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Nevada's Education Savings Accounts: A Constitutional Analysis

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NEVADA'S EDUCATION SAVINGS ACCOUNTS:
A CONSTITUTIONAL ANALYSIS

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Introduction

This piece will analyze potential conflicts between Senate Bill 302 and Article XI of the Nevada Constitution to explore the constitutionality of educational savings accounts.

Education Funding and School Choice

The Supreme Court of the United States recognizes education as “perhaps the most important function of state and local governments” because “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹ Indeed, although education is not a fundamental right under the United States Constitution,² the Court noted that “[p]roviding public schools ranks at the very apex of the function of a State.”³ Accordingly, every state has a state constitutional provision establishing a free public school system.⁴

Though the requirement for states to establish free public schools is universal, the question of how to properly fund these schools is the source of long-running legislative and judicial debate in states throughout the country.⁵ The current conversation is often split along ideological lines, pitting the free-market “school-choice” viewpoint against a more traditional, utilitarian viewpoint.⁶

¹ Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

² San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

³ Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

⁴ See Appendix B, for a complete list of state constitutional school-establishment provisions most similar to Article XI, § 2 of the Nevada Constitution. See also John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007) (providing a “comprehensive examination of the state convention debates regarding education clauses”).

⁵ See, e.g., William E. Thro, *School Finance Litigation as Facial Challenges*, 272 EDUC. L. REP. 687 (2011), for a more detailed explanation of school finance litigation throughout the country.

⁶ A. Lane Morrison, Note, *Equalizing the “Great Equalizer”: The Alabama Accountability Act and the Quest to Find A Model for Education Improvement Through Choice*, 66 ALA. L. REV. 1169, 1184 (2015).

The most common argument in favor of school-choice programs is one grounded on market-based principles.⁷ Generally, this argument is centered on the premise that traditional public schools lack a direct incentive to strive to maintain the highest possible standards for students, and that if parents are given more choice on which schools their children will attend, public schools will be forced to compete and eventually improve.⁸ The cornerstone of school-choice policies is the implementation of a system allowing a payment voucher,⁹ tax-credit scholarship,¹⁰ or Educational Savings Account (“ESA”).¹¹

ESAs direct educational funds to individual parents, rather than to the school district.¹² With ESAs, educational funds for individual students are placed into restricted-use savings accounts for their families to use on defined and approved educational expenses.¹³ In 2011, Arizona was the first state to enact an ESA program.¹⁴ ESA programs are currently active in five states: Arizona, Florida, Tennessee, Mississippi, and, most recently, Nevada.¹⁵

⁷ *Id.*

⁸ *Id.* at 1184–86 (Morrison’s Note provides additional arguments in favor of school-choice programs, including the argument that voucher programs help afford lower-income families increased educational opportunities).

⁹ Voucher programs allow “parents to use public funding allocated for their child toward tuition at a private school of their choice.” Arianna Prothero, *What’s the Difference Between Vouchers and Education Savings Accounts?*, EDUC. WK. (Apr. 23, 2016, 5:30 PM), http://blogs.edweek.org/edweek/charterschoice/2015/06/school_vouchers_education_savings_accounts_difference_between.html [<https://perma.cc/4R25-A3AG>].

¹⁰ In a tax-credit scholarship program, the state provides “tax-credits to incentivize businesses or individuals to donate money to a scholarship granting organization, which then gives money to students to use toward tuition at a private school. *Id.*

¹¹ In an ESA program, “the state sets aside money usually . . . based on its per-pupil funding formulas in individual accounts for participating students. Their parents or guardians can then withdraw that money to spend on approved educational expenses.” *Id.*

¹² Inez Feltscher, *Education and Workforce Director Testifies in Missouri about Education Savings Accounts - The Year of Education Savings Accounts: A Frontier of Educational Choice in the “Show Me” State*, AM. LEGIS. EXCHANGE COUNCIL (Feb. 15, 2016), <https://www.alec.org/article/education-and-workforce-director-testifies-in-missouri-about-education-savings-accounts/> [<https://perma.cc/5ZFF-GCZH>] (testimony before the H. Comm. on Elementary and Secondary Educ., State of Mo.).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

The argument against school-choice is typically grounded in utilitarianism; because school funding is already scarce, school-choice programs—particularly voucher or ESA programs¹⁶—will strip funding from public schools, meaning the schools will be unable to provide the most benefit to the highest number of public school students.¹⁷ Proponents argue that this reduced funding for public schools could hamper schools’ ability to serve the most students, and undermine the quality of education they provide to their students.¹⁸

These ideological splits often manifest as legal challenges to state-enacted “school-choice” programs. The programs generally encounter two types of constitutional roadblocks: “mandatory-pay” provisions that mandate public school funds to be appropriated directly to state general funds,¹⁹ and “no-pay provisions,” also known as “Little Blaine Amendments,” that restrict any public funds from going to religiously-affiliated private schools.²⁰

Education Funding in Nevada

*[T]here are some subjects which are justly and properly objects of legislation, and among them, one of the most worthy is that of education.*²¹

Nevada’s Constitution’s framers “strongly believed that each child should have the opportunity to receive a basic education,”²² which “resulted in a Constitution that places great

¹⁶ Vouchers and ESAs are very similar, and often encounter similar legal challenges. See Josh Cunningham, *The Next Generation of School Vouchers: Educational Savings Accounts*, NAT’L CONF. ST. LEGISLATURES (Jan. 11, 2016), <http://www.ncsl.org/research/education/the-next-generation-of-school-vouchers-education-savings-accounts.aspx> [https://perma.cc/AN6Z-U3KB].

¹⁷ Morrison, *supra* note 6, at 1185–88.

¹⁸ *Id.* Morrison’s Note also provides additional arguments against school-choice programs, including arguments that voucher programs have not shown demonstrable improvement in other states, that private schools receiving public funds are not held to the same levels of accountability as public schools, and that voucher programs could undermine the progress in public school integration made since *Brown v. Board of Education*.

¹⁹ See, e.g., *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

²⁰ See, e.g., *Niehaus v. Huppenthal*, 310 P.3d 983, 985 (Ariz. Ct. App. 2013).

²¹ OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 571 (1866) [hereinafter *DEBATES & PROCEEDINGS*] (statement of J.H. Warwick, Lander Cty.).

²² *Guinn v. Legislature of the State*, 119 Nev. 277, 286 (2003) [hereinafter *Guinn I*].

importance on education.”²³ Though Article XI mandates the Nevada Legislature “encourage by all suitable means” the promotion of education²⁴ through the establishment and maintenance of a “uniform system of common schools”²⁵ and a state university,²⁶ debates have occurred since early statehood on how to interpret Article XI’s various funding provisions.²⁷

Though courts have been asked to interpret Article XI’s logistical provisions since statehood, the method through which the Legislature actually funds Nevada’s public schools has remained relatively unchanged over the last half-century.²⁸ Since 1967, the Legislature has funded Nevada’s public school system primarily through the Nevada Plan, a statewide, formula-based funding mechanism.²⁹ The Nevada Plan calls for state educational funding to school districts to “equal[] the difference between school district basic support guarantee and local available funds produced by mandatory taxes minus all the local funds attributable to pupils who reside in the county but attend a charter school or a university school for profoundly gifted pupils.”³⁰

The Basic Support Guarantee (“BSG”) is funded by the Legislature through a combination of funds appropriated to the State’s Distributive School Account (“DSA”) and local

²³ *Id.*

²⁴ NEV. CONST. art. XI, § 1.

²⁵ NEV. CONST. art. XI, § 2.

²⁶ NEV. CONST. art. XI, §§ 4, 8.

²⁷ *See, e.g., State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897) (holding salary of teacher at state orphan home was impermissible under Article XI, §§ 2–6); *State v. Hallock*, 16 Nev. 373 (1882) (holding transfer of funds to Catholic-run orphan asylum violated Article XI, § 10); *State v. Rhoades*, 4 Nev. 312 (1868) (holding the legislature is prohibited from using the funds arising from sale of land granted for education for any other branch of state government, except that which is immediately connected with the educational system pursuant to Article XI).

²⁸ There were, however, some changes to the Nevada Plan’s per-pupil formula enacted during the 2015 Legislative Session. *See* S.B. 508, 2015 Leg., 78th Sess. (Nev. 2015) (modifying certain funding formula provisions of NEV. REV. STAT. § 387.121 (2015)).

²⁹ LEGISLATIVE COUNSEL BUREAU, FISCAL ANALYSIS DIV., THE NEVADA PLAN FOR SCHOOL FINANCE: AN OVERVIEW 6 (2015), https://www.leg.state.nv.us/Division/Fiscal/NevadaPlan/Nevada_Plan.pdf [<https://perma.cc/7TDB-SQEE>].

³⁰ NEV. REV. STAT. § 387.121 (2015).

taxes.³¹ The DSA, in turn, is comprised primarily of the appropriations of state revenue³² made by the Legislature for the operation of Nevada’s public schools, pursuant to Article XI of the Nevada Constitution.³³

The Nevada Constitution requires the educational appropriations the Legislation “deems to be sufficient” to be passed prior to any other government appropriations.³⁴ In accordance with the requirements imposed by Article XI, the 78th Legislature passed the omnibus educational appropriations act Senate Bill (“S.B.”) 515 to “ensur[e] sufficient funding” to Nevada’s schools for the 2015–17 biennium.³⁵

S.B. 302: Education Savings Accounts

The school-choice debate featured prominently in the 2015 Legislative Session, where Governor Sandoval called on the Legislature to enact a broad based solution to improve Nevada’s public education system.³⁶ In addition to the mandated funding of public schools, the 78th Legislature passed laws that allowed money to attach to individual students, in hopes of promoting school choice. The first of these bills, Assembly Bill (“A.B.”) 165, created the Nevada Educational Choice Scholarship Program.³⁷ The second and more controversial bill passed was S.B. 302, which created ESAs.³⁸

³¹ NEV. REV. STAT. § 387.1233 (2015).

³² DSA funding is comprised of monies from: the “State General Fund, [a] share of the annual slot tax, [i]nvestment income from the permanent school fund, [f]ederal mineral land lease receipts, [o]ut-of-state [Local School Support Tax] LSST revenue that cannot be attributed to a particular county, [m]edical marijuana excise tax, [and] [t]ransfers of [Initiative Petition] IP 1 (2009) room tax revenues.” LEGISLATIVE COUNSEL BUREAU, *supra* note 29, at 9.

³³ See NEV. REV. STAT. §§ 387.030, 387.013 (2015).

³⁴ NEV. CONST. art XI, § 6(2).

³⁵ S.B. 515, 2015 Leg., 78th Sess. (Nev. 2015).

³⁶ Brian Sandoval, Governor, 2015 State of the State Address, at 11 (2015) (transcript available at <http://gov.nv.gov/uploadedFiles/govnv.gov/Content/About/2015-SOS.pdf> [<https://perma.cc/U3NV-8E8M>]).

³⁷ Assemb. B. 165, 2015 Leg., 78th Sess. (Nev. 2015). A.B. 165 is a tax-credit scholarship program that allows corporations to claim a 100 percent tax credit if they contribute to approved scholarship grant organizations. These organizations then provide private scholarships to low-income families that meet certain requirements. *Id.*

³⁸ S.B. 302, 2015 Leg., 78th Sess. (Nev. 2015).

Although Nevada is the fifth state to create an ESA program, it is widely considered the first “universal” program.³⁹ Under S.B. 302, any student enrolled in a Nevada public school for one-hundred consecutive schools days can use the student’s share of his or her per-pupil funding to cover education expenses,⁴⁰ including private school tuition.⁴¹ S.B. 302 directs the State Treasurer to administer the program,⁴² which grants eligibility to over 450,000 students statewide.⁴³ S.B. 302 specifically includes language providing that “the provisions of the bill may not be deemed to infringe on the independence or autonomy of any private school or to make the actions of a private school the actions of the government of this State.”⁴⁴

ESA Eligibility in Nevada

Under S.B. 302, all students ages seven through eighteen in Nevada are eligible for the ESA program, as long as they have been enrolled in a public school for at least one-hundred consecutive days prior to applying for funds.⁴⁵ Because private and homeschooled students are not included in the “count day” DSA funding, they are ineligible to participate in the ESA program. Although not in the bill itself, the Nevada State Treasurer created two exemptions to this one-hundred-day rule.⁴⁶ First, was created because the text of S.B. 302 only includes

³⁹ *Nevada - Education Savings Accounts*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/school-choice/programs/nevada-education-savings-accounts/> [<https://perma.cc/SW3R-B29A>] (last visited Apr. 30, 2016). The ESA programs in other states are considered more restrictive. In Florida, Mississippi, and Tennessee, for instance, ESAs are only available to special-needs students. Feltscher, *supra* note 12. Arizona’s original program was only available to children with special needs; however, after its first year, the program was expanded to include children in underperforming schools, children of active duty military members and those killed in the line of duty, and children adopted out of the foster care system. *Id.*

⁴⁰ S.B. 302 § 7.

⁴¹ *Id.* § 11.

⁴² *Id.* §§ 7, 15.

⁴³ NEV. STATE TREASURER, EDUCATION SAVINGS ACCOUNT - PARENT HANDBOOK 4 (Version 1.2 2016) [hereinafter ESA HANDBOOK], http://www.nevadatreasurer.gov/uploadedFiles/nevadatreasurergov/content/SchoolChoice/Parents/Parent_Handbook.pdf [<https://perma.cc/D7UC-QAR6>].

⁴⁴ S.B. 302 § 14.

⁴⁵ *Id.* § 7.

⁴⁶ ESA HANDBOOK, *supra* note 43, at 5.

eligibility for those students currently required to attend school by Nevada law.⁴⁷ However, because the S.B. 302 nor the relevant Nevada Revised Statutes “did not address” how to treat students ages five through seven, the State Treasurer expanded the program to include these students, who are accounted for in the annual DSA budget.⁴⁸ The second exemption covers children of active-duty military parents who are serving at a military base in Nevada.⁴⁹ The Treasurer cites the Interstate Compact for Military Children as the authority that allows this exemption.⁵⁰ The Compact for Military Children intends to “remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents.”⁵¹

Although all students who meet the one-hundred-day requirement are eligible for the DSA funds, the percentage of funding varies. Students with a disability⁵² and students from families whose household income is less than 185 percent of the federal poverty line are eligible to receive 100 percent of the per-pupil funding.⁵³ All other students that meet the one-hundred-day requirement are able to receive 90 percent of the per-pupil funding.⁵⁴ For non-traditional public school students, such as those who are not enrolled for a full load of classes in the public school system, the ESA funding amount is pro-rated according to the number of classes students

⁴⁷ S.B. 302 § 7. Under Nevada law, children ages seven through eighteen are required to attend public school. NEV. REV. STAT. § 392.040 (2015).

⁴⁸ ESA HANDBOOK, *supra* note 43, at 5.

⁴⁹ *Id.*

⁵⁰ ESA HANDBOOK, *supra* note 43, at 5.

⁵¹ S.B. 303, 2009 Leg., 75th Sess. (Nev. 2009).

