to flow from the contract or from the contractual relationship. *See, e.g., McMillin Scripps North Partnership v. Royal Ins. Co.,* [19 Cal.App.4th 1215, 23 Cal.Rptr.2d 243 (1993)] (declaring that the duty "supplements" express contractual provisions to prevent conduct that, while not technically a breach of express contractual provisions, frustrates the other party in securing his rights to the benefits of the contract); *Rawlings v. Apodaca,* [151 Ariz. 149, 726 P.2d 565 (1986)] (holding that an insurer breaches the duty by conduct that destroys the security for which the insured bargained or that exposes the insured to a risk from which the insured sought protection).

Id. at *3, *5. Although not binding, the above language provides a reasonable basis for concluding that Ohio law would recognize Greenberg and Rossmann's claim that Life of Virginia breached its ***521** duty of good faith and fair dealing when it sought to charge substantial additional premium payments despite the alleged single-premium status of the contracts. With there being no indication that Ohio law would bar such a claim, and given *Buckeye Union* 's emphasis on the broad nature of this duty, we find that the district court erred when it concluded that Greenberg and Rossmann had failed to state a claim upon which relief could be granted.

7. Breach of fiduciary duty

Finally, the sisters allege that they "relied upon Life of Virginia and its agents to deal with them in a fair and accurate manner with full disclosure of all pertinent factors relating to ... financial transactions." They further contend that Life of Virginia "had a duty to provide complete and truthful information to [them] when inducing them to purchase the life insurance policies...." Based upon Life of Virginia's alleged failures to provide full and accurate information, coupled with the alleged misrepresentations made by its agent, the sisters claim that Life of Virginia breached its fiduciary duty to them.

Under Ohio law, fiduciary duties can arise either by law or by the operation of the relationship between the parties. *See Stone v. Davis,* 66 Ohio St.2d 74, 419 N.E.2d 1094, 1098 (1981) ("[A] fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed."). As the district court recognized, Greenberg and Rossmann do not allege that the fiduciary relationship stems from their agreements with Life of Virginia, but rather from the operation of a special relationship between the parties.

In *Stone,* the Ohio Supreme Court explained that a fiduciary duty may arise from an informal relationship when "there is a ... position of superiority or influence, acquired by virtue of [a] special trust." *Id.* According to the district court, Greenberg and Rossmann "did not allege[ ] that their relationship with Defendant or its agent was one in which Defendant occupied a position of superiority or influence acquired by virtue of special trust reposed in Defendant by Plaintiffs." The district court concluded as a matter of law that the parties' transaction was a typical arm's-length relationship that did not involve fiduciary duties.

Specifically, Greenberg and Rossmann allege in their complaint that Life of Virginia

> trains and encourages its agents to develop close, confidential relationships with their customers. Pursuant to this training, Life of Virginia's agents encourage customers, including Plaintiffs and Class Members, to reveal personal and confidential information to the agents, and to rely upon the agents for financial advice, investment advice, estate planning and counseling based on their knowledge and expertise concerning Life of Virginia's sophisticated and complex financial products.

They further claim that they

> did not have the information, ability or expertise to fully and professionally evaluate the financial transactions that they were induced to enter into by Life of Virginia and its agents ... [They] did not have the ability to analyze or test Life of Virginia's sales illustrations and the reasonableness of the assumptions which were used to make the projections of the cost of the life insurance policies as shown in those sales illustrations.

Despite Greenberg and Rossmann's assertions that Life and Virginia and its agents possessed superior knowledge upon which they were forced to rely, their allegations fail to demonstrate the existence of a special relationship of trust. *See* *Stone,* 419 N.E.2d at 1098. Rather, the relationship possesses the qualities of a typical arm's-length transaction, in which the seller often possesses more expertise on the item to be sold and the buyer typically ***522** relies on the seller's representations. But this is insufficient in and of itself to establish a special relationship of trust. *See* *Ed Schory & Sons, Inc. v. Society Nat'l Bank,* 75 Ohio St.3d 433, 662 N.E.2d 1074, 1082 (1996) (holding that a fiduciary relationship did not exist where the creditor dealt with the debtor in a commercial context in which the parties were dealing at arm's length, each protecting its own interest). To hold otherwise would impose fiduciary obligations on the seller of goods or services in the vast multitude of ordinary arm's-length transactions simply on the basis that the seller possessed superior knowledge of the product being sold.

We conclude that the district court correctly found that the parties had engaged in an arm's-length transaction as a matter of law. Even taking the well-pled facts as true, the sisters' cause of action for breach of fiduciary duty fails to state a claim upon which relief can be granted.

C. Second amended complaint

1. Standard of review

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading should be "freely given when justice so requires." The purpose of Rule 15(a) is "to reinforce the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.' " *Moore v. City of Paducah,* 790 F.2d 557, 559 (6th Cir.1986) (quoting *Tefft v. Seward,* 689 F.2d 637, 639 (6th Cir.1982)). A district court has discretion in determining whether justice requires that the amendment be allowed. *See* *Moore,* 790 F.2d at 559. On appeal, we generally review a district court's denial of a motion to amend for abuse of discretion. *See id.* When the district court bases its decision on a legal conclusion that the proposed amendment would not survive a motion to dismiss, however, we review the decision *de novo. See* *LRL Properties v. Portage Metro Housing Auth.,* 55 F.3d 1097, 1104 (6th Cir.1995).