⁵² “Students with a disability” as defined by NEV. REV. STAT. § 388.440 (2015).

⁵³ S.B. 302 § 8, 2015 Leg., 78th Sess. (Nev. 2015). For the 2015–16 school year, 100 percent of the per-pupil funding is estimated to be \$5,700. ESA HANDBOOK, *supra* note 43, at 7.

⁵⁴ S.B. 302 § 8. For the 2015–16 school year, 90 percent of the per-pupil funding is estimated to be \$5,100. ESA HANDBOOK, *supra* note 43, at 7.

attended in the public school.⁵⁵ Eligibility is valid for one school year, but may be terminated early or renewed for the next school year.⁵⁶

ESA Logistics

ESAs are funded from the DSA.⁵⁷ If an eligible child's parent wants to participate in the ESA program, they must fill out an application with the Nevada State Treasurer.⁵⁸ If approved, the parent will enter into a written contract with the State Treasurer agreeing that: (1) the child will be educated in Nevada by a participating entity; (2) the grant money awarded to the child will be deposited into an individual savings account; (3) the grant money will be spent according to the established regulations; and (4) the money will be frozen during breaks in the school year.⁵⁹ ESA accounts are funded on a quarterly basis,⁶⁰ and parents must apply during one of the corresponding open-enrollment periods.⁶¹ Once the funds are placed in an ESA, the child's grant amount must be deducted from the total apportionment to the child's resident school district.⁶² Accordingly, the child must be unenrolled in the public school one day prior to funds being placed in the ESA.⁶³

Families may only use the grant funds in the ESA account at a "participating entity." Under S.B. 302, a participating entity is defined as: (1) a private school licensed pursuant to NRS Chapter 394 or exempt from such licensing pursuant to NRS 394.211; (2) an eligible institution; (3) a program of distance education that is not operated by a public school or the Department of

⁵⁵ ESA HANDBOOK, *supra* note 43, at 5. For instance, if a child is enrolled one class in the public school system, they are eligible to receive one-sixth of the calculated ESA amount. *Id.*

⁵⁶ S.B. 302 § 7.

⁵⁷ *Id.* § 16.1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* § 8.

⁶¹ ESA HANDBOOK, *supra* note 43, at 6.

⁶² S.B. 302 § 16.

⁶³ ESA HANDBOOK, *supra* note 43, at 7.

Education; (4) an accredited tutor or tutoring facility; or (5) the parent of a child.⁶⁴ Any of the above entities that wish to become a participating entity must apply to the Treasurer for approval.⁶⁵ The Treasurer will compile and make available a list of participating entities annually.⁶⁶

ESA funds may be used for a variety of educational purposes, such as tuition, fees, textbooks, tutoring, distance education, certain test fees, transportation, educational therapies and services, tutoring, curriculum, and supplies.⁶⁷ Under the ESA program, “tuition” refers to the money charged by private schools, distance education programs, and eligible institutions.⁶⁸ S.B. 302 defines an “eligible institution” as:

A university, state college or community college within the Nevada System of Higher Education; or [a]ny other college or university that: [w]as originally established in, and is organized under the laws of, this State; [i]s exempt from taxation pursuant to 26 U.S.C. § 501(c)(3); and [i]s accredited by a regional accrediting agency recognized by the United States Department of Education.⁶⁹

Many of the approved uses for ESA funds require parents to pay costs upfront, and apply for reimbursement from their child’s account.⁷⁰ Any funds that remain in the ESA at the end of a school year may be rolled over to the next school year, provided the child does not graduate or move out of Nevada, at which point, the remaining funds are transferred to the State General Fund.⁷¹

⁶⁴ S.B. 302 § 11.

⁶⁵ S.B. 302 § 11.

⁶⁶ *Id.* § 13.

⁶⁷ *Id.* § 9.

⁶⁸ ESA HANDBOOK, *supra* note 43, at 8.

⁶⁹ S.B. 302 § 3.5. It is worth noting that students are only able to use ESA funds at eligible institutions if they have not already graduated from high school. *Id.* § 8.

⁷⁰ *See generally* ESA HANDBOOK, *supra* note 43.

⁷¹ S.B. 302 § 8.

ESA Oversight

Along with administering the ESA program, the Treasurer is also responsible for providing oversight for the program. The law includes specific requirements for participating entities, and the State Treasurer is tasked with ensuring the requirements are met.⁷² Further, all students in the ESA program are required to take national, norm-referenced tests in Math and English/Language Arts.⁷³ The State Treasurer must compile the data according to various factors and submit results to the Nevada Department of Education.⁷⁴ Further, after three years the State Treasurer must submit a report of the graduation rates of students who participated in the ESA program.⁷⁵

Scope of Analysis

S.B. 302 implicates several provisions of Article XI that mandate the establishment and funding of Nevada’s public school system, including: Section 2, which bans school-district-wide sectarian institution and encourages public school attendance;⁷⁶ Section 3, which requires the funding “pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses[;]”⁷⁷ Section 6, which mandates schools be maintained by “direct legislative appropriation from the general fund[;]”⁷⁸ and Section 10, which prohibits public funds being used in religiously-affiliated schools.⁷⁹

This piece will analyze potential conflicts between S.B. 302 and the Nevada Constitution in order to explore the constitutionality of ESAs. This analysis involves questions of

⁷² *Id.* §§ 10–12.

⁷³ *Id.* § 12.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ NEV. CONST. art. XI, § 2.

⁷⁷ *Id.* § 3.

⁷⁸ *Id.* § 6.

⁷⁹ *Id.* § 10.

constitutional and statutory interpretation. S.B. 302 certainly implicates Article XI of the Nevada Constitution. Article XI provides that the Legislature shall encourage education “by suitable means[.]” The question is whether S.B. 302’s education savings accounts are a suitable means to achieve that goal. To be constitutional, S.B. 302 must comply with Article XI’s various sections, which are to “be read as a whole, so as to give effect to and harmonize each provision.”⁸⁰

Additionally, in questions involving potentially conflicting constitutional and statutory provisions, because “[t]he goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification[.]”⁸¹ Nevada courts “consider first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them.”⁸² Accordingly, the original constitutional meaning of the sections of Article XI, as well as any subsequent amendments to those sections, will be provided. Relevant case law and legislative history, from Nevada and other jurisdictions, will be summarized for each constitutional provision. Finally, the piece will predict and analyze the potential constitutionality, or unconstitutionality, of ESAs.

Article XI, Section 2 **Uniform system of public schools**

Section 2 establishes a “uniform system of public schools” and provides “any school district” that allows “instruction of a sectarian character” may be “deprived of its proportion of the interest of the public school fund during such neglect or infraction.”⁸³ Additionally, Section 2 provides that the Legislature may pass laws that “will tend to secure a general attendance of the

⁸⁰ Nevadans for Nev. v. Beers, 122 Nev. 930 (2006).

⁸¹ Thomas v. Nev. Yellow Cab Corp., 327 P.3d 518, 522 (Nev. 2014), *reh’g denied* (Sept. 24, 2014) (internal citations and quotations omitted).

⁸² *Id.*

⁸³ NEV. CONST. art. XI, § 2 (reproduced in full in Appendix A).

children in each school district upon said public schools.”⁸⁴

It is unlikely that ESAs will run afoul of Section 2, as the section simply discusses the actions of public school districts and state-mandated compulsory school attendance. ESAs seemingly do not impinge this provision. The legislative history of Section 2, however, provides a more complete picture of the debates at the time of Nevada’s statehood that implicate many of the important provisions potentially at issue with the adoption of S.B. 302.

Legislative History

Constitutional Convention: Sectarian instruction and compulsory attendance.

Perhaps more than any other section in Article XI, delegates at Nevada’s Constitutional Convention labored over the details of Section 2. The establishment of a uniform school system was not heavily debated. Two other provisions of Section 2, however, provided the most debate: the sectarian instruction clause and the compulsory school attendance clause.⁸⁵ Delegates wanted Nevada to provide for a more educated population by ensuring a secular-based, moral education,⁸⁶ but did not think compelling parents to send their children to public school would comport with traditional notions of the American republic.⁸⁷ The delegates anticipated future interpretations of Section 2 would change with the times, noting that the provision is “elastic and comprehensive, and may be adapted to any want of any particular portion of the community, or any condition of progress of the public mind.”⁸⁸

⁸⁴ *Id.*

⁸⁵ *See, e.g.*, DEBATES & PROCEEDINGS, *supra* note 21, at 565–600, 660, 661, 745.

⁸⁶ *Id.* at 566 (statement of E.F. Dunne, Humboldt Cty.).

⁸⁷ *Id.* at 571 (statement of J.H. Warwick, Lander Cty.).

⁸⁸ *Id.* at 572 (statement of John A. Collins, Storey Cty.).

Sectarian instruction

Members of the Committee on Education, through extensive discussion and debate, provided the nuanced intent of the sectarian instruction clause of Section 2, described as a “penalty for neglect” to be levied against state-established public school districts.⁸⁹ The Committee further clarified that the penalty would only be levied against a district when sectarian instruction was allowed in a school in that district that was established under the auspices of the state-sanctioned, common school system.⁹⁰ John A. Collins, delegate from Storey County, stated that Section 2 was intended to allow public schools to “properly encourage the practice of morality, in contradistinction to sectarian doctrines.”⁹¹ Collins was careful to note, however, that this provision has “reference only to public schools, organized under the general laws of the State.”⁹² Indeed, despite the “sectarian” reference in its text, Section 2 “is not to be supposed that the laws enacted under it will stand in the way of, or prevent any Catholic school from being organized or carried on; but the provision prevents the introduction of sectarianism into the public schools.”⁹³

Discussion between Albert Hawley, delegate from Douglas County, and J.H. Warwick, delegate from Lander County, provides more context. Seeking clarification, Hawley inquired whether, under Section 2, the “mere fact of the existence of that Catholic school in the district could have any possible influence in preventing the payment of the school-money under the

⁸⁹ *Id.* at 579.

⁹⁰ *Id.* at 660 (statement of Cornelius M. Brosnan, Storey Cty.).

⁹¹ *Id.* at 566 (statement of John A. Collins, Storey Cty.).

⁹² *Id.* at 568 (statement of John A. Collins, Storey Cty.).

⁹³ *Id.*

law?”⁹⁴ Warwick answered in the negative, noting such an interpretation “would be manifestly unjust.”⁹⁵

The debate regarding the prohibition of funding schools that allow sectarian instruction continued long into the Convention. Indeed, after nearly twenty days of debate, members of the Committee on Education decided to more explicitly prohibit sectarian instruction in all state-established schools—not just the “common schools” outlined in Section 2, but also the state university established and provided for in Sections 4, 5, and 8.⁹⁶ The debate resulted in a late amendment that ultimately became Article XI, Section 9. Section 9 strictly prohibits sectarian instruction in “any school or university that may be established under [the Nevada] Constitution.”⁹⁷

Compulsory school education

Debate regarding compulsory school attendance was seemingly as fervent as debate regarding sectarian instruction in public school. While delegates wanted to ensure proper instruction to Nevada’s schoolchildren, many were skeptical “that the proposition to compel parents to send their children to our public schools, or to any other schools, is inimical to the spirit of our Republican institutions.”⁹⁸ To this end, the language of Section 2 was modified to merely encourage school attendance, rather than compel public school attendance. Indeed, the purpose of Section 2 was not “to compel attendance on the public schools at all,” but rather, “to merely require that all children shall receive educational instruction to a certain extent, each year,

⁹⁴ *Id.* (statement of Albert Hawley, Douglas Cty.).

⁹⁵ *Id.* (statement of J.H. Hardwick, Lander Cty.).

⁹⁶ *Id.* at 660 (statement of John A. Collins, Storey Cty.).

⁹⁷ *Id.*; *see also* NEV. CONST. art XI, § 9.

⁹⁸ DEBATES & PROCEEDINGS, *supra* note 21, at 571 (statement of J.G. McClinton, Esmeralda Cty.).

and the parents may send them to school wherever they please.”⁹⁹ Though Section 2 establishes uniform schools, it does not require attendance in those schools; the delegates’ intent favored some amount of school choice, as opposed to rigidly compelling public school attendance.

Ultimately, the delegates of Nevada’s Constitutional Convention ratified Section 2 to read:

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 neglecting to establish and maintain such a school, or 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.¹⁰⁰

Subsequent amendments

Despite the lengthy discussion surrounding both the sectarian clause and the compulsory school attendance clause of Section 2 that occurred at the Constitutional Convention, Section 2’s text has remained mostly unchanged since its adoption in 1866. Indeed, the only change to the text was removal of the phrase “neglecting to establish and maintain such a school” as proposed and passed by the 1935 Legislature,¹⁰¹ agreed to and passed by the 1937 Legislature,¹⁰² and approved and ratified during the 1938 general election.¹⁰³ The current version of Section 2 is simply the text that remained following the 1938 amendment.¹⁰⁴

Relevant Case Law

Nevada courts have not directly interpreted Section 2 in the school-funding context.

⁹⁹ *Id.* (statement of E.F. Dunne, Humboldt Cty.).

¹⁰⁰ NEV. CONST. art. XI, § 2 (1866), *reprinted in* DEBATES & PROCEEDINGS, *supra* note 21, at 845.

¹⁰¹ 1935 Nev. Stat. 440.

¹⁰² 1937 Nev. Stat. 550.

¹⁰³ *See* NEV. CONST. art. XI, § 2.

¹⁰⁴ *Id.*

Although the Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the state's payment of a state orphan home teacher's salary out of the general school fund was impermissible under Article XI, sections 2–6,¹⁰⁵ the payment at issue was likely only impermissible under Section 3, which, as discussed below, mandated payment of state funds for only educational purposes. The *Westerfield* Court simply cited Section 2 to note the constitutional guarantee for a uniform system of public schools, not to buttress any argument at issue in the case.¹⁰⁶ Accordingly, the issue of whether diverting funding under Section 2 to fund the new ESA program violates Section 2 would be an issue of first impression for the court.

Does S.B. 302 violate Article XI, Section 2?

Likely no. S.B. 302 neither infringes on the uniform establishment of public schools nor permits any sectarian institution in public schools. Indeed, Section 2 is meant to apply only to instruction and attendance in state-established public schools. S.B. 302 will likely only implicate private schools outside the purview of state control. S.B. 302 does not permit sectarian instruction in public schools and, thus, does not implicate the sectarian instruction clause of Section 2.

The compulsory school attendance clause will also likely not be implicated by any S.B. 302 provision. Section 2 requires that the Legislature encourage Nevada students to attend schools. ESAs simply provide a means for those same students to attend a different school. Finally, the framers of Nevada's Constitution intended for Section 2's language to be "elastic," providing the provision with some interpretive latitude. Thus, S.B. 302 likely does not violate Article XI, Section 2.

It is possible, however, that the Nevada Supreme Court could hold that diverting funding

¹⁰⁵ 23 Nev. 468 (1897).