2. The district court erred when it denied the motion to amend

After dismissing the first amended complaint upon substantive grounds, the district court proceeded to consider Greenberg and Rossmann's motion to file a second amended complaint. The district court denied the motion on the basis that such a filing would be futile, concluding that none of the proposed amendments would cure the defects present in the first amended complaint.

Without changing the substance of the six causes of action, the proposed second amended complaint primarily alters the language of the sisters' "vanishing-premium" theory to a "single-premium" theory. The term "single premium" more accurately describes the character of Greenberg and Rossmann's alleged purchase. They have maintained throughout this action that they entered into life insurance contracts with Life of Virginia that required them to pay only a single premium. Their second amended complaint simply attempted to articulate this theory with greater clarity.

Because we are reversing the district court's blanket dismissal of all of Greenberg and Rossmann's causes of action as listed in their first amended complaint, the district court's conclusion that the second amended complaint would be futile can no longer stand. The district court should therefore reconsider the sisters' motion to amend in light of our conclusion that the first amended complaint states claims upon which relief can be granted, and in light of Rule 15(a)'s

provision that leave should be "freely given when justice so requires." *See* *Moore,* 790 F.2d at 559.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** in part and **REVERSE** in part the district court's decision. Greenberg and Rossmann's breach of fiduciary duty claim is **DISMISSED**. All of the ***523** remaining causes of action are **REINSTATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

All Citations

177 F.3d 507, 43 Fed.R.Serv.3d 783, 1999 Fed.App. 0178P

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 LockeAlice 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.

Jane R. Wettach, Durham, for Education Scholars and Duke Children's Law Clinic, amici curiae.

Tin Fulton Walker & Owen, Charlotte, by Luke Largess; and National Education Association, Washington, DC, by Philip Hostak, pro hac vice, for National Education Association, amicus curiae.

UNC Center for Civil Rights, by Mark Dorosin, Managing Attorney, and Elizabeth Haddix, Senior Staff Attorney, for North Carolina Conference of the National Association for the Advancement of Colored People, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., Charlotte, by Richard A. Vinroot and Matthew F. Tilley, for Pacific Legal Foundation, amicus curiae.

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

....

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

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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.

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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.

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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.
>
> * * *
>
> 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.
>
> 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:
>
> * * *
>
> 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.
>
> 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.

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:

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.

126 S.Ct. 699
Supreme Court of the United States

James LOCKHART, Petitioner,
v.
UNITED STATES et al.

No. 04–881.

Argued Nov. 2, 2005.

Decided Dec. 7, 2005.

Synopsis

Background: Social Security recipient challenged government's withholding of benefits in order to offset his debt on federally reinsured student loans. The United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, dismissed complaint and recipient appealed. The United States Court of Appeals for the Ninth Circuit, Noonan, Circuit Judge, 376 F.3d 1027, affirmed. Certiorari was granted.

The Supreme Court, Justice O'Connor, held that United States may offset Social Security benefits to collect student loan debt that has been outstanding for over 10 years; abrogating *Lee v. Paige,* 376 F.3d 1179.

Affirmed.

Justice Scalia concurred and filed opinion.

Procedural Posture(s): On Appeal.

****699 *142** *Syllabus* *

In 2002, the Government began withholding a portion of petitioner's Social Security payments to offset his debt on federally reinsured student loans that were more than 10 years overdue. Petitioner sued, arguing that the offset was barred by the 10–year statute of limitations of the Debt Collection Act of 1982, 31 U.S.C. § 3716(e)(1). The Social Security Act generally exempts benefits from attachment or other legal process, 42 U.S.C. § 407(a), and provides that "[n]o other provision of law ... may be construed to ... modify ... this section except to the extent that it does so by express reference," § 407(b). The Higher Education Technical Amendments of 1991 eliminated time limitations on suits to collect student loans, 20 U.S.C. § 1091a(a)(2)(D). In 1996, the Debt Collection Improvement Act subjected Social Security benefits to offset, "[n]otwithstanding [§ 407]," 31 U.S.C. § 3716(c)(3)(A)(i). The District Court dismissed petitioner's complaint, and the Ninth Circuit affirmed.

Held: The United States may offset Social Security benefits to collect a student loan debt that has been outstanding for over 10 years. Pp. 701–702.

(a) The Debt Collection Improvement Act makes Social Security benefits subject to offset, providing the sort of express ****700** reference that § 407(b) says is necessary to supersede the anti-attachment provision. P. 701.

(b) The Higher Education Technical Amendments remove the 10–year limit that would otherwise bar offsetting petitioner's Social Security benefits to pay off his student loan debt. Debt collection by Social Security offset was not authorized until five years after this abrogation of time limits, but the plain meaning of the Higher Education Technical Amendments must be given effect even though Congress may not have foreseen all of their consequences, *Union Bank v. Wolas,* 502 U.S. 151, 158, 112 S.Ct. 527, 116 L.Ed.2d 514. Though the Higher Education Technical Amendments, unlike the Debt Collection Improvement Act, do not explicitly mention § 407, an express reference is only required to authorize attachment in the first place. Pp. 701–702.