¹⁰⁶ *Id.* at 470.

away from the public school system violates the establishment of a uniform school system and, thus, violates Section 2. The Florida Supreme Court employed this rationale when ruling Florida's education voucher system unconstitutional.¹⁰⁷ The Florida Supreme Court reasoned that providing funding to private schools that are in direct competition with Florida's free public schools violated Florida's Constitution because free public schools are the sole, constitutionally-guaranteed means by which public education should be provided.¹⁰⁸ If a Nevada court utilizes the same analysis, then S.B. 302 would likely be unconstitutional under Article XI, Section 2.

Article XI, Section 3

Pledge of certain property and money, escheated estates and fines collected under penal laws for educational purposes; apportionment and use of interest.

Section 3 is Nevada's "land grant" provision and requires that revenue from certain transactions be kept in the Permanent School Fund. The interest from this Fund is transferred to the DSA. Section 3 provides:

All lands granted by Congress to this state for educational purposes, all estates that escheat to the state, all property given or bequeathed to the state for educational purposes, and the proceeds derived from these sources, together with that percentage of the proceeds from the sale of federal lands which has been granted by Congress to this state without restriction or for educational purposes and all fines collected under the penal laws of the state are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses. . . .¹⁰⁹

¹⁰⁷ Bush v. Holmes, 919 So. 2d 392, 410 (Fla. 2006) (holding "the alternative system of private schools funded by the [voucher program] cannot be deemed uniform in accordance with the mandate [to provide uniform common schools]").

¹⁰⁸ Victoria Guilfoyle, *Constitutional Law - Education - State-Wide School Voucher Program Declared Unconstitutional Under the "Uniformity" Provision of Florida's Education Article.*, 38 RUTGERS L.J. 1329, 1337 (2007).

¹⁰⁹ NEV. CONST. art. XI, § 3.

Legislative History

The Nevada territorial legislators considered Section 3 of Article XI of Nevada’s Constitution during the second Constitutional Convention in 1864.¹¹⁰ It was proposed as Section 7 and there are only three comments of record pertaining to its adoption.¹¹¹ These few comments do not shed any light on the context of the section’s adoption, or reveal whether there was any debate.¹¹² In fact, the record seems to evince the language likely came directly from Congress, and the vote operated as a “rubber-stamp” approval of Congress’s school lands proposal,¹¹³ leading to “inefficiency” and “corruption.”¹¹⁴ This created the need for multiple court interpretations and amendments during Nevada’s first thirty years of statehood.¹¹⁵

Section 3 has been amended a total of five times since its adoption.¹¹⁶ The first amendment, ratified in 1889, removed and replaced the provision that divided the interest proportionally among the counties by the number of school-eligible children, with a provision allowing the legislature to set the standard.¹¹⁷ The second amendment, ratified in 1912, expanded the types of bonds acceptable for investment to include bonds from other states and Nevada counties.¹¹⁸ The third amendment ratified in 1916, expanded the State’s ability to invest in loans

¹¹⁰ Christopher J. Walker, *The History of School Trust Lands in Nevada: The No Child Left Behind Act of 1864*, 7 NEV. L.J. 110, 122 (2006).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Federal land grants for public schools were common at the time, and many state constitutions share similar provisions. See ALEXANDRA USHER, CTR. FOR EDUC. POL’Y, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND POLICY (2011), www.cep-dc.org/cfcontent_file.cfm?Attachment=Usher_Paper_FederalLandGrants_041311.pdf [<https://perma.cc/L722-S5HJ>], for a more detailed explanation of federal land grants programs of the era. See also Appendix C for state constitutional provisions most similar to Art. XI, § 3.

¹¹⁴ Walker, *supra* note 110, at 123.

¹¹⁵ *Id.* at 123–24.

¹¹⁶ *Id.* at 125.

¹¹⁷ *Id.* (citing 1885 Nev. Stat. 160–61).

¹¹⁸ *Id.* (citing 1909 Nev. Stat. 340). Previously, the Nevada Constitution only allowed the state to invest federal and Nevada State bonds. *Id.*

secured by the agricultural land of the state.¹¹⁹ The fourth amendment, ratified in 1980, allowed the legislature to determine the policies for the investment provisions and removed the existing policies.¹²⁰ Finally, the fifth amendment, ratified in 1988, codified Nevada’s case law and clarified the principle that these funds cannot be used for non-educational purposes.¹²¹

Relevant Case Law

In addition to the amendments, the Nevada Supreme Court sought to clarify and remedy many of the issues caused by the “rubber stamping” of Section 3.¹²² For example, in 1875, the court held that both the principal and the interest of these funds must not be used for any other purpose other than educational purposes;¹²³ and in the late 1800s, the court helped to define a “proper educational purpose.”

In *State v. Rhoades*, an action was brought before the Nevada Supreme Court to compel the State Treasurer to use the education funds to “cover administrative expenses of the Permanent Education Fund.”¹²⁴ The Court looked to the State’s constitutional framers’ intent and finding no express prohibition, determined that this was a permissible purpose under the Constitution.¹²⁵ Then, in *Westerfield*,¹²⁶ an assistant teacher at the state orphan’s home brought a writ of mandamus¹²⁷ to compel the State Treasurer to pay her salary out of the general school

¹¹⁹ *Id.* (citing 1915 Nev. Stat. 513).

¹²⁰ *Id.* (citing 1977 Nev. Stat. 1716).

¹²¹ *Id.* (citing 1985 Nev. Stat. 2361, 2362).

¹²² *Id.* at 123.

¹²³ *State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897); *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 10 Nev. 290, 314 (1875).

¹²⁴ *State v. Rhoades*, 4 Nev. 312, 314 (1868).

¹²⁵ *Id.* at 317 (speculating as to the intent of the framers and determining that “[the constitutional framers] probably had no intention of prohibiting [Nevada] from using a part of the trust estate to make the rest available”); *see also* Walker, *supra* note 110, at 124.

¹²⁶ *Westerfield*, 23 Nev. at 470.

¹²⁷ The state orphan’s home opened in 1870. *See* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 564–65 (2002).

fund.¹²⁸ The court held that “Section 3 of Article XI of the [C]onstitution prohibits the legislature from using the funds . . . which were granted for educational purposes, for any other branch of state expenditure, except that immediately connected with the educational system . . .”¹²⁹ and the orphan’s home was not part of the State’s educational system,¹³⁰ thus the assistant teacher could not be paid from this fund.¹³¹ However, the court did allow the teacher to be paid from the state’s general fund.¹³² Additionally, the Court in *Westerfield* allowed a public superintendent’s salary to be paid from the general school fund, as provided for by the Nevada Legislature.¹³³ Therefore, the key distinction as to whether the general school funds are being used for an educational purpose seems to hinge on whether the person or entity is part of the State’s educational system. No Nevada case law has interpreted this section since 1901.¹³⁴

Does S.B. 302 violate Article XI, Section 3?

Likely no—ESAs are unlikely to interfere with the revenue and interest requirements of Section 3. The revenue generated pursuant to Section 3 is kept in the Permanent School Fund. The interest on that revenue is transferred to the DSA. ESAs require a diversion of some of that revenue because ESAs are also drawn from the DSA. This diversion, however, likely will infringe upon the constitutional mandate for revenue and interest to continue to be appropriated

¹²⁸ *Westerfield*, 23 Nev. at 470. .

¹²⁹ *Id.* at 471.

¹³⁰ *Id.* at 472. “In the apportionment of the school fund as required by the constitution (art. XI, sec. 3), the wards of the state at the orphans’ home should not be counted as a part of the children of Ormsby county, as their education is provided for by the state orphans’ home, and they have not the right to attend the public school.” *Id.* (quoting *State v. Dovey*, 19 Nev. 396 (1887)).

¹³¹ *Westerfield*, 23 Nev. at 472.

¹³² *Id.*

¹³³ *State ex rel. Cutting v. Westerfield*, 24 Nev. 29, 35 (1897) (“[T]here is a material difference between that case and the case at bar. In article XI of the constitution, which provides for the common school system, the office of the superintendent is created. It was created solely for the benefit of the common schools. The superintendent is their chief officer. His official duties are directly connected with them, and the state’s expenditures with reference to his office are immediately connected with the common school system.”).

¹³⁴ See *Ex parte McMahon*, 26 Nev. 243, 245 (1901) (voiding a judgment that directed a penal fine be paid to an informer, under Article XI, § 3 because “the informer” was not an educational purpose).

in a manner consistent with the text of Section 3. Thus, S.B. 302 likely does not violate Section 3.

Article XI, Section 6
Support of university and common schools by direct legislative appropriation; priority of appropriations.

Section 6(1) states that, in addition to “other means provided for the support and maintenance of [the State] university and common schools,” the Legislature shall provide the funding for the “support and maintenance [of the public schools and State university] by direct legislative appropriation from the general fund.”¹³⁵ Additionally, Section 6(2) mandates that the Legislature must pass an appropriation of the funding it “deems to be sufficient” to “fund the operation of the public schools in the State” prior to “any other appropriation . . . enacted to fund a portion of the state budget.”¹³⁶ Finally, Section 6(5) provides that “[a]ny appropriation of money enacted in violation of subsection 2, 3, or 4 is void.”¹³⁷

Legislative History

Section 6’s legislative history can be assessed in three parts: (1) the original text of the provision, which provided a “special tax” of “one-half of one mill on the dollar of all taxable property in the State” for the support and maintenance of the university and common schools;¹³⁸ (2) the 1954 amendment, which made wholesale changes to the text of the section, deleted the special tax language, and mandated school funding be provided by “direct legislative appropriation[;]”¹³⁹ and (3) the 2006, post-*Guinn v. Legislature* amendments, which added

¹³⁵ NEV. CONST. art. XI, § 6(1) (reproduced in full in Appendix A); see also Appendix D, for a list of state constitutional provisions most similar to Article XI, § 6.

¹³⁶ NEV. CONST. art. XI, § 6(2); subsections (3) and (4) pertain to appropriations enacted during special sessions of the Legislature, and are thus inapplicable here.

¹³⁷ NEV. CONST. art. XI, § 6(5).

¹³⁸ NEV. CONST. art. XI, § 6 (1866), *reprinted in* DEBATES & PROCEEDINGS, *supra* note 21, at 846.

¹³⁹ See 1951 Nev. Stat. 591; 1953 Nev. Stat. 716; NEV. SEC’Y OF STATE, PROPOSITIONS TO BE VOTED UPON IN STATE OF NEVADA AT GENERAL ELECTION, NOVEMBER 2, 1954 (1954),

subsections 2–6 and expressly detailed when educational appropriations must occur during legislative sessions.¹⁴⁰

Constitutional Convention: Special Tax

Early versions of Section 6, titled “Special Tax,” contemplated a small tax that would be used to fund both the university and public school system.¹⁴¹ Section 6 initially read:

The Legislature shall provide a special tax of one half of one mill on the dollar of all taxable property in the State, in addition to the other means provided for the support and maintenance of said university and common schools; provided, that at the end of ten years they may reduce said tax to one quarter of one mill on each dollar of taxable property.¹⁴²

Much of the early debate regarding Section 6 concerned the proper amount of discretion that should be given to the Legislature to determine the use of the Special Tax. Indeed, delegates amended Section 6’s mandatory language several times,¹⁴³ disagreeing about whether legislative discretion over public school funding would be allowed.¹⁴⁴ Some delegates were unconvinced that future legislatures would take seriously the obligation to provide funding for schools throughout the state.¹⁴⁵ Delegates wanted to ensure that “men coming into our State may come with a full conviction and assurance that a proper foundation has been laid for affording the means of instruction to their children as they grow up.”¹⁴⁶ This argument won the day, and the mandatory language was left in Section 6, with only a small compromise—that the Legislature

<https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1954.pdf> [<https://perma.cc/3HYB-SZKZ>].

¹⁴⁰ Article XI, § 6(2)–(6) added by successful initiative petitions in the 2004 and 2006 General Elections. *See* NEV. SEC’Y OF STATE, STATEWIDE BALLOT QUESTIONS 3–7 (2004),

<https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf> [<https://perma.cc/Z9RW-GMSN>]; NEV. SEC’Y OF STATE, STATEWIDE BALLOT QUESTIONS 4–8 (2006),

<https://nvsos.gov/Modules/ShowDocument.aspx?documentid=206> [<https://perma.cc/7GC9-ESV4>].

¹⁴¹ NEV. CONST. art. XI, § 6 (1866), *reprinted in* DEBATES & PROCEEDINGS, *supra* note 21, at 846.

¹⁴² *Id.*

¹⁴³ DEBATES & PROCEEDINGS, *supra* note 21, at 587–88.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 588 (statement of John A. Collins, Storey Cty.).

would be given discretion to lower the mandatory tax after ten years.¹⁴⁷

Section 6 did not see large changes for nearly a century. The subsequent amendments simply modified the tax rate from “one-half mill” to a rate that could “not exceed two-mills.”¹⁴⁸ Then, in the 1930s, language allowing the rate to be changed after ten years was ultimately removed.¹⁴⁹

1950s: Direct Legislative Appropriation

Section 6 saw massive changes in the early 1950s. Nevada’s public education system was modernizing,¹⁵⁰ and the education-funding model in place under Section 6 became unfeasible.¹⁵¹ The Special Tax was volatile, and left the public school system subject to the whims of the real estate market.¹⁵² Therefore, the Legislature sought to provide educational funding in a manner consistent with “almost all of the [other] state departments and agencies”—by direct legislative appropriation.¹⁵³ The direct appropriation process was thought to remove the uncertainty inherent in relying on volatile tax revenue—the process is more straightforward because the “Legislature knows exactly what it is appropriating and the [state] agencies know exactly what they are receiving.”¹⁵⁴ This streamlined funding approach was proposed and passed by the 1951 Legislature,¹⁵⁵ agreed to and passed by the 1953 Legislature,¹⁵⁶ and approved and ratified in the

¹⁴⁷ *Id.*

¹⁴⁸ 1885 Nev. Stat. 161; 1887 Nev. Stat. 169.

¹⁴⁹ 1935 Nev. Stat. 440; 1937 Nev. Stat. 550.

¹⁵⁰ MARY ELLEN GLASS, NEVADA’S TURBULENT ’50S: DECADE OF POLITICAL AND ECONOMIC CHANGE 49–60 (1981).

¹⁵¹ LEGISLATIVE COUNSEL BUREAU, REPORT OF THE NEVADA LEGISLATIVE COUNSEL BUREAU BULLETIN NO. 20, at 5 (1953), <http://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1955/Bulletin020.pdf> [<https://perma.cc/FG24-KRR7>].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 1951 Nev. Stat. 591.

¹⁵⁶ 1953 Nev. Stat. 716.

1954 general election.¹⁵⁷ The 1954 voter-approved language is the current language of Section 6(1).

Post-Guinn: Priority of Appropriations

The most recent substantive amendments to Section 6 came in the aftermath of the 2003 legislative gridlock that culminated in the much-discussed¹⁵⁸ *Guinn v. Legislature* (“*Guinn I*”).¹⁵⁹ In 2003, the Legislature failed to fund education during the regular legislative session and in two subsequent special sessions, primarily due to a deadlock over how to raise the necessary revenue.¹⁶⁰ Nevada needed new tax revenue to meet its educational obligations, thus, Section 6’s educational-funding mandate conflicted with another constitutional provision¹⁶¹ requiring a two-thirds vote of both legislative houses to impose any new tax.¹⁶² A legislative impasse occurred.

Consequently, Governor Kenny Guinn, took the “extraordinary step” of petitioning the Nevada Supreme Court for a writ of mandamus against the Legislature.¹⁶³ The Nevada Supreme Court held that the earlier constitutional requirement mandating financial support of public schools was a “substantive” right that trumped the “procedural” right requiring a two-thirds voting majority.¹⁶⁴ The Court directed the Legislature to proceed under a simple majority rule.¹⁶⁵

¹⁵⁷ NEV. SEC’Y OF STATE, *supra* note 139, at 6.

¹⁵⁸ Jeffrey W. Stempel, *The Most Rational Branch: Guinn v. Legislature and the Judiciary’s Role as the Helpful Arbiter of Conflict*, 4 NEV. L.J. 518, 518 n.2 (2005).

¹⁵⁹ 119 Nev. 460 (2003); *see* NEV. SEC’Y OF STATE, STATEWIDE BALLOT QUESTIONS 4 (2004), <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf> [<https://perma.cc/GSN5-N5Y6>] (arguing in favor of the amendment because “[t]he budget deadlock [Nevada] experienced during the 2003 legislative sessions must never be repeated”).

¹⁶⁰ William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution*, 5 NEV. L.J. 308, 308–09 (2005).

¹⁶¹ NEV. CONST. art. IV, § 18(2).

¹⁶² Popkin, *supra* note 160, at 308.

¹⁶³ Troy L. Atkinson, *The Future of Guinn v. Legislature*, 4 NEV. L.J. 566, 567 (2005).

¹⁶⁴ *Guinn I*, 119 Nev. at 287. This method of constitutional interpretation was overruled by Nevadans for *Nev. v. Beers*, where the Nevada Supreme Court held “the Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.” 122 Nev. at 938.

¹⁶⁵ *Guinn I*, 119 Nev. at 288.

The *Guinn I* decision was not well received by the public nor the press.¹⁶⁶ As a result, an amendment modifying Section 6 was proposed by initiative petition and approved and ratified in the 2004¹⁶⁷ and 2006¹⁶⁸ General Elections. The amendment added subsections 2–6, which mandate that the Legislature fund education, with the monies it “deems to be sufficient,” prior to any other appropriation and that any appropriations made prior to the educational appropriation are void.¹⁶⁹

Relevant Case Law

Early case law involving Section 6 only mentions the provision in passing.¹⁷⁰ Section 6 was cited in *Westerfield* but, similar to Section 2, the *Westerfield* court simply cited Section 6 to note that a tax was to be levied to support public education in Nevada, not to buttress any argument at issue in the case.¹⁷¹

More recent case law offers more substance, but still does not provide judicial interpretation of Section 6. Section 6 was cited most heavily in *Guinn I* and its progeny. After the Nevada Supreme Court directed the Legislature to proceed under a simple majority in *Guinn I*,¹⁷² the Legislature obliged by passing balanced-budget and educational-funding bills.¹⁷³ In *Guinn II*, members of the Legislature petitioned for re-hearing, and the Nevada Supreme Court denied the petition because “once the Legislature adopted revenue-raising legislation by a two-thirds

¹⁶⁶ Stempel, *supra* note 158, at 518 n.2.

¹⁶⁷ 2004 Official General Election Results, NEV. SEC’Y OF STATE (last visited Apr. 26, 2016), <http://nvsos.gov/SOSelectionPages/results/2004General/ElectionSummary.aspx> [https://perma.cc/2B46-7Z2U].

¹⁶⁸ 2006 Official Statewide General Election Results, NEV. SEC’Y OF STATE (last visited Apr. 26, 2016), <http://nvsos.gov/SOSelectionPages/results/2006StateWideGeneral/ElectionSummary.aspx> [https://perma.cc/N7YV-SAFI].

¹⁶⁹ NEV. CONST. art. XI, § 6.

¹⁷⁰ See, e.g., *State ex rel. Keith v. Westerfield*, 23 Nev. 468 (1897).

¹⁷¹ *Id.*

¹⁷² *Guinn I*, 119 Nev. 277 (2003).

¹⁷³ *Guinn v. Legislature of State of Nev.*, 119 Nev. 460 (2003) [hereinafter *Guinn II*].

supermajority in order to fund the public school system and balance the State’s budget, the rehearing petition became moot.”¹⁷⁴

Legislators, along with voters and taxpayers, unsuccessfully sought relief in the federal courts as well. In *Angle v. Legislature*, the United States District Court for the District of Nevada dismissed the legislators’ application for injunctive relief on two grounds: (1) legislator plaintiffs could not overcome the “unequivocal jurisdictional bar”¹⁷⁵ precluding “lower federal courts from exercising jurisdiction over any claim that is ‘inextricably intertwined’ with the decision of the state court;”¹⁷⁶ and (2) voter and taxpayer plaintiffs failed to state a claim on which relief could be granted.¹⁷⁷ In *Amodei v. Nevada State Senate*, the Ninth Circuit affirmed the *Angle* decision.¹⁷⁸

Does S.B. 302 violate Article XI, Section 6?

Seemingly no. Though a plain reading of Section 6(1) may find S.B. 302 unconstitutional, the legislative history of Section 6(1) provides a reading of “direct appropriation” that would provide sufficient latitude for the Legislature to fund Nevada’s public schools in a manner that allows ESAs for Nevada students. Additionally, S.B. 302 seems entirely outside the scope of Section 6(2), which simply mandates the Legislature appropriate the funds it “deems to be sufficient” prior to other state appropriations. Thus, it seems S.B. 302 does not violate Article XI, Section 6(2) and, if the court finds that the language of Section 6(1) to allow diversion of funds pursuant to S.B. 302, may not violate Section 6.

Section 6(1): Direct appropriation.

¹⁷⁴ *Id.* at 476.

¹⁷⁵ 274 F. Supp. 2d 1152, 1155 (D. Nev. 2003), *aff’d*, *Amodei v. Nev. State Senate*, 99 F. App’x 90 (9th Cir. 2004).

¹⁷⁶ *Id.* (citing *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003)).

¹⁷⁷ *Id.*

¹⁷⁸ *Amodei v. Nevada State Senate*, 99 F. App’x 90 (9th Cir. 2004).

The text of Section 6(1) provides that “in addition to other means provided for the support and maintenance” of public schools, the Legislature “shall provide for their support and maintenance by direct legislative appropriation from the general fund[.]”¹⁷⁹ Although ESAs could be included as “other means provided for the support and maintenance” of the public school system,¹⁸⁰ the analysis of S.B. 302’s constitutionality under Section 6(1) will likely hinge on the court’s interpretation of “direct appropriation.”

Direct appropriation is not clearly defined in Section 6. A plain reading of the term would suggest the Legislature must fund the State’s educational system through an appropriation of money directly from the General Fund into the DSA as contemplated by the Nevada Plan. An appropriation is a “legislative grant of money for a specific purpose.”¹⁸¹ Reading those two provisions together would indicate that the money must be directly appropriated to the General Fund for a specific purpose—funding public schools in Nevada, not funding public schools *and* ESAs in Nevada. If the court determines this process to be the only permissible direct appropriation, then it seems likely that the diversion of funds necessary to fund ESAs would violate Section 6(1) and thus, be unconstitutional.

If the court looks to the legislative history of direct appropriation, as used in Section 6(1), the court’s holding might be different. The 1950’s amendments to Section 6(1) modified the language away from the Special Tax and instituted the direct appropriation process in order to provide more certainty and logistical ease to the educational-funding process. Thus, the direct appropriation language of Section 6(1) should be read with the understanding that the current

¹⁷⁹ NEV. CONST. art. XI, § 6(1).

¹⁸⁰ *Id.* This is an unlikely result given the anticipated diversion of funds to mostly private schools.

¹⁸¹ NEV. LEGISLATURE, LEGISLATIVE MANUAL, APPENDIX F (2015), <https://www.leg.state.nv.us/Division/Research/Publications/LegManual/2015/AppF.pdf> [<https://perma.cc/7KEA-XM8W>] (defining “Appropriation”).

requirement is for the state to appropriate money to the general fund, as opposed to relying on taxes to determine the amount of revenue available to schools, which was the case prior to the 1950s amendments. Indeed, the Legislative Counsel Bureau noted prior to the amendments being approved, that such a process is easier because in the direct appropriations process, the “Legislature knows exactly what it is appropriating and the [state] agencies know exactly what they are receiving.”¹⁸² That seems to be the case here. The 78th Legislature directly appropriated funding for the public school system in Nevada in S.B. 515, and the school districts know, with reasonable certainty,¹⁸³ what funds they will receive. S.B. 302 does not require an appropriation that would contravene this reading of Section 6(1) and thus, legislative history suggests S.B. 302 does not violate Section 6(1).

Section 6(2): Priority of appropriation

S.B. 302 likely does not violate Section 6(2), as the bill appears to be entirely outside the purview of the Section. Section 6(2) mandates the Legislature appropriate educational funds it “deems to be sufficient” prior to any other appropriations.¹⁸⁴ The 78th Legislature achieved these aims through S.B. 515, the educational-funding appropriations bill.¹⁸⁵ S.B. 515 was passed prior to other appropriations acts, and ensures “sufficient” funding for the public school system in Nevada.¹⁸⁶ S.B. 302 neither complicates nor precludes either of these actions from occurring. Accordingly, S.B. 302 is likely constitutional under Section 6(2).

S.B. 302 likely does not violate Section 6(1) nor 6(2) and, therefore, is likely to be constitutional under Article XI, Section 6.

¹⁸² LEGISLATIVE COUNSEL BUREAU, *supra* note 151, at 5.

¹⁸³ Reasonable certainty in annual funding is an accepted part of the educational funding process in Nevada; though anticipated funding is provided for the biennium, actual educational funding needs fluctuate with annual enrollment figures.

¹⁸⁴ S.B. 302, 2015 Leg., 78th Sess. (Nev. 2015).

¹⁸⁵ S.B. 515, 2015 Leg., 78th Sess. (Nev. 2015).

¹⁸⁶ *Id.*

Article XI, Section 10
No public money to be used for sectarian purposes

*No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.*¹⁸⁷

Article XI, Section 10 is Nevada’s “Little Blaine Amendment”—a state constitutional provision that prohibits public money “of any kind or character” being used “for sectarian purpose.”¹⁸⁸ Little Blaine Amendments occur in various state provisions and mirror the language of a failed amendment (the “Blaine Amendment”) to the United States Constitution in the late 1800s. The history of the Blaine Amendment, however, reveals a discriminatory intent and has been the subject of much school-voucher and ESA litigation throughout the country.

Accordingly, discussion of Section 10 will begin with a historical background of the federal Blaine Amendment. Next, it will analyze the legislative history Nevada’s Little Blaine Amendment, as well as relevant case law. Then, it will provide the history and case law stemming from Little Blaine Amendments in Arizona, Florida, and Ohio. Finally, the piece will examine the constitutional issues implicated by S.B. 302 under Section 10.

Federal Blaine Amendment

The failed “Blaine Amendment” emerged from anti-Catholic sentiment in American cities and schoolhouses in nineteenth-century America.¹⁸⁹ The sentiment arose out of ever-increasing tension between a Protestant majority and the growing Catholic population.¹⁹⁰ The United States had been overwhelmingly Protestant since the time of its founding, but the influx

¹⁸⁷ NEV. CONST. art. XI, § 10. See also Appendix E, for a list of state constitutional provisions most similar to Article XI, § 10.

¹⁸⁸ NEV. CONST. art. XI, § 10.

¹⁸⁹ Bybee & Newton, *supra* note 127, at 552.

¹⁹⁰ *Id.* at 556.

of immigrants and Catholic converts began to change America's the religious makeup.¹⁹¹ Indeed, at the time of the founding, less than 1 percent of Americans were Catholics; by the end of the Civil War, that figure rose to more than 10 percent of the population.¹⁹² As its numbers swelled, Catholic political influence increased as well; by 1876, a consensus emerged that the Catholic vote had largely "determined the results of elections since 1870."¹⁹³

Perhaps the greatest source of tension between the Protestant majority and the Catholic minority was the public school system.¹⁹⁴ As early as 1871, members of Congress, including Nevada Senator William Stewart, proposed amending the U.S. Constitution to prohibit federal, state, and local governments from funding sectarian schools.¹⁹⁵ A year later, the local school boards of Cincinnati, Chicago, and New York voted to prohibit Bible readings and religious exercises in their public schools.¹⁹⁶ In response, Catholics sought to create private schools because "public schools were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching."¹⁹⁷ The political ascent of the growing Catholic population in urban centers encouraged the Protestant majority to impose a strict denial of government support to sectarian institutions.¹⁹⁸

In September of 1875, President Ulysses S. Grant responded to this mounting political pressure when he publicly vowed to "[e]ncourage free schools, and resolve that not one dollar be

¹⁹¹ *Id.*

¹⁹² Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 135 (2000).

¹⁹³ Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 32 (1957).

¹⁹⁴ Bybee & Newton, *supra* note 127, at 556.

¹⁹⁵ Nevada Senator William Stewart's proposed amendment read, in relevant part:

There shall be maintained in each State and Territory a system of free common schools; but neither the United States nor any State, Territory, county, or municipal corporation shall aid in the support of any school wherein the peculiar tenets of any religious denomination are taught.

Id. The Senate never voted on the proposal. *Id.*

¹⁹⁶ Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 670–71 (1998).

¹⁹⁷ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 151 (1992).

¹⁹⁸ Viteritti, *supra* note 196.

appropriated to support any sectarian schools.”¹⁹⁹ Three months later, when Grant delivered his last annual message to Congress, he warned of “the dangers threatening us” and the “importance that all [men] should be possessed of education and intelligence,” lest “ignorant men . . . sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft.”²⁰⁰ Grant recommended a constitutional amendment “making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all of the children” and “prohibiting the granting of any school funds, or school taxes . . . for the benefit of or in aid . . . of any religious sect or denomination.”²⁰¹ Grant’s descriptions of “demagogue,” “priestcraft,” and “religious sect” in connection with public education were all indirect references to Catholicism.²⁰² Indeed, the political influence of Catholics grew to become an important force in America, and in many states Catholics sought public funding for their schools and charities equal to the funding received by Protestant and secular institutions.²⁰³

In order for Grant's proposed constitutional amendment to be realized, it would need a Congressional sponsor. An opportunistic Congressman, former Speaker of the House James Blaine of Maine²⁰⁴ acted swiftly to sponsor what would have become the Sixteenth Amendment.²⁰⁵ Blaine claimed such an amendment would be necessary to correct a “constitutional defect”—that the Fourteenth Amendment had not yet incorporated the

¹⁹⁹ *Id.*

²⁰⁰ Bybee & Newton, *supra* note 127, at 551 (citing 4 CONG. REC. 175 (1875)).