(c) Though the Debt Collection Improvement Act retained the Debt Collection Act's general 10–year bar on offset authority, the Higher Education Technical Amendments retain their effect as a limited exception ***143** to the Debt Collection Act time bar in the student loan context. The Court declines to read any meaning into a failed 2004 congressional effort to amend the latter Act to explicitly authorize offset of debts over 10 years old. See, *e.g., United States v. Craft,* 535 U.S. 274, 287, 122 S.Ct. 1414, 152 L.Ed.2d 437. P. 702.

376 F.3d 1027, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, *post,* p. 702.

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Opinion

Justice O'CONNOR delivered the opinion of the Court.

We consider whether the United States may offset Social Security benefits to collect a student loan debt that has been outstanding for over 10 years.

I

A

Petitioner James Lockhart failed to repay federally reinsured student loans that he had incurred between 1984 and 1989 under the Guaranteed Student Loan Program. These loans were eventually reassigned to the Department of Education, which certified the debt to the Department of the Treasury through the Treasury Offset Program. In 2002, the Government began withholding a portion of petitioner's Social Security payments to offset his ****701** debt, some of which was more than 10 years delinquent.

***144** Petitioner sued in Federal District Court, alleging that under the Debt Collection Act's 10–year statute of limitations, the offset was time barred. The District Court dismissed the complaint, and the Court of Appeals for the Ninth Circuit affirmed. 376 F.3d 1027 (2004). We granted certiorari, 544 U.S. 998, 125 S.Ct. 1928, 161 L.Ed.2d 772 (2005), to resolve the conflict between the Ninth Circuit and the Eighth Circuit, see *Lee v. Paige,* 376 F.3d 1179 (C.A.8 2004), and now affirm.

B

The Debt Collection Act of 1982, as amended, provides that, after pursuing the debt collection channels set out in 31 U.S.C. § 3711(a), an agency head can collect an outstanding debt "by administrative offset." § 3716(a). The availability of offsets against Social Security benefits is limited, as the Social Security Act, 49 Stat. 620, as amended, makes Social Security benefits, in general, not "subject to execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a). The Social Security Act purports to protect this anti-attachment rule with an express-reference provision: "No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." § 407(b).

Moreover, the Debt Collection Act's offset provisions generally do not authorize the collection of claims which, like petitioner's debts at issue here, are over 10 years old. 31 U.S.C. § 3716(e)(1). In 1991, however, the Higher Education Technical Amendments, 105 Stat. 123, sweepingly eliminated time limitations as to certain loans: "Notwithstanding any other provision of statute ... no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken," 20 U.S.C. § 1091a(a)(2), for the repayment ***145** of various student loans, including the loans at issue here, § 1091a(a)(2)(D).

The Higher Education Technical Amendments, by their terms, did not make Social Security benefits subject to offset; these were still protected by the Social Security Act's anti-attachment rule. Only in 1996 did the Debt Collection Improvement Act—in amending and recodifying the Debt Collection Act—provide that, "[n]otwithstanding any other provision of law (including [§ 407] ...)," with a limited exception not relevant here, "all payment due an individual under ... the Social Security Act ... shall be subject to offset under this section." 31 U.S.C. § 3716(c)(3)(A)(i).

II

The Government does not contend that the "notwithstanding" clauses in both the Higher Education Technical Amendments and the Debt Collection Improvement Act trump the Social Security Act's express-reference provision. Cf. *Marcello v. Bonds,* 349 U.S. 302, 310, 75 S.Ct. 757, 99 L.Ed. 1107 (1955) ("Exemptions from the terms of the ... Act are not lightly to be presumed in view of the statement ... that modifications must be express [.] But ... [u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the ... Act, we must hold that the present statute expressly supersedes the ... provisions of that Act"); *Great Northern R. Co. v. United States,* 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908).

****702** We need not decide the effect of express-reference provisions such as § 407(b) to resolve this case. Because the Debt Collection Improvement Act clearly makes Social Security benefits subject to offset, it provides exactly the sort of express reference that the Social Security Act says is necessary to supersede the anti-attachment provision.

It is clear that the Higher Education Technical Amendments remove the 10–year limit that would otherwise bar offsetting petitioner's Social Security benefits to pay off his student loan debt. Petitioner argues that Congress could ***146** not have intended in 1991 to repeal the Debt Collection Act's statute of limitations as to offsets against Social Security benefits—since debt collection by Social Security offset was not authorized until five years later. Therefore, petitioner continues, the Higher Education Technical Amendments' abrogation of time limits in 1991 only applies to then-valid means of debt collection. We disagree. "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas,* 502 U.S. 151, 158, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991).

Petitioner points out that the Higher Education Technical Amendments, unlike the Debt Collection Improvement Act, do not explicitly mention § 407. But § 407(b) only requires an express reference to authorize attachment in the first place—which the Debt Collection Improvement Act has already provided.

III

Nor does the Debt Collection Improvement Act's 1996 recodification of the Debt Collection Act help petitioner. The Debt Collection Improvement Act, in addition to adding offset authority against Social Security benefits, retained the Debt Collection Act's general 10–year bar on offset authority. But the mere retention of this previously enacted time bar does not make the time bar apply in all contexts—a result that would extend far beyond Social Security benefits, since it would imply that the Higher Education Technical Amendments' abrogation of time limits was now a dead letter as to any kind of administrative offset. Rather, the Higher Education Technical Amendments retain their effect as a limited exception to the Debt Collection Act time bar in the student loan context.