²⁰¹ Bybee & Newton, *supra* note 127, at 552 (citing 4 CONG. REC. 205 (1875)).

²⁰² *Id.* at 551.

²⁰³ *Id.*

²⁰⁴ Oddly enough, Maine, Blaine’s home state, has no “Little Blaine Amendment” and no compelled support provision. Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 92 (2005). Nonetheless, the state does not fund religious schools and “boasts little charitable choice activity.” *Id.* Further, parochial schools “may not participate in Maine’s rural tuition-reimbursement program.” *Id.*

²⁰⁵ Bybee & Newton, *supra* note 127, at 551–52.

Establishment Clause to apply against the States.²⁰⁶ Blaine argued that without incorporation, the “states were left free to do as they pleased.”²⁰⁷ Within a week, Blaine, introduced the legislation that would become known as the “Blaine Amendment,” which provided:

[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.²⁰⁸

The language of the amendment, just like the language of Grant’s speech, was not a coincidence—it was “an open secret that ‘sectarian’ was code for ‘Catholic.’”²⁰⁹

The amendment was ultimately unsuccessful. The amendment encountered initial legislative success—in August of 1876, the House of Representatives approved the bill with the necessary two-thirds vote.²¹⁰ This is perhaps unsurprising given its powerful sponsor and message echoing popular sentiments of then-President Grant.²¹¹ The proposal, however, died in the Senate after failing to receive the necessary two-thirds vote,²¹² and Congress never sent the Blaine Amendment to the states for ratification.²¹³ Although the amendment failed, its impact left a lasting mark on American constitutional discourse concerning church-and-state issues.

“Little Blaine Amendments”

Although Congress never sent the Blaine Amendment to the states for ratification, many states adopted “Little Blaine Amendments” around the same time President Grant and Blaine

²⁰⁶ Viteritti, *supra* note 196, at 671 n.65 (1998) (quoting F. William O’Brien, *The States and “No Establishment”*: *Proposed Amendments to the Constitution Since 1789*, 4 WASHBURN L.J. 183, 188 (1965)).

²⁰⁷ Viteritti, *supra* note 196, at 671 n.65 (1998).

²⁰⁸ Goldenziel, *supra* note 204, at 64.

²⁰⁹ *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (*citing* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41–43 (1992)).

²¹⁰ Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942 (1951).

²¹¹ Goldenziel, *supra* note 204, at 64.

²¹² Meyer, *supra* note 210, at 944.

²¹³ Bybee & Newton, *supra* note 127, at 559.

called for the constitutional change.²¹⁴ During the 1870s, nine additional states adopted Little Blaine Amendments.²¹⁵ Additionally, Congress began requiring new states, as a condition of entry to the Union, to include some kind of Little Blaine Amendment in their constitution.²¹⁶ As a result, by 1890 at least twenty-nine states had some kind of constitutional prohibition limiting the use of public funds for sectarian-educational purposes.²¹⁷ The next decade saw sixteen more states, plus the District of Columbia, add such provisions.²¹⁸

Nevada's Little Blaine Amendment

Legislative History

Nevada was no exception to the nationwide trend to adopt Little Blaine Amendments. In February 1877, during Nevada's first legislative session, Assemblyman W.H. Botsford from Storey County proposed the "Little Blaine Amendment" for Nevada.²¹⁹ The proposal amended Article XI, Section 10 of the Nevada Constitution to read, "No public funds, of any kind or character whatever, State, county or municipal, shall be used for sectarian purposes."²²⁰ The proposal passed the Nevada Legislature twice, and then went to the voters of the 1880 general election for a vote.²²¹ The amendment was approved 14,216 to 672.²²²

²¹⁴ Some states' "Little Blaine Amendments" slightly predate Grant's calls for a national amendment, but the national debate of the amendment "surely reinforced state activity." *Id.*

²¹⁵ Viteritti, *supra* note 196, at 673 n.78 (1998).

²¹⁶ Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 220 n.9 (1948).

²¹⁷ Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 147 (1996); *see also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 (1992).

²¹⁸ *See* Lemon v. Kurtzman, 403 U.S. 602, 647 (1971) (Brennan, J., concurring).

²¹⁹ Bybee & Newton, *supra* note 127, at 565.

²²⁰ *Id.*

²²¹ *Id.* at 565–66.

²²² *Id.* at 566.

Relevant Case Law

State ex rel. Nevada Orphan Asylum v. Hallock

After the amendment was passed, the Nevada Legislature passed legislation funding an orphanage asylum operated by a Catholic church.²²³ Governor John Kinkead signed the legislation into law, but State Controller J. F. Hallock refused to appropriate the funds.²²⁴ Hallock and Nevada's executive officials believed that such an appropriation would violate the newly-passed Section 10, per the new amendment.²²⁵

The dispute culminated in *State ex rel. Nevada Orphan Asylum v. Hallock*, in which the Nevada Supreme Court unanimously denied the funding on the grounds that it violated Section 10.²²⁶ The Asylum filed an action in the Nevada Supreme Court seeking a writ of mandamus to compel payment by the State Controller, arguing the term "sectarian" referred to those Christian doctrines upon which various Christian denominations disagreed, and that it did not include the agreed-upon Christian doctrines.²²⁷ Under this interpretation, the Asylum reasoned its activities were not "sectarian," and thus, the funding was constitutional.²²⁸ Further, the Asylum argued that the money was being used for food and board, neither of which were "religious activities."²²⁹ Conversely, the Nevada Attorney General argued that the term "sectarian" applied to all religious denominations and because the Asylum was a sectarian institution, it was barred from receiving any funds.²³⁰

²²³ *Id.* at 567.

²²⁴ *Id.* at 568.

²²⁵ *Id.* at 567–68.

²²⁶ *State v. Hallock*, 16 Nev. 373 (1882).

²²⁷ Bybee & Newton, *supra* note 127, at 567–68.

²²⁸ *Id.* at 568.

²²⁹ *Id.*

²³⁰ *Id.* at 568–69.

The Nevada Supreme Court looked to the legislative intent of the bill, and found the intent to be clear—since the Asylum was the only sectarian institution that had ever applied for or received state funding, the amendment was likely adopted to explicitly bar the Asylum from receiving any funds.²³¹ Accordingly, the term “sectarian” necessarily encompassed the activities in which the Asylum participated.²³² The Court defined “sectarian” broadly to mean “a religious sect that defines a distinct organization or party.”²³³ Further, the Court rejected the argument that the funds were not used for sectarian purposes because the funds would be used “for the relief and support of a sectarian institution and in part at least for sectarian purposes.” Given the link between the Asylum’s sectarian nature and services performed, the Court concluded it would be “impossible to separate the legitimate use from that which is forbidden.”²³⁴

Subsequent Decisions in Nevada

No Nevada court has cited the *Hallock* decision for substance since its holding.²³⁵ Rather, its more recent citations were procedural in nature.²³⁶ For example, in *State v. Grey*, the Nevada Supreme Court cited *Hallock* to illustrate the proper method for amending the constitution.²³⁷ Similarly, in 2009 and 2014, the United States District Court for the District of Nevada and the Nevada Supreme Court, respectively, cited *Hallock* to support the assertion that a constitutional amendment adopted after the passage of a statute enactment was controlling.²³⁸

²³¹ *Id.* at 569.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 570.

²³⁵ *Id.*

²³⁶ 21 Nev. 278 (1893); Bybee & Newton, *supra* note 127, at 570.

²³⁷ Bybee & Newton, *supra* note 127, at 570; *see also Grey*, 21 Nev. 278.

²³⁸ *Lucas v. Bell Trans*, 2:08-CV-01792-RCJ-RJ, 2009 WL 2424557, at *7 (D. Nev. June 24, 2009); *Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 521 (Nev. 2014), *reh’g denied* (Sept. 24, 2014).

The Nevada Attorney General has written several opinions about how Section 10 should be interpreted with regard to religious uses of public facilities,²³⁹ accommodating religious practices in public programs,²⁴⁰ and using public funds in religious institutions.²⁴¹ However, the Attorney General opinions span sixty years and do not distinguish between the Federal Establishment Clause and Section 10 of the Nevada Constitution, therefore it is difficult to understand how Section 10 should be interpreted in light of new laws or facts.²⁴² Thus, there is little case law or other authority interpreting Nevada’s Little Blaine Amendment.

Blaine Amendments in Other States

Little Blaine Amendments have been litigated throughout the country.²⁴³ Each state detailed below will provide an analysis of Little Blaine Amendments in a different educational context: Arizona recently litigated a Little Blaine Amendment challenge to its ESA program; Florida instituted many of these programs before Nevada and was often cited as the model behind many of the 2015 educational reforms;²⁴⁴ and Ohio has lengthy litigation history involving its Little Blaine Amendment, culminating in the United States Supreme Court decision in *Zelman v. Simmons-Harris*, upholding its voucher program.

²³⁹ Bybee & Newton, *supra* note 127, at 570–71 (opining that schools may rent out public buildings for religious purposes for a fee, because that way no public funds would be expended for sectarian purposes).

²⁴⁰ *Id.* at 571 (opining against the use of state funds for students to take classes in public school, not offered in the parochial schools they attended, and the use of student study hall for religious instruction off campus).

²⁴¹ *Id.* at 573 (opining that the funding of hospitalization of crippled children at St. Mary’s Hospital in Reno was allowable, distinguishing it from *Hallock* as there would be no attempt at religious instruction during their stay).

²⁴² *Id.* at 573–74.

²⁴³ For a thorough discussion of Blaine Amendment constitutional challenges in states not explored here, *see, e.g.*, Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 578–601 (2003) (discussing, *inter alia*, Blaine Amendments of Utah, Arizona, Alabama, Texas, Washington, Missouri, and Oklahoma); Goldenziel, *supra* note 204, at 74–79, 87–91 (discussing Blaine Amendments in Wisconsin, Colorado, and Michigan).

²⁴⁴ *See, e.g.*, Lyndsey Layton & Emma Brown, *The Ultimate in School Choice or School as a Commodity?*, WASH. POST (June 3, 2015), https://www.washingtonpost.com/local/education/in-nevada-school-choice-on-steroids-and-a-breakthrough-for-conservatives/2015/06/03/3cdd2300-09ff-11e5-95fd-d580f1c5d44e_story.html [<https://perma.cc/Y4HF-2XPW>].

Arizona's Little Blaine Amendment

Legislative History

Arizona was one of the last states to adopt the “Little Blaine Amendment” doing so in 1912.²⁴⁵ Unlike the Little Blaine Amendment in Nevada, however, Arizona’s Little Blaine Amendment was implemented into Arizona’s State Constitution from its state hood, so there is little legislative history regarding its adoption.²⁴⁶ Arizona’s constitutional Little Blaine Amendments are: “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,”²⁴⁷ known as the “religion clause;” and “[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation,”²⁴⁸ known as the “aid clause.”

Relevant Case Law

Community Council v. Jordan

The Arizona courts have interpreted the purpose of the clauses as providing for the “historical doctrine of separation of church and state,” and ensuring, “that there would be no state supported religious institutions, thus precluding governmental preference and favoritism of one or more churches.”²⁴⁹ *Community Council v. Jordan* was one of the first cases to consider state funding of a religious non-profit through reimbursement vouchers for state welfare

²⁴⁵ Ward McAfee, *Q & A, Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions*, PEW F., (Mar. 28, 2003)

<http://www.pewforum.org/2003/03/28/separation-of-church-and-states-an-examination-of-state-constitutional-limits-on-government-funding-for-religious-institutions/> [<https://perma.cc/S6JA-7AYC>].

²⁴⁶ *Kotterman v. Killian*, 972 P.2d 606, 621–22 (Ariz. 1999) (“There is sparse recorded evidence respecting the clauses at issue here, and any historical analysis is necessarily filled with speculation.”).

²⁴⁷ ARIZ. CONST. art. II, § 12; *Niehaus v. Huppenthal*, 310 P.3d 983, 985 (Ariz. Ct. App. 2013).

²⁴⁸ ARIZ. CONST. art. IX, § 10; *Niehaus*, 310 P.3d at 985.

²⁴⁹ 432 P.2d 460, 463 (Ariz. 1967).

services.²⁵⁰ Community Council had a contract with the State Welfare Department, which provided that the nonprofit would be reimbursed \$1.00 for every \$2.50 spent.²⁵¹ Community Council assigned community responsibilities to the Salvation Army, a religious organization, and then filed a claim for reimbursement for “the supplying of food, lodging, clothing, cash assistance, transportation, laundry and cleaning for the month of April 1967, and total[ing] \$5,399.17.”²⁵²

Arizona refused to fund the reimbursement and asserted the funding would be in conflict with its Constitution.²⁵³ The issue before the court was “whether the state or any of its agencies can choose to do business with and discharge part of its duties through denominational or sectarian institutions without contravening constitutional prohibitions.”²⁵⁴ The court held that the “aid” prohibited by the Arizona State Constitution was narrowly limited to assistance that would encourage the preference of one religion over another, or religion over no religion.²⁵⁵ Because this aid only partially reimbursed for the actual cost of materials, the court held that this was not the type of aid prohibited by the Arizona State Constitution.²⁵⁶

Pratt v. Arizona Board of Regents

The Arizona Supreme Court continued to observe this narrow interpretation in *Pratt v. Arizona Board of Regents*.²⁵⁷ In 1974, a resident of the State of Arizona brought an action against the Arizona Board of Regents asking the court to prohibit, as being unconstitutional, their agreement to lease a state-university football stadium to an evangelist for a series of religious

²⁵⁰ *Id.* at 451 (noting this was a case of first impression).

²⁵¹ *Id.* at 450.

²⁵² *Id.* at 451.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 466.

²⁵⁶ *Id.*

²⁵⁷ 520 P.2d 514, 515 (Ariz. 1974).

services.²⁵⁸ Using the rationale in *Community Council*, the court held that the lease was not a violation of the Arizona State Constitution where the lease is occasional and for a “fair rental value.”²⁵⁹ The court held that because the lease was a straight commercial transaction, it did not place any power, prestige, or approval behind the religious beliefs of the reverend.²⁶⁰

Kotterman v. Killian

The aid clause was called into question in 1999.²⁶¹ In *Kotterman v. Killian*, the petitioners challenged the constitutionality of a law, which allowed citizens who donate to School Tuition Organizations (“STOs”) to claim a state tax credit of up to \$500 for those STOs.²⁶² The Arizona Supreme Court held that tax credits were no different than tax deductions, in that they are both “legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals.”²⁶³ The court determined that since no money ever technically enters the state’s control the credit is equivalent to a tax deduction, and the money is never “public.”²⁶⁴ Thus, because the tuition tax credit was no different than previously-allowable tax deductions, including charitable contributions made directly to churches, the tax credit did not violate the Arizona State Constitution.²⁶⁵

Cain v. Horne

In *Pratt, Jordan*, and *Kotterman*, the aid and religion clauses were considered together, for the most part, with no significant discussion of their differences.²⁶⁶ However, in *Cain v. Horne*, the Arizona Supreme Court noted the differences and drew the line where the money is

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 517.

²⁶⁰ *Id.*

²⁶¹ *Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999).

²⁶² *Id.* at 609–10.

²⁶³ *Id.* at 613.

²⁶⁴ *Id.* at 617.

²⁶⁵ *Id.*

²⁶⁶ Timothy M. Hogan, et. al., *Education and the Arizona Constitution*, 3 PHX. L. REV. 99, 110 (2010).

de-facto “earmarked” for religious institutions.²⁶⁷ In 2006, the Arizona State Legislature launched two programs that provided state funding to students in order to attend a private school instead of public school.²⁶⁸ Each program allowed the parents to select the school and the State would disburse a check to the parents who must “restrictively endorse” the check to the selected institution.²⁶⁹ One program entitled “The Arizona Scholarships for Pupils with Disabilities Program”²⁷⁰ allowed students with disabilities an option to attend a private school with a scholarship up to the amount the student would have received in state aid from attending a public school.²⁷¹ To be eligible for the scholarship, students had to attend a “[q]ualified school” which was defined as a “nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state.”²⁷² The second program, entitled “The Arizona Displaced Pupils Choice Grant Program,”²⁷³ allowed children in foster care to attend private school at a “[q]ualified school” providing up to \$5,000 for tuition.²⁷⁴ In addition, the laws specifically allowed sectarian schools to participate.²⁷⁵ Petitioners alleged, “that the voucher programs were facially unconstitutional under Article 2, Section 12, and Article 9, Section 10 of the Arizona Constitution.”²⁷⁶

The court distinguished these “voucher programs” from the tax credit in *Kotterman*, because the funds in *Cain* were public monies, and the funding was given directly to the private

²⁶⁷ 202 P.3d 1178, 1181 (Ariz. 2009).

²⁶⁸ *Id.* at 1180.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1181.

sectarian institutions.²⁷⁷ Distinguishing these “voucher programs” from the contract in *Community Council*, the court determined that the programs were not permissible because there was no limitation as to what the funds could be used for, unlike the contractual limitations in *Community Council*.²⁷⁸ Thus, because the programs directly transferred state funds to private schools, the aid clause expressly prohibited them, and the fact that the checks first went to parents was immaterial.²⁷⁹

Niehaus v. Huppenthal

In 2011, the Arizona Legislature again toed the line of the aid clause by passing S.B. 1553, which, similar to the Arizona Scholarships for Pupils with Disabilities Program struck down in *Cain*, provided educational scholarships to students with disabilities.²⁸⁰ Students who qualified under the law received a scholarship equivalent to the amount of support they would receive in a public institution.²⁸¹ The scholarships were given to parents in exchange for the parents’ agreement to “provide an education for the student in at least ‘reading, grammar, mathematics, social studies and science.’”²⁸² In addition, the student could not enroll in a public school district or charter school.²⁸³ Scholarships were given to the parents and had several permissible uses, including: tuition, textbooks, educational therapies, tutoring, curriculum, exam fees, and other education related fees.²⁸⁴

Petitioners challenged the constitutionality of ESAs in *Niehaus v. Huppenthal*, arguing it violated Article 9, Section 10 of the Arizona Constitution (the aid clause), and Article 2, Section

²⁷⁷ *Id.* at 1183.

²⁷⁸ *Id.* at 1183–84.

²⁷⁹ *Id.*

²⁸⁰ *Niehaus v. Huppenthal*, 310 P.3d 983, 984 (Ariz. Ct. App. 2013).

²⁸¹ *Id.* at 984.

²⁸² *Id.* at 984. “[Q]ualified school was defined as ‘a nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state.’” *Id.* at 985.

²⁸³ *Id.*

²⁸⁴ *Id.* at 984–85.

12 of the Arizona Constitution (the religion clause).²⁸⁵ The Arizona Court of Appeals upheld the law, distinguishing the program from the voucher programs in *Cain* in which every dollar of the voucher programs was earmarked for private schools, because here the funds were deposited in an account and could be used toward a variety of purposes.²⁸⁶ Thus, under Arizona law tax credit

Florida’s Little Blaine Amendment

Legislative History

Florida first adopted its Blaine Amendment in the mid-to-late-1800s, and “no-aid” language from the 1885 Constitution language most resembles the language that Congressman Blaine introduced in his failed amendment. Florida’s 1885 amendment provided:

No preference shall be given by law to any church, sect or mode of worship, and no money 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.²⁸⁷

In 1968, Florida revised its constitution and the Blaine Amendment was readopted.²⁸⁸

The Blaine Amendment moved to Article I, Section 3 and provides:

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.*²⁸⁹

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ FLA. CONST., DECLARATION OF RIGHTS, § 6 (1885).

²⁸⁸ Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1, 3 (2005).

²⁸⁹ FLA. CONST. art. I, § 3 (emphasis added).

The Constitution Revision Commission originally omitted the final no-aid sentence of the provision.²⁹⁰ It would have then matched the federal Establishment Clause.²⁹¹ However, the legislature amended the provision to keep the no-aid prohibition.²⁹²

Relevant Case Law

Southside Estates Baptist Church

In *Southside Estates Baptist Church v. Board of Trustees*, the Florida District Court of Appeal held that a Board of Trustees of a Florida School District could permit the use of school buildings during non-school hours for any legal assembly, including religious meetings.²⁹³ In 1959, the Board of Trustees allowed several churches to use schools during Sunday non-school hours.²⁹⁴ No direct funding went to the churches, however, appellant argued that use of the building was something of value, and that the wear and tear from the use of the building was an indirect contribution from the public and thus a violation of the Blaine amendment.²⁹⁵ The court rejected the argument.²⁹⁶ The court then held that an incidental benefit to a religious group resulting from an appropriate use of public property did not violate the 1885 Blaine Amendment.²⁹⁷

Bush v. Holmes I

The Florida courts twice held the Florida educational vouchers, known as the “Opportunity Scholarship Program (“OSP”), unconstitutional in *Bush I* (2004) and *Bush II*

²⁹⁰ *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. Dist. Ct. App. 2004) [hereinafter *Bush I*].

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Southside Estates Baptist Church v. Bd. of Trs.*, 115 So. 2d 697, 700-01 (Fla. 1959).

²⁹⁴ *Id.* at 698.

²⁹⁵ *Id.* at 699.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

(2006).²⁹⁸ The OSP provided “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.”²⁹⁹ A student attending a private school under the latter option received a state voucher made payable to the student’s parent or guardian from the Department of Education.³⁰⁰ It was mailed directly to the private school chosen by the parent or guardian.³⁰¹ Initially the program was struck down as a violation of Florida’s Little Blaine Amendment, but was then struck down on appeal on separate grounds.³⁰² Both opinions are useful to the analysis here.

In *Bush I*, the Florida District Court of Appeal in an en banc decision held that the OSP prohibited sectarian schools from receiving funds from the State through the OSP.³⁰³ Specifically, it violated the no-aid provision found in the last sentence of Article I, Section 3 of the Blaine Amendment which mandates that “[n]o revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid . . . of any sectarian institution.”³⁰⁴ The Florida District Court of Appeal held it was “undisputed that the OSP use[d] state revenues to fund vouchers that are paid to private schools chosen by the parents or guardians of students.”³⁰⁵

Additionally, the Florida District Court of Appeal rejected the argument that the OSP was not a direct or indirect aid to any sectarian institutions because the vouchers were made payable to the parent or guardian.³⁰⁶ Even though they are made to the parent or guardian, they must

²⁹⁸ *Bush I*, *supra* note 290; *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) [hereinafter *Bush II*]

²⁹⁹ *Id.* at 400.

³⁰⁰ *Bush I*, *supra* note 290, at 347.

³⁰¹ *Id.* at 347.

³⁰² *Id.*

³⁰³ *Id.* at 366.

³⁰⁴ *Id.* at 347.

³⁰⁵ *Id.* at 352.

³⁰⁶ *Id.* at 352–53.

restrictively endorse it to the school and then the state pays the school.³⁰⁷ The court found that “such an indirect path for the aide does not remove the OSP from the restrictions of the no-aid provision.”³⁰⁸ Further, the Florida District Court of Appeal was not persuaded by the argument that, because the OSP voucher did not cover the full cost of the students’ education, it did not constitute aid.³⁰⁹ The Florida District Court of Appeal noted that “[t]he entire educational mission of [private] schools, including the religious education component, is advanced and enhanced by the additional, financial support received through operation of the Opportunity Scholarship Program.”³¹⁰

Finally, the court found that “because an OSP voucher is used to pay the cost of tuition, any disbursement made under the OSP and paid to a sectarian or religious school is made in aid of a ‘sectarian institution,’” regardless if the voucher funds or supports a church or religious denomination.³¹¹ 90 percent of the students in Escambia County who used an OSP voucher were enrolled in a school operated by the Catholic Church where the church’s tenets were taught.³¹²

As a result of the analysis above, the Florida District Court of Appeal held that the OSP violated the no-aid provision found in Article 1, Section 3 of the Florida Constitution because the OSP used state revenues to aid sectarian schools.³¹³

Bush v. Holmes II

In *Bush II*, the Florida Supreme Court held the OSP was unconstitutional because a different section of the Florida Constitution—Article IX, Section 1(a), which mandates Florida to

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 353.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 346.

³¹¹ *Id.* at 353.

³¹² *Id.* at 354.

³¹³ *Id.* at 366.

operate a uniform system of public schools.³¹⁴ Because the court held it was unconstitutional under Article IX, the court found it unnecessary to address whether the OSP violated the Blaine Amendment found in Article I, Section 3 of the Florida Constitution.³¹⁵ Since the Florida Supreme Court did not reach the question construing Article 1, Section 3, the earlier opinion holding vouchers in violation of Florida’s Little Blaine Amendment also remains controlling law.³¹⁶

Ohio’s Little Blaine Amendment

Legislative History

In 1851, Ohio enacted its Little Blaine Amendment at the state’s second Constitutional Convention.³¹⁷ Found in Article VI, Section 2 of the Ohio Constitution, which reads:

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, 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.³¹⁸

Whether this section was motivated by anti-Catholic bigotry is uncertain, “[t]he fourth [sic] section provides for the safety of school funds against sectarian innovation, and forever bars access to exclusive control by sectarianism and needs no comment”³¹⁹

³¹⁴ *Bush II*, 919 So. 2d 392, 398 (Fla. 2006).

³¹⁵ *Id.*

³¹⁶ *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 117 (Fla. Dist. Ct. App. 2010).

³¹⁷ Goldenziel, *supra* note 204, at 70. An amendment was proposed in a subsequent constitutional convention to delete the language, which prohibits a religious sect from having exclusive control over school funds, however the amendment was never adopted. *Id.*

³¹⁸ OHIO CONST. art VI, § 2.

³¹⁹ Goldenziel, *supra* note 204, at 70.

Relevant Case Law

Nineteenth Century cases

This specific provision of the statute has been interpreted by four major cases since its inception. The section was called on for interpretation in both the 1872 case *Board of Education of Cincinnati v. Minor*, and the 1893 case, *Nessle v. Hum*, in reference to school board decisions involving the instruction and reading of religious texts.³²⁰ However, the Ohio Supreme Court held in both cases that it did not have jurisdiction to decide whether the matter was constitutional because the legislature placed the management of public schools under the exclusive authority of the board of education, and thus, the court had no authority to intervene.³²¹ In the 1945 case *Findley v. City of Conneaut*, a testator left a will that called on one of two Ohio municipalities to use the testator's bonds to establish a private polytechnic industrial school, requiring the teaching of Protestant religion as a prominent feature.³²² The Ohio Supreme Court held that under Article VI, Section 6, "[a] municipality has no authority to issue bonds or expend funds raised by taxation for the support of a sectarian school . . . [even] where a will provides for the offering of a fund for the establishment of a sectarian school to a certain city."³²³

Hononhan v. Holt

In the 1968 case *Hononhan v. Holt*, an Ohio appeals court upheld summary judgment in favor of an Ohio law that allowed for reimbursement of transportation costs to parents of non-public school students who did not qualify to ride the school bus.³²⁴ The law was challenged

³²⁰ Bd. of Ed. of Cincinnati v. Minor, 23 Ohio St. 211, 211 (1872); *Nessle v. Hum*, 1 Ohio Dec. 140 (Ct. Com. Pl. 1894).

³²¹ *Id.*

³²² *Findley v. Conneaut*, 63 N.E.2d 449, 449–50 (Ohio Ct. App. 1945).

³²³ *Id.*

³²⁴ 244 N.E.2d 537, 539 (Ohio Ct. Com. Pl. 1968) (addressing a change in state law which now allowed for non-public school children who lived more than two miles from any school to take the school bus, when previously

under the Establishment Clauses of both the United States and Article VI, Section 2 of the Ohio Constitutions³²⁵ The court found that the law did not violate the United States or Ohio State Constitutions.³²⁶ The court then rejected the plaintiff’s theory that the non-public school’s choice of the location of its schools was indicative of its control over the school funds of the state, holding that since it would be “equally logical to argue that such ‘control’ had thus been turned over to the parent.”³²⁷ The court upheld the law as constitutional under Article VI, Section 2, because its overall purpose was to benefit parents rather than religion.³²⁸

Simmons-Harris v. Goff

Finally, in 1995, the state of Ohio, in its annual appropriations legislation, established a pilot scholarship program commonly known as the School Voucher Program.³²⁹ The Program required the state superintendent to provide scholarships to low-income students in the Cleveland City School District.³³⁰ The scholarships were disbursed in checks made payable to the student’s parents, and were only allowed to be used in an adjacent public school district, or a registered private school.³³¹ The Program was challenged in *Simmons-Harris v. Goff* as violating the Ohio Constitution, as well as the Establishment Clause and the First Amendment of the United States Constitution.³³² The lower court found it unconstitutional both under the Establishment Clause of

transportation was only provided for public schools. The change also allowed parental reimbursement of transportation costs for non-public school students when school-bus transportation was impracticable).

³²⁵ *Id.*

³²⁶ *Id.* at 543 (reasoning that “every argument contained in the briefs to such effect has been rejected by the United States Supreme Court either in *Everson* or *Allen*, or both, and for these reasons we conclude that the Ohio ‘Bus Law’ is not violative of the provisions of the United States Constitution”). The court also looked to the same United States jurisprudence in upholding the law under the Ohio Constitution’s Establishment Clause. *Id.*

³²⁷ *Id.* at 544 (analyzing other factors such as the ability of the school board to set the bus schedule and deny reimbursement for or providing for transportation when it is unnecessary or unreasonable).

³²⁸ *Id.*

³²⁹ *Simmons-Harris v. Goff*, 711 N.E.2d 203, 205 (Ohio 1999).