Finally, we decline to read any meaning into the failed 2004 effort to amend the Debt Collection Act to explicitly authorize offset of debts over 10 years old. See H.R. 5025, 108th Cong., 2d Sess., § 642 (Sept. 8, 2004); S. 2806, 108th ***147** Cong., 2d Sess., § 642 (Sept. 15, 2004). "[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' " *United States v. Craft,* 535 U.S. 274, 287, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)). In any event, it is unclear what meaning we could read into this effort even if we were inclined to do so, as the failed amendment—which was not limited to offsets against Social Security benefits—would have had a different effect than the interpretation we advance today.

Therefore, we affirm the judgment of the Ninth Circuit.

It is so ordered.

Justice SCALIA, concurring.

I agree with the Court that, even if the express-reference requirement in § 207(b) of the Social Security Act is binding, it has ****703** been met here; and I join the opinion of the Court because it does not imply that the requirement *is* binding. I would go further, however, and say that it is not.

"[O]ne legislature," Chief Justice Marshall wrote, "cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck,* 6 Cranch 87, 135, 3 L.Ed. 162 (1810). "The correctness of this principle, so far as respects general legislation," he asserted, "can never be controverted." *Ibid.* See also *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it"); 1 W. Blackstone, Commentaries on the Laws of England 90 (1765) ("Acts of parliament derogatory from the power of subsequent parliaments bind not"); T. Cooley, Constitutional Limitations 125–126 (1868) (reprint 1987). Our cases have uniformly endorsed this principle. See, *e.g., United States v. Winstar Corp.,* 518 U.S. 839, 872, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality opinion); *Reichelderfer v. Quinn,* 287 U.S. 315, 318, 53 S.Ct. 177, 77 L.Ed. 331 (1932) ("[T]he will of a particular Congress ... does not impose itself upon those to follow in succeeding years"); *Manigault v. Springs,* 199 U.S. 473, 487, 26 S.Ct. 127, 50 L.Ed. 274 (1905); *Newton v.* ***148** *Commissioners,* 100 U.S. 548, 559, 25 L.Ed. 710 (1880) (in cases involving *"public interests"* and *"public laws,"* "there can be ... no irrepealable law"); see generally 1 L. Tribe, American Constitutional Law § 2–3, p. 125, n. 1 (3d ed.2000).

Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them. Thus, in *Marcello v. Bonds,* 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), we interpreted the Immigration and Nationality Act as impliedly exempting deportation hearings from the procedures of the Administrative Procedure Act (APA), despite the requirement in § 12 of the APA that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly," 60 Stat. 244. The Court refused "to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act." 349 U.S., at 310, 75 S.Ct. 757. We have made clear in other cases as well, that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute. In *Great Northern R. Co. v. United States,* 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908), we said of an express-statement requirement that "[a]s the section ... in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly *or by necessary implication* in a subsequent enactment." (Emphasis added.) A subsequent Congress, we have said, may exempt itself from such requirements by "fair implication"—that is, *without* an express statement. *Warden v. Marrero,* 417 U.S. 653, 659–660, n. 10, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974). See also *Hertz v. Woodman,* 218 U.S. 205, 218, 30 S.Ct. 621, 54 L.Ed. 1001 (1910).

To be sure, legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware. For example, we have asserted that exemptions from the ***149** APA are "not lightly to be presumed" in light of its express-reference requirement, *Marcello, supra,* at 310, 75 S.Ct. 757; see also *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51, 75 S.Ct. 591, 99 L.Ed. 868 (1955). That assertion may add little or nothing to our ****704** already-powerful presumption against implied repeals.

> "We have repeatedly stated ... that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith,* 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion) (internal quotation marks and citations omitted).

See also *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other "magical password."

For the reasons set forth in the majority opinion, in the Higher Education Technical Amendments and the Debt Collection Improvement Act, Congress unambiguously authorized, without exception, the collection of 10–year–old student-loan debt by administrative offset of Government payments. In doing so, it flatly contradicted, and thereby effectively repealed, part of § 207(a) of the Social Security Act.

This repeal is effective, regardless of whether the express-reference requirement of § 207(b) is fulfilled.

Despite our jurisprudence on this subject, it is regrettably not uncommon for Congress to attempt to burden the future exercise of legislative power with express-reference and express-statement requirements. See, *e.g.,* 1 U.S.C. § 109; 5 U.S.C. § 559; 25 U.S.C. § 1735(b); 42 U.S.C. § 2000bb–3(b); 50 U.S.C. §§ 1547(a)(1), 1621(b). In the present case, it might seem more respectful of Congress to refrain from declaring ***150** the invalidity of the express-reference provision. I suppose that would depend upon which Congress one has in mind: the prior one that enacted the provision, or the current one whose clearly expressed legislative intent it is designed to frustrate. In any event, I think it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such express-reference provisions are ineffective.

All Citations

546 U.S. 142, 126 S.Ct. 699, 163 L.Ed.2d 557, 74 USLW 4037, 108 Soc.Sec.Rep.Serv. 1, 05 Cal. Daily Op. Serv. 10,271, 2005 Daily Journal D.A.R. 14,005, 19 Fla. L. Weekly Fed. S 23

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

112 S.Ct. 2130
Supreme Court of the United States

Manuel LUJAN, Jr., Secretary of the Interior, Petitioner
v.
DEFENDERS OF WILDLIFE, et al.

No. 90–1424

Argued Dec. 3, 1991.

Decided June 12, 1992.