³³⁰ *Id.*

³³¹ *Id.* at 205–06

³³² *Id.* at 206.

the United States Constitution and the Ohio Constitution, in addition to violating the no-funding clause of the Ohio Constitution.³³³ The Ohio Supreme Court reversed.³³⁴

The Ohio Supreme Court incorporated United States Supreme Court jurisprudence in its analysis of the alleged violations of both the United States and the Ohio Constitution's Establishment Clauses and adopted the United States Supreme Court's *Lemon Test*.³³⁵ In analyzing the Program's constitutionality under Article VI, Section 2, the court emphasized the role of independent school choice and held that since the independent decisions of parents and students determined whether sectarian schools received money, the program did not violate the state's no-funding provision.³³⁶

Zelman v. Simmons-Harris

The Program was again challenged in *Zelman v. Simmons-Harris*, and the United States Supreme Court plurality relied upon the Court's *Zelman* independent choice reasoning in upholding the program under the Establishment Clause of the United States Constitution, opining:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.³³⁷

³³³ *Id.*

³³⁴ *Id.* at 216.

³³⁵ *Simmons-Harris*, 711 N.E.2d 203, 207 (Ohio 1999); Goldenziel, *supra* note 204, at 72.

³³⁶ Goldenziel, *supra* note 204, at 73.

³³⁷ 536 U.S. 639, 652 (2002).

Providing further clarity, Chief Justice Rehnquist asserted that “no reasonable observer” would interpret the indirect flow of funds from the government to religious institutions by way of parent choice as “carr[ying] with it the imprimatur of government endorsement.”³³⁸

Does S.B. 302 violate Article XI, Section 10?

Seemingly no, with some interesting caveats. If the court is bound solely by its prior decisions, namely *Hallock*, then S.B. 302 likely violates Section 10. However, the legal landscape has changed a great deal since *Hallock*, and the court may choose to examine a Section 10 challenge to S.B. 302 through a looser, more modern lens that incorporates parent choice into the legal analysis.

Indeed, under more recent Supreme Court case law, Section 10 itself may violate the United States constitution, rendering S.B. 302 constitutional. Either way, the court must decide its modern interpretation of “public funds” and “sectarian purpose”, as well as the relationship between Article XI, Section 10 and the Fourteenth Amendment Equal Protection Clause of the United States Constitution.

“Public funds”

A plain reading of Article XI, Section 10 would likely find S.B. 302 unconstitutional. Section 10 prohibits public funds from being used for a secular purpose; if the education funding from the state is used to pay tuition at religiously affiliated private school, then such a payment would seem to violate Section 10. Indeed, the direct appropriation of public funds to the Catholic-run asylum in *Hallock* violated Section 10. If the court determines ESA is analogous to a direct appropriation, and the funds remain “public funds” even after being directed toward

³³⁸ *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750, 1761 (2009) (citing *Zelman*, 536 U.S. at 652).

parents pursuant to S.B. 302, then the program violates Section 10 whenever the funds are provided to a religiously-affiliated school, and would thus be unconstitutional.

On the contrary, a closer inquiry into the mechanics of S.B. 302 would likely render ESAs constitutional under Section 10. The existence of parental choice in S.B. 302 may change the court’s analysis of whether the funds are truly “public funds.” Since Section 10 prohibits the use of public funds, it begs the question: “At what point do public funds cease to be the public’s funds, so that Section 10 no longer constrains their use?”³³⁹ Courts in both Ohio and Arizona held parental choice in educational funding programs did not violate the states’ respective Little Blaine Amendments. In *Simmons-Harris v. Goff*, the Ohio Supreme Court held its school voucher program did not violate Ohio’s sectarian-aid provision because school funds would only reach religiously affiliated schools through the “independent decisions of parents and students.”³⁴⁰ Similarly, in *Nieuhaus v. Huppenthal*, the Arizona Court of Appeals upheld Arizona’s ESA program because parents had discretion over the ultimate destination of the funds.³⁴¹ Under S.B. 302, Nevada parents are given a similar choice and, presumably, Nevada courts could reach a similar conclusion. If so, then funds diverted under S.B. 302 would not be “public funds,” and would thus be outside the purview of Section 10.

“Sectarian purpose”

In deciding whether ESA funds are used for a “sectarian purpose,” the court must decide two questions: (1) what constitutes a “sectarian purpose;” and (2) whether the Blaine Amendment’s anti-Catholic history renders Section 10 unconstitutional.

³³⁹ Bybee & Newton, *supra* note 124, at 583.

³⁴⁰ 711 N.E.2d 203, 207 (Ohio 1999).

³⁴¹ 310 P.3d 983, 984 (Ariz. Ct. App. 2013).

Extent of sectarian purpose.

If Nevada courts solely consider prior case law in assessing an institution's "secular purpose," then ESAs are likely unconstitutional under the rationale advanced in *Hallock*. In *Hallock*, the court found that since at least some part of funds granted to the Asylum would support sectarian purposes, and "it is impossible to separate the legitimate use from that which is forbidden," then any funds provided to the institution would run afoul of Section 10.³⁴² This strict interpretation would certainly implicate any school funds used for tuition at a religiously-affiliated private school, and would render S.B. 302 unconstitutional.

On the contrary, some interpretations of sectarian purposes are less strict. The Nevada Attorney General has "indicated a greater willingness" to parse out "legitimate and illegitimate uses of state funds by religious organizations."³⁴³ The United States Supreme Court has even noted that not every act by a religious institution was necessarily religious, and that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."³⁴⁴ This, too, begs a question: Is every facet of a religiously affiliated school a "sectarian purpose?" Is a math class taught at a sectarian school for a sectarian purpose, and if not, does Section 10 still bar indirect public funds for that class? Such an issue would be one of first impression for the court.

Section 10 and the Equal Protection Clause

Section 10 may run afoul of the Equal Protection Clause of the Fourteenth Amendment³⁴⁵ because it singles out religious institutions,³⁴⁶ which could make it more restrictive than the

³⁴² Bybee & Newton, *supra* note 124, at 584 (citing *State v. Hallock*, 16 Nev. 373, 388 (1882)).

³⁴³ Bybee & Newton, *supra* note 124, at 585 (citing *Op. Nev. Att'y Gen.* 276 (Nov. 5, 1965)).

³⁴⁴ *Id.* (citing *Hunt v. McNair*, 413 U.S. 734, 742 (1973)).

³⁴⁵ "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Establishment Clause.³⁴⁷ When construed in that manner, Section 10 would be overinclusive because it goes further than necessary to comply with the Establishment Clause.³⁴⁸

Under the Equal Protection Clause, any state action that treats some people differently than other similarly-situated people must, at the very least, bear a rational relationship to a legitimate state interest.³⁴⁹ State action that differentiates based upon a suspect classification, such as race or national origin, is subject to strict scrutiny and must be narrowly tailored to address a compelling state interest to avoid judicial invalidation.³⁵⁰ State action can discriminate either through overt discrimination or through a facially neutral policy enacted for a discriminatory purpose.³⁵¹

The threshold issue in this equal protection analysis of Section 10 is whether the provision was motivated by a suspect discriminatory purpose. If so, then Section 10 is subject to strict scrutiny. If not, then presumably, Section 10 is only subject to rational basis review. The Supreme Court has repeatedly stated in dicta that classifications based on religion are suspect under the Equal Protection Clause.³⁵² Although not binding, the statements made in dicta suggest that state action based on religious classification, such as the prohibition of funding for sectarian purposes, are subject to strict scrutiny under the Equal Protection Clause.³⁵³

³⁴⁶ The Equal Protection Clause is “concerned with the way government treats some people vis-à-vis others.” See Heytens, *supra* note 192, at 150–51 (citing Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 371 (1999)).

³⁴⁷ Heytens, *supra* note 192, at 150–52 (arguing all Little Blaine Amendments run afoul of Establishment Clause).

³⁴⁸ *Id.* at 141.

³⁴⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

³⁵⁰ Heytens, *supra* note 192, at 141.

³⁵¹ *Id.* (citing *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979) (holding that a government policy with a disparate impact upon a protected class is “unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose”).

³⁵² *See id.* at 142 n.150 (citing *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533 (1993) (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation . . . [the law] is invalid unless it is justified by a compelling interest that is narrowly tailored to advance that interest.”)).

³⁵³ Though strict scrutiny is normally focused on the protection of “discrete and insular minorities,” and presumably Catholics, or religious persons in general, are not necessarily an insular minority in Nevada, this distinction is

Section 10 seemingly discriminates on the basis of religion because historical research suggests it was enacted with the constitutionally suspect purpose of discriminating against Catholics in Nevada.³⁵⁴ If this is the case, then another important consideration for Nevada courts is whether the passage of time since the enactment of Section 10 potentially mitigates the discriminatory purpose for purposes of strict scrutiny review. The short answer would appear to be no; the nearly 150-year span is unlikely to mitigate a discriminatory purpose. “Passage of time, standing alone, is insufficient to purge the taint of an originally invidious purpose.”³⁵⁵

If a Nevada court holds religion as a suspect class, and holds that Section 10 was enacted with a discriminatory purpose, then the law must be subjected to strict scrutiny. The state would have to demonstrate a “compelling interest” to maintain the law—even if this were possible, such a result would likely not occur because the State of Nevada would likely be fighting the constitutionality of Section 10 as it pertains to S.B. 302. Accordingly, Section 10 would likely be held unconstitutional, and S.B. 302 would thus not be in violation of the statute.

Conclusion

S.B. 302 implicates a potential constitutional issue with nearly every provision of Article XI. These provisions, however, have not been interpreted for substance, and will require courts to undertake significant analysis of the text and intent of Article XI and its relevant sections. Given the analysis above, it would appear that a plain reading of most relevant constitutional provisions is more likely to render S.B. 302 unconstitutional, but an analysis incorporating the legislative history of the various provisions would allow the ESA program to pass constitutional

“ultimately irrelevant for determining the level of equal protection scrutiny.” *See id.* (citing *Adarand Constructors v. Peña*, 515 U.S. 200 (1995)).

³⁵⁴ *See generally* Bybee & Newton, *supra* note 124.

³⁵⁵ Heytens, *supra* note 192, at 142 n.150 (citing *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down eighty-five year-old law provision of the Alabama Constitution because it was enacted with discriminatory purpose).

muster. Either way, the case will likely provide clarity on the proper method of interpretation for the public school provisions of Article XI for future courts and legislatures.

Appendix A

Article XI of the Nevada Constitution

Section 1. Legislature to encourage education; appointment, term and duties of superintendent of public instruction.

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.

Section 2. Uniform system of common schools.

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.

Section 3. Pledge of certain property and money, escheated estates and fines collected under penal laws for educational purposes; apportionment and use of interest.

All lands granted by Congress to this state for educational purposes, all estates that escheat to the state, all property given or bequeathed to the state for educational purposes, and the proceeds derived from these sources, together with that percentage of the proceeds from the sale of federal lands which has been granted by Congress to this state without restriction or for educational purposes and all fines collected under the penal laws of the state are hereby pledged for educational purposes and the money therefrom must not be transferred to other funds for other uses. The interest only earned on the money derived from these sources must be apportioned by the legislature among the several counties for educational purposes, and, if necessary, a portion of that interest may be appropriated for the support of the state university, but any of that interest which is unexpended at the end of any year must be added to the principal sum pledged for educational purposes.

Section 4. Establishment of state university; control by board of regents.

The Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.

Section 5. Establishment of normal schools and grades of schools; oath of teachers and professors.

The Legislature shall have power to establish Normal schools, and such different grades of schools, from the primary department to the University, as in their discretion they may deem necessary, and all Professors in said University, or Teachers in said Schools of whatever grade, shall be required to take and subscribe to the oath as prescribed in Article Fifteenth of this Constitution. No Professor or Teacher who fails to comply with the provisions of any law framed

in accordance with the provisions of this Section, shall be entitled to receive any portion of the public monies set apart for school purposes.

Section 6. Support of university and common schools by direct legislative appropriation; priority of appropriations.

1. In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

2. During a regular session of the Legislature in any odd-numbered year, before any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.

3. During a special session of the Legislature that is held between the end of a regular session in an odd-numbered year in which the Legislature has not enacted the appropriation or appropriations required by subsection 2 to fund education for the next ensuing biennium and the first day of that next ensuing biennium, before any other appropriation is enacted other than appropriations required to pay the cost of that special session, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.

4. During a special session of the Legislature that is held in a biennium for which the Legislature has not enacted the appropriation or appropriations required by subsection 2 to fund education for the biennium in which the special session is being held, before any other appropriation is enacted other than appropriations required to pay the cost of that special session, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the population reasonably estimated for the biennium in which the special session is held.

5. Any appropriation of money enacted in violation of subsection 2, 3 or 4 is void.

6. As used in this section, "biennium" means a period of two fiscal years beginning on July 1 of an odd-numbered year and ending on June 30 of the next ensuing odd-numbered year.

Section 7. Board of Regents: Election and duties.

The Governor, Secretary of State, and Superintendent of Public Instruction, shall for the first four years and until their successors are elected and qualified constitute a Board of Regents

to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of office of said Board of Regents provide for the election of a new Board of Regents and define their duties.

Section 8. Immediate organization and maintenance of state university.

The Board of Regents shall, from the interest accruing from the first funds which come under their control, immediately organize and maintain the said Mining department in such manner as to make it most effective and useful, Provided, that all the proceeds of the public lands donated by Act of Congress approved July second AD. Eighteen hundred and sixty Two, for a college for the benefit of Agriculture[,] the Mechanics Arts, and including Military tactics shall be invested by the said Board of Regents in a separate fund to be appropriated exclusively for the benefit of the first named departments to the University as set forth in Section Four above; And the Legislature shall provide that if through neglect or any other contingency, any portion of the fund so set apart, shall be lost or misappropriated, the State of Nevada shall replace said amount so lost or misappropriated in said fund so that the principal of said fund shall remain forever undiminished[.]

Section 9. Sectarian instruction prohibited in common schools and university.

No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.

Section 10. No public money to be used for sectarian purposes.

No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

Appendix B

State constitutional provisions most similar to Article XI, § 2

State Constitutional Provision	Text
Alabama Article 14, § 256	The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.
Alaska Article 7, § 1	The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.
Arizona Article XI, § 1	<p>A. The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include:</p> <ol style="list-style-type: none"> 1. Kindergarten schools. 2. Common schools. 3. High schools. 4. Normal schools. 5. Industrial schools. 6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character. <p>B. The legislature shall also enact such laws as shall provide for the education and care of pupils who are hearing and vision impaired.</p>
Arkansas Article XIV, § 1	Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.
California Article IX, § 5	The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

Colorado Article IX, § 2	The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year.
Connecticut Article VIII, § 1	There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.
Delaware Article X, § 1	The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.
Florida Article IX, § 1(a)	The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that: <ol style="list-style-type: none"> (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students; (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.
Georgia Article VIII, § I	The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.
Hawaii Article X, § 1	The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit

	<p>of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist:</p> <ol style="list-style-type: none"> 1. Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and 2. Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities
Idaho Article IX, § 1	The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.
Illinois Article X, § 1	A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.
Indiana Article VIII, § 1	Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.
Iowa Article IX, 2nd, § 3	The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.[. . .]
Kansas Article VI, § 1	The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.
Kentucky § 183	The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.
Louisiana Article VIII, § 1	The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.
Maine Article VIII, § 1	A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State; provided, that no donation, grant or endowment shall at any time be made by the Legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have

	the right to grant any further powers to alter, limit or restrain any of the powers vested in any such literary institution, as shall be judged necessary to promote the best interests thereof.
Maryland Article VIII, § 1	The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.
Massachusetts Part 2, chapter 5, § II	Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.
Michigan Article VIII, § 2, paragraph 1	The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.
Minnesota Article XIII, § 1	The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.
Mississippi Article VIII, § 201	The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.
Missouri Article IX, § 1(a)	A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.
Montana Article X, § 1(3)	The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.
Nebraska Article VII, § 1	The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.

	The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.
Nevada Article XI, § 2	<i>See Appendix A.</i>
New Hampshire Part 2, article 83	Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. [. . .]
New Jersey Article VIII, § 4(1)	The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.
New Mexico Article XII, § 1	A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.
New York Article XI, § 1	The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.
North Carolina Article IX, § 2	The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
North Dakota Article VIII, § 2	The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.
Ohio Article VI, § 3	Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.
Oklahoma Article XIII, § 1	The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.

Oregon Article VIII, § 3	The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.
Pennsylvania Article III, § 14	The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.
Rhode Island Article XII, § 1	The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.
South Carolina Article XI, § 3	The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.
South Dakota Article VIII, § 1	The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.
Tennessee Article XI, § 12	The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.
Texas Article VII, § 1	A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.
Utah Article X, § 1	The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.
Vermont Chapter 2, § 68	Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. [. . .]
Virginia Article VIII, § 1	The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.
Washington Article IX, § 1	The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such

	high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.
West Virginia Article XII, § 1	The Legislature shall provide, by general law, for a thorough and efficient system of free schools.
Wisconsin Article X, § 3	The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.
Wyoming Article VII, § 1	The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.

Appendix C

State constitutional provisions most similar to Article XI, § 3

State Constitutional Provision	Text
Alabama Article 14, §§ 257–60.	<p>§ 257: The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this state or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific object of the original grants or appropriations;</p> <p>§ 258: All lands or other property given by individuals, or appropriated by the state for educational purposes, and all estates of deceased persons who die without leaving a will or heir, shall be faithfully applied to the maintenance of the public schools;</p> <p>§ 259: All poll taxes collected in this state shall be applied to the support of the public schools in the respective counties where collected;</p> <p>§ 260: The income arising from the sixteenth section trust fund, the surplus revenue fund, until it is called for by the United States government, and the funds enumerated in sections 257 and 258 of this Constitution, together with a special annual tax of thirty cents on each one hundred dollars of taxable property in this state, which the legislature shall levy, shall be applied to the support and maintenance of the public schools, and it shall be the duty of the legislature to increase the public school fund from time to time as the necessity therefor and the condition of the treasury and the resources of the state may justify; provided, that nothing herein contained shall be so construed as to authorize the legislature to levy in any one year a greater rate of state taxation for all purposes, including schools, than sixty-five cents on each one hundred dollars' worth of taxable property; and provided further, that nothing herein contained shall prevent the legislature from first providing for the payment of the bonded indebtedness of the state and interest thereon out of all the revenue of the state.</p>
Alaska	None.
Arizona Article XI, §§ 8, 10	<p>§ 8:A. A permanent state school fund for the use of the common schools shall be derived from the sale of public school lands or other public lands specified in the enabling act approved June 20, 1910; from all estates or distributive shares of estates that may escheat to the state; from all unclaimed shares and dividends of any corporation incorporated under the laws of Arizona; and from all gifts, devises, or bequests made to the state for general educational purposes.</p> <p>B. The rental derived from school lands, with such other funds as may be provided by law shall be apportioned only for common and high school education in Arizona, and in such manner as may be prescribed by law.</p>

	<p>§ 10: The revenue for the maintenance of the respective state educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the enabling act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective state educational institutions. In addition to such income the legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all state educational institutions, and shall make such special appropriations as shall provide for their development and improvement.</p>
<p>Arkansas Article XIV, § 3</p>	<p>(a) The General Assembly shall provide for the support of common schools by general law. In order to provide quality education, it is the goal of this state to provide a fair system for the distribution of funds. It is recognized that, in providing such a system, some funding variations may be necessary. The primary reason for allowing such variations is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district. It is further recognized that funding variations or restrictions thereon may be necessary in order to comply with, or due to, other provisions of this Constitution, the United States Constitution, state or federal laws, or court orders.</p> <p>(b)(1) There is established a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used solely for maintenance and operation of the schools.</p> <p>(2) Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of 32 schools in the school district. The rate of tax available for maintenance and operation levied by each school district on the effective date of this amendment shall be reduced to reflect the levy of the uniform rate of tax. If the rate of tax available for maintenance and operation levied by a school district on the effective date of this amendment exceeds the uniform rate of tax, the excess rate of tax shall continue to be levied by the school district until changed as provided in subsection (c)(1). If the rate of tax available for maintenance and operation levied by a school district on the effective date of this amendment is less than the uniform rate of tax, the uniform rate of tax shall nevertheless be levied in the district.</p> <p>(3) The uniform rate of tax shall be assessed and collected in the same manner as other school property taxes, but the net revenues from the uniform rate of tax shall be remitted to the State Treasurer and distributed by the state to the school districts as provided by law. No portion of the revenues from the uniform rate of tax shall be retained by the state. The revenues so distributed shall be used by the school districts solely for maintenance and operation of schools. [. . .]</p>
<p>California Article XVI, § 8(a)</p>	<p>From all state revenues there shall first be set apart the moneys to be applied by the State for support of the public school system and public institutions of</p>

	higher education.
Colorado Article IX, §§ 5, 17(4)(a)	<p>§ 5: The public school fund of the state shall consist of the proceeds of such land as have heretofore been, or may hereafter, be granted to the state by the general government for educational purposes; all estates that may escheat to the state; also all other grants, gifts or devises that may be made to this state for educational purpose.</p> <p>§ 17(4): (a) There is hereby created in the department of the treasury the state education fund. Beginning on the effective date of this measure, all state revenues collected from a tax of one third of one percent on federal taxable income, as modified by law, of every individual, estate, trust and corporation, as defined in law, shall be deposited in the state education fund. Revenues generated from a tax of one third of one percent on federal taxable income, as modified by law, of every individual, estate, trust and corporation, as defined in law, shall not be subject to the limitation on fiscal year spending set forth in article X, section 20 of the Colorado constitution. All interest earned on monies in the state education fund shall be deposited in the state education fund and shall be used before any principal is depleted. Monies remaining in the state education fund at the end of any fiscal year shall remain in the fund and not revert to the general fund.</p> <p>(b) In [. . .] each fiscal year [. . .], the general assembly may annually appropriate monies from the state education fund. Monies in the state education fund may only be used to comply with subsection (1) of this section and for accountable education reform, for accountable programs to meet state academic standards, for class size reduction, for expanding technology education, for improving student safety, for expanding the availability of preschool and kindergarten programs, for performance incentives for teachers, for accountability reporting, or for public school building capital construction.</p>
Connecticut Article VIII, § 4	The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require.
Delaware Article X, § 4	No part of the principal or income of the Public School Fund, now or hereafter existing, shall be used for any other purpose than the support of free public schools.
Florida Article IX, § 6	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.

Georgia Article VIII, § 5, para. VII	The board of education of each school system may accept bequests, donations, grants, and transfers of land, buildings, and other property for the use of such system.
Hawaii	None.
Idaho Article IX, §§ 3, 4	<p>§ 3: The public school permanent endowment fund of the state shall forever remain inviolate and intact; the earnings of the public school permanent endowment fund shall be deposited into the public school earnings reserve fund and distributed in the maintenance of the schools of the state, and among the counties and school districts of the state in such manner as may be prescribed by law. No part of the public school permanent endowment fund principal shall ever be transferred to any other fund, or used or appropriated except as herein provided. Funds shall not be appropriated by the legislature from the public school earnings reserve fund except as follows: the legislature may appropriate from the public school earnings reserve fund administrative costs incurred in managing the assets of the public school endowment including, but not limited to, real property and monetary assets. The state treasurer shall be the custodian of these funds, and the same shall be securely and profitably invested as may be by law directed. [. . .]</p> <p>§ 4: The public school permanent endowment fund of the state shall consist of the proceeds from the sale of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands, and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state; and all other grants, gifts, devises, or bequests made to the state for general educational purposes; and amounts allocated from the public school earnings reserve fund. Provided however, that proceeds from the sale of school lands may be deposited into a land bank fund to be used to acquire other lands within the state for the benefit of endowment beneficiaries. If those proceeds are not used to acquire other lands within a time provided by the legislature, the proceeds shall be deposited into the public school permanent endowment fund along with any earnings on the proceeds.</p>
Illinois	None.
Indiana Article VIII, §§ 2, 3	§ 2: The Common School fund shall consist of the Congressional Township fund, and the lands belonging thereto; The Surplus Revenue fund; The Saline fund and the lands belonging thereto; The Bank Tax fund, and the fund arising from the one hundred and fourteenth section of the charter of the State Bank of Indiana; The fund to be derived from the sale of County Seminaries, and the moneys and property heretofore held for such Seminaries; from the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue; All lands and other estate

	<p>which shall escheat to the State, for want of heirs or kindred entitled to the inheritance; All lands that have been, or may hereafter be, granted to the State, where no special purpose is expressed in the grant, and the proceeds of the sales thereof; including the proceeds of the sales of the Swamp Lands, granted to the State of Indiana by the act of Congress of the twenty eighth of September, eighteen hundred and fifty, after deducting the expense of selecting and draining the same; Taxes on the property of corporations, that may be assessed by the General Assembly for common school purposes.</p> <p>§ 3. The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.</p>
<p>Iowa Article IX, 2nd, § 3</p>	<p>[. . .] The proceeds of all lands that have been or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such percent as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state</p>
<p>Kansas Article I, §§ 1, 6, 7</p>	<p>§ 1: Sections numbered sixteen and thirty-six in each township in the state, including Indian reservations and trust lands, shall be granted to the state for the exclusive use of common schools; and when either of said sections, or any part thereof, has been disposed of, other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefore.</p> <p>§ 6: That five percentum of the proceeds of the public lands in Kansas, disposed of after the admission of the state into the union, shall be paid to the state for a fund, the income of which shall be used for the support of common schools.</p> <p>§ 7: That the five hundred thousand acres of land to which the state is entitled under the act of congress entitled "An act to appropriate the proceeds of the sales of public lands and grant pre-emption rights," approved September 4th, 1841, shall be granted to the state for the support of common schools.</p>
<p>Kentucky §§ 184, 186</p>	<p>§ 184: The bond of the Commonwealth issued in favor of the Board of Education for the sum of one million three hundred and twenty-seven thousand dollars shall constitute one bond of the Commonwealth in favor of the Board of Education, and this bond and the seventy-three thousand five hundred dollars of the stock in the Bank of Kentucky, held by the Board of</p>

	<p>Education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law.</p> <p>§ 186: All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.</p>
<p>Louisiana Article VIII, § 13(B)</p>	<p>The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of funds appropriated.</p>
<p>Maine Article IX, § 8(3)</p>	<p>The Legislature shall have power to provide that taxes, which it may authorize a School Administrative District or a community school district to levy, may be assessed on real, personal and intangible property in accordance with any cost-sharing formula which it may authorize.</p>

<p>Maryland Article VIII, §§ 1, 3</p>	<p>§ 1: The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.</p> <p>§ 3: The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.</p>
<p>Massachusetts</p>	<p>None.</p>
<p>Michigan Article IX, § 11</p>	<p>There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law. Sixty percent of all taxes imposed at a rate of 4% on retailers on taxable sales at retail of tangible personal property, 100% of the proceeds of the sales and use taxes imposed at the additional rate of 2% provided for in section 8 of this article, and other tax revenues provided by law, shall be dedicated to this fund. Payments from this fund shall be made in full on a scheduled basis, as provided by law. Beginning in the 1995-96 state fiscal year and each state fiscal year after 1995-96, the state shall guarantee that the total state and local per pupil revenue for school operating purposes for each local school district shall not be less than the 1994-95 total state and local per pupil revenue for school operating purposes for that local school district, as adjusted for consolidations, annexations, or other boundary changes. [. . .]</p>
<p>Minnesota Article XI, § 8</p>	<p>The permanent school fund of the state consists of (a) the proceeds of lands granted by the United States for the use of schools within each township, (b) the proceeds derived from swamp lands granted to the state, (c) all cash and investments credited to the permanent school fund and to the swamp land fund, and (d) all cash and investments credited to the internal improvement land fund and the lands therein. No portion of these lands shall be sold otherwise than at public sale, and in the manner provided by law. All funds arising from the sale or other disposition of the lands, or income accruing in any way before the sale or disposition thereof, shall be credited to the permanent school fund. Within limitations prescribed by law, the fund shall be invested to secure the maximum return consistent with the maintenance of the perpetuity of the fund. The principal of the permanent school fund shall be perpetual and inviolate forever. This does not prevent the sale of investments at less than the cost to the fund; however, all losses not offset by gains shall be repaid to the fund from the interest and dividends earned thereafter. The net interest and dividends arising from the fund shall be distributed to the different school districts of the state in a manner prescribed by law. [. . .]</p>
<p>Mississippi Article VIII, § 206-A</p>	<p>There is hereby created and established in the State Treasury a trust fund which may be used, as hereinafter provided, for the improvement of education within the State of Mississippi. There shall be deposited in such trust fund:</p> <p>(a) The state's share of all oil severance taxes and gas severance taxes derived from oil and gas resources under state-owned lands or from severed state-owned minerals;</p>

	<p>(b) Any and all monies received by the state from the development, production and utilization of oil and gas resources under state-owned lands or from severed state-owned minerals, except for the following portions of such monies:</p> <ul style="list-style-type: none"> i) All mineral leasing revenues specifically reserved by general law in effect at the time of the ratification of this amendment for the following purposes: <ul style="list-style-type: none"> (A) management of a state leasing program; (B) clean-up, remedial or abatement actions involving pollution as a result of oil or gas exploration or production; (C) management or protection of state waters, land and wildlife; or (D) acquisition of additional waters and land; and (ii) Monies derived from sixteenth section lands and lands held in lieu thereof or from minerals severed from sixteenth section lands and lands held in lieu thereof; and (iii) Monies derived from lands or minerals administered in trust for any state institution of higher learning or administered therefor by the head of any such institution; <p>(c) Any gift, donation, bequest, trust, grant, endowment or transfer of money or securities designated for said trust fund; and</p> <p>(d) All such monies from any other source whatsoever as the Legislature shall, in its discretion, so appropriate or shall, by general law, so direct.</p> <p>The principal of the trust fund shall remain inviolate and shall be invested as provided by general law. Interest and income derived from investment of the principal of the trust fund may be appropriated