Synopsis

Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, dismissed for lack of standing, 658 F.Supp. 43. The Court of Appeals for the Eighth Circuit reversed, 851 F.2d 1035. The District Court entered judgment in favor of environmental groups, 707 F.Supp. 1082, and the Court of Appeals affirmed, 911 F.2d 117. On certiorari, the Supreme Court, Justice Scalia, held that: (1) plaintiffs did not assert sufficiently imminent injury to have standing, and (2) plaintiffs' claimed injury was not redressable.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Souter joined.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun dissented and filed an opinion in which Justice O'Connor joined.

**2133 *Syllabus* *

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)'s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)'s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court's dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary's motion, which renewed his objection to standing, and granted respondents' motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

**2134 *Held:* The judgment is reversed, and the case is remanded.

911 F.2d 117, (CA 8 1990), reversed and remanded.

Justice SCALIA delivered the opinion of the Court, except as to Part III–B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 2135–2140, 2142–2146.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia,* that they have suffered an injury in fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 2135–2137.

*556 b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed to show that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See *Sierra Club v. Morton,* 405 U.S. 727, 735, 739, 92 S.Ct. 1361, 1366, 1368, 31 L.Ed.2d 636. Affidavits of members claiming an intent to revisit project sites at some

indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 2137–2140.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. See, *e.g., Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. Pp. 2142–2146.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C.J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post,* p. 2146. STEVENS, J., filed an opinion concurring in the judgment, *post,* ****2135 *557** p. 2147. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post,* p. 2151.

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* Terence P. Ross, Daniel J. Popeo, and Richard A. Samp filed a brief for the Washington Legal Foundation et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the City of Austin et al. by William A. Butler, Angus E. Crane, Michael J. Bean, Kenneth Oden, James M. McCormack, and Wm. Robert Irvin; for the American Association of Zoological Parks & Aquariums et al. by Ronald J. Greene and W. Hardy Callcott; for the American Institute of Biological Sciences by Richard J. Wertheimer and Charles M. Chambers; and for the Ecotropica Foundation of Brazil et al. by Durwood J. Zaelke.

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Opinion

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered ***558** Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.*, seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting ***559** § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43, 47–48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari, 500 U.S. 915, 111 S.Ct. 2008, 114 L.Ed.2d 97 (1991).

II

While the Constitution of the United States divides all power conferred upon ****2136** the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot–Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends ***560** largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." The Federalist No. 48, p. 256 (Carey and

McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e.g., Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.,* at 756, 104 S.Ct., at 3327; *Warth v. Seldin,* 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972); [1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore, supra,* 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." ***561** *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.,* at 38, 43, 96 S.Ct., at 1924, 1926.

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990); *Warth, supra,* 422 U.S., at 508, 95 S.Ct., at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan v. National Wildlife Federation,* 497 U.S. 871, 883–889, 110 S.Ct. 3177, 3185–3189, 111 L.Ed.2d 695 (1990); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 114–115, and n. 31, 99 S.Ct. 1601, 1614–1615, and n. 31, 60 L.Ed.2d 66 (1979); ****2137** *Simon, supra,* 426 U.S., at 45, n. 25, 96 S.Ct., at 1927, and n. 25; *Warth, supra,* 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra,* 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has ***562** caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also *Simon, supra,* 426 U.S., at 41–42, 96 S.Ct., at 1925, 1926; and it becomes

the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g.,* *Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen, supra,* 468 U.S., at 758, 104 S.Ct., at 3328; *Simon, supra,* 426 U.S., at 44–45, 96 S.Ct., at 1927; *Warth, supra,* 422 U.S., at 505, 95 S.Ct., at 2208.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of ***563** standing. See, *e.g.,* *Sierra Club v. Morton,* 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.,* at 734–735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by ****2138** funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.,* at 735, 739, 92 S.Ct., at 1366, 1368. See generally *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.,* at 145–146. When Ms. Skilbred was asked ***564** at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.,* at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " *Lyons,* 461 U.S., at 102, 103 S.Ct., at 1665 (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495–496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the

"actual or imminent" injury that our cases require. See *supra,* at 2136. [2]

**2139 *565 Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation,* which held that a plaintiff claiming injury from environmental damage *566 must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U.S., at 887–889, 110 S.Ct., at 3188–3189; see also *Sierra Club,* 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible —though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals **2140 of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that *567 might have been the subject of his interest will no longer exist, see *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection. [3]

*568 B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." *Allen,* 468 U.S., at 759–760, 104 S.Ct., at 3329.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, *e.g.,* 16 U.S.C. § 1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); § 1535(d)(1) **2141 ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining

statutory necessity, lies with ***569** the agencies, see § 1536(a)(2) ("*Each Federal agency shall,* in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed.Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.[4] The ***570** Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] ... would result in consultation." *Defenders of Wildlife,* 851 F.2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the ****2142** position that the regulation is not binding.[5] The ***571** short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon,* 426 U.S., at 43–44, 96 S.Ct., at 1926–1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.[6] There is no standing.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence ***572** a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F.2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.,* the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).[7] Nor is it simply a case where concrete injury has been ****2143** suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the ***573** unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.[8]

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief

that ***574** no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in *Fairchild v. Hughes,* 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

> "[This is] not a case within the meaning of ... Article III.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit...." *Ibid.*

In *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute ****2144** an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.,* at 488–489, 43 S.Ct., at 601.

In *Ex parte Lévitt,* 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. ***575** "It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429, 433–434, 72 S.Ct. 394, 396–397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.' " *Richardson, supra,* at 171, 176–177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind...." *Schlesinger, supra,* at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because ***576** " 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' " *Allen,* 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of " 'the public interest protections of the Eighth Amendment' "; once again, "[t]his allegation raise [d] only the 'generalized interest of all citizens in constitutional governance' ... and [was] an inadequate basis on which to grant ... standing." *Whitmore,* 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental ****2145** to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and ***577** that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon,* 262 U.S., at 489, 43 S.Ct., at 601, and to become " 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Allen, supra,* 468 U.S., at 760, 104 S.Ct., at 3329 (quoting *Laird v. Tatum,* 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)). We have always rejected that vision of our role:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard,* 321 U.S. 288, 309–310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

***578** "Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club,* 405 U.S., at 740–741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that "[t]he ... injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 208–212, 93 S.Ct. 364, 366–368, 34 L.Ed.2d 415 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in *Sierra Club,* "[Statutory] broadening [of] the categories of injury that may be alleged in support ****2146** of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S., at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

***579** Justice KENNEDY, with whom Justice SOUTER joins, concurring in part and concurring in the judgment.
Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). This component of the standing inquiry is not satisfied unless

> "[p]laintiffs ... demonstrate a 'personal stake in the outcome.' ... Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons,* 461 U.S. 95, 101–102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante,* at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see *Sierra Club v. Morton, supra,* 405 U.S., at 735, n. 8, 92 S.Ct., at 1366, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante,* at 2139–2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986) ("[R]espondents ... undoubtedly have alleged a sufficient 'injury in fact' in that ***580** the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, ****2147** and I do not read the Court's opinion to suggest a contrary view. See *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *ante,* at 2145–2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U.S.C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence ***581** of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the

party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

Justice STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion ***582** that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." ****2148** 16 U.S.C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing, [1] and the Court reiterates that holding today. See *ante,* at 2137.

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante,* at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, ***583** therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante,* at 2138–2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin,* 422 U.S. 490, 498–499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct.... The injury or threat of injury must be both 'real and immediate,'

not 'conjectural,' or 'hypothetical.' " *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (quoting *Golden v. Zwickler,* 394 U.S. 103, 109–110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e.g., Whitmore v. Arkansas,* 495 U.S. 149, 158–159, 110 S.Ct. 1717, 1724–1725, 109 L.Ed.2d 135 (1990); *Los Angeles v. Lyons,* 461 U.S. 95, 105, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); *O'Shea,* 414 U.S., at 497, 94 S.Ct., at 676. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential ***584** source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skilbred have ****2149** introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As Justice BLACKMUN explains, *post,* at 2152–2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is ***585** promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante,* at 2140–2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante,* at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post,* at 2156–2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 284–285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.,* at 285, 69 S.Ct., at 577, and therefore presume that " 'legislation of Congress, unless a ***586** contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,' " ****2150** *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros.,* 336 U.S., at 285, 69 S.Ct., at 577).

Section 7(a)(2) provides, in relevant part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[3]], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of

> any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section...." 16 U.S.C. § 1536(a)(2).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic reference in ***587** the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed.Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of ***588** endangered species is the "destruction of ****2151** natural habitat." S.Rep. No. 93–307, p. 2 (1973); see also H.Rep. No. 93–412, p. 2 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; *TVA v. Hill,* 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U.S.C. § 1537(a). It also directs the Secretary of the Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence ***589** of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people.*" §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.[7]

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O'CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional ****2152** authority of Congress to allow

***590** citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed.Rule Civ.Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.,* at 249, 106 S.Ct., at 2511.

The Court never mentions the "genuine issue" standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, "affidavits or other evidence showing, through specific facts" the existence of injury. *Ante,* at 2137. The Court thereby confuses respondents' evidentiary burden (*i.e.,* affidavits asserting "specific facts") in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i.e.,* the existence of a "genuine issue" of "material fact") under Rule 56(c).

***591** 1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante,* at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses ****2153** Kelly's and Skilbred's general statements ***592** that they intended to revisit the project sites as "simply not enough." *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," *ibid.,* the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. *Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury") (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a "description of concrete plans" or "specification of *when* the some day [for a return visit] will be," *ante,* at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore v.*

Arkansas, 495 U.S. 149, 155–156, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles v. Lyons,* 461 U.S., at 105, 103 S.Ct., at 1667 (harm dependent on police's arresting plaintiff again ***593** and subjecting him to chokehold); *Rizzo v. Goode,* 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (harm rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea v. Littleton,* 414 U.S. 488, 495–498, 94 S.Ct. 669, 675–677, 38 L.Ed.2d 674 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden v. Zwickler,* 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14–year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she ****2154** would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

***594** 2

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante,* at 2139. To support that conclusion, the Court mischaracterizes our decision in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity." *Ante,* at 2139. In *National Wildlife Federation,* the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U.S., at 888, 110 S.Ct., at 3188. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, *e.g.,* *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e.g.,* *Arkansas v. Oklahoma,* 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the Asian elephants in another part of the world. *Ante,* at 2139. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling ***595** at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante,* at 2146 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74–75, and n. 20, 98 S.Ct. 2620, 2630–2631, and n. 20, 57 L.Ed.2d 595 (1978) (plaintiff must show "substantial likelihood" that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the "action agencies" (*e.g.,* AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly ****2155** bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).[2] And he has previously ***596** taken the same position in this very litigation, having stated in his answer to the complaint that petitioner "admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act]." App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play "Three–Card Monte" with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that "there is no reason they should be obliged to honor an incidental legal determination the suit produced." *Ante,* at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.[3] Under ***597** principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

> "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront v. Compagnie des Sucreries de Puerto Rico,* 217 U.S. 475, 487, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910).

This principle applies even to the Federal Government. In *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. "Thus, although not a party, the United States plainly had a sufficient 'laboring ****2156** oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.,* at 155, 99 S.Ct., at 974. See also *United States v. Mendoza,* 464 U.S. 154, 164, n. 9, 104 S.Ct. 568, 574, n. 9, 78 L.Ed.2d 379 (1984) (Federal Government estopped where it "constituted a 'party' in all but a technical sense"). In my view, the action agencies have had sufficient "laboring oars" in this litigation since its inception to be bound from subsequent ***598** relitigation of the extraterritorial scope of the § 7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

***599** The second redressability obstacle relied on by the plurality is that "the [action] agencies generally supply only a fraction of the funding for a foreign project." *Ante,* at 2142. What this Court might "generally" take to be true does not eliminate the existence of a genuine issue of fact to withstand

**2157 summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." *Ibid.* The plurality neglects to mention that this "fraction" amounts to $170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed *600 the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: "Respondents have produced nothing to indicate that the projects they have named will ... do less harm to listed species, if that fraction is eliminated." *Ante,* at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that "[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved." App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project." *Id.,* at 216.

*601 I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was "overseeing" the rehabilitation of the Aswan project. *Id.,* at 101. See also *id.,* at 65 (Bureau of Reclamation publication stating: "In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project").

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental **2158 'right' to have the Executive observe the procedures required by law." *Ante,* at 2143. Whatever the Court might mean with that very broad language, it cannot be saying that "procedural injuries" *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as *602 "procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that "procedural" injuries

are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Ante,* at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Court examined a ***603** statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which "diminis[h] the effectiveness" of an international whaling convention. *Id.,* at 226, 106 S.Ct., at 2864. The Court expressly found standing to sue. *Id.,* at 230–231, n. 4, 106 S.Ct., at 2865–2866, n. 4. In *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 348, 109 S.Ct. 1835, 1844, 104 L.Ed.2d 351 (1989), this Court considered injury from violation of the "action-forcing" procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). The Secretary is also obligated to suggest "reasonable and prudent alternatives" to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own "biological ****2159** assessment for the purpose of identifying any endangered species or threatened species" likely to be affected by agency action. § 1536(c)(1). After the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources" which would foreclose the "formulation or implementation of any reasonable and prudent alternative measures" to avoid jeopardizing listed species. § 1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante,* at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs ***604** are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante,* at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. *Ante,* at 2145 (Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). Here Congress seeks not to delegate "executive" power but only to strengthen the procedures it has legislatively mandated. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991). "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*." *Ibid.* (emphasis added).

***605** Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS v. Chadha,* 462 U.S. 919, 953–954, n. 16, 103 S.Ct. 2764, 2785–2786, n. 16, 77 L.Ed.2d 317 (1983); *American Power & Light Co. v. SEC,* 329 U.S., at 105–106, 67 S.Ct. at 142–143. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Ante,* at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, ****2160** this Court has acknowledged "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," but "*these procedures are almost certain to affect the agency's substantive decision.*" *Robertson v. Methow Valley Citizens Council,* 490 U.S., at 350, 109 S.Ct., at 1846 (emphasis added). See also *Andrus v. Sierra Club,* 442 U.S. 347, 350–351, 99 S.Ct. 2335, 2337, 60 L.Ed.2d 943 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [the environmental-impact statement requirement] would be lost"). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch —Congress—that certain procedures are directly tied to protection against a substantive harm.

***606** In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. "Typically ... the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright,* 468 U.S., at 752, 104 S.Ct., at 3325. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.' " *Mistretta v. United States,* 488 U.S. 361, 393, 109 S.Ct. 647, 665, 102 L.Ed.2d 714 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled "procedural" in nature.

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

2 The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because "a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites." *Post,* at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the "soon" is supposed to mean. If "soon" refers to the standard mandated by our precedents—that the injury be "imminent," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to return. But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is " ' "*certainly* impending," ' " *id.,* at 158, 110 S.Ct., at 1725 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, *e.g.,* *id.,* at 156–160, 110 S.Ct., at 1723–1726; *Los Angeles v. Lyons,* 461 U.S. 95, 102–106, 103 S.Ct. 1660, 1665–1667, 75 L.Ed.2d 675 (1983).

There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon "the affirmative actions of third parties beyond a plaintiff's control," *post,* at 2153. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's failure to show that he will soon expose *himself* to the injury, see, *e.g.,* *Lyons, supra,* at 105–106, 103 S.Ct., at 1666–1667; *O'Shea v. Littleton,* 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974); *Ashcroft v. Mattis,* 431 U.S. 171, 172–173, n. 2, 97 S.Ct. 1739, 1740 n. 2, 52 L.Ed.2d 219 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand ... detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. *Post,* at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be

determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

3 The dissent embraces each of respondents' "nexus" theories, rejecting this portion of our analysis because it is "unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm" to the plaintiff. *Post,* at 2154. But summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, "certainly impending." The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not "*necessarily* " prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in *Sierra Club,* for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN's accusation that a special rule is being crafted for "environmental claims," *post,* at 2154, is correct, but *he* is the craftsman.

Justice STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post,* at 2148–2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

4 We need not linger over the dissent's facially impracticable suggestion, *post,* at 2154–2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post,* at 2155–2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post,* at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.,* that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the "*complete* relief" referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post,* at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction ... a one-way street running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either

conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

5 Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post,* at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

6 The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post,* at 2157–2158. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the " 'negative impacts to the wildlife,' " *post,* at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

7 There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

8 The dissent's discussion of this aspect of the case, *post,* at 2157–2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post,* at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan Whaling Assn. v. American Cetacean Soc.,* 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), and *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), *post,* at 2158–2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w [ould] be adversely affected by continued

whale harvesting," see 478 U.S., at 230–231, n. 4, 106 S.Ct., at 2866, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 812–813 (CA9 1987).

1 See, *e.g., Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686–687, 93 S.Ct. 2405, 2415–2416, 37 L.Ed.2d 254 (1973); *Japan Whaling Assn. v. American Cetacean Society,* 478 U.S. 221, 230–231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986).

2 As we recognized in *Sierra Club v. Morton,* 405 U.S., at 735, 92 S.Ct. at 1366, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened...." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents, cf. *ante,* at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

3 The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U.S.C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed.Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

4 Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U.S.C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F.2d 117, 122 (CA8 1990); see also *Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 282, 287–288, 69 S.Ct. 575, 578–579, 93 L.Ed. 680 (1949) (statute requiring an 8–hour day provision in " '[e]very contract made to which the United States ... is a party' " is inapplicable to contracts for work performed in foreign countries).

5 Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

6 Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies

extraterritorially even if the latter does not. 911 F.2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

7 Of course, Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements]," and that "encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments...." 16 U.S.C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F.2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

1 The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in "mitigating the negative impacts to the wildlife involved." *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: "The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system." *Id.,* at 215. It adds: "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife." *Id.,* at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment "showed that the [Mahaweli] project could affect several endangered species." *Id.,* at 159.

2 This section provides in part:

> "(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required...."

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed.Reg. 19928 (1986) ("Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as 'nonbinding guidelines' that would govern only the Service's role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7").

3 For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as "counsel" to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the

District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that " '[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.' " See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

4 The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: " 'The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*' ". *Ante,* at 2141, n. 4 (quoting *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989)). See also *Mollan v. Torrance,* 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.). The plurality proclaims that "[i]t cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante,* at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies." *Ante,* at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed.Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante,* at 2141. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante,* at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman–Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory

opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

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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.

Attorneys and Law Firms

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David J. Hensel, Pence Hensel, LLC, Indianapolis, IN, Chance D. Weldon, Pacific Legal Foundation, Sacramento, CA, for The Pacific Legal Foundation.

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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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

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.

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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.

Melnick & Melnick and Robert R. Melnick, Youngstown; John W. Whitehead and Steven H. Aden, Honolulu, HI, urging reversal for amicus curiae Rutherford Institute.

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.

Nathan J. Diament, New York, NY, pro hac vice, urging reversal for amicus curiae ****207** Institute for Public Affairs, Union of Orthodox Jewish Congregations of America.

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

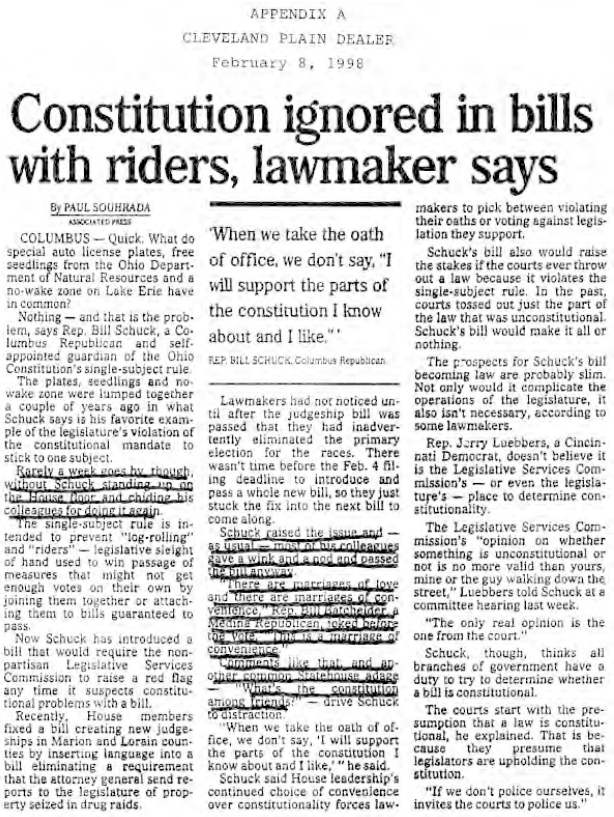
of an inference of logrolling (in the absence of evidence of logrolling) and has invalidated an otherwise constitutional law on the basis of a technical procedural infraction. At one time, such intrusions by one branch of a government into the business of another were taken only with extreme caution 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 bill 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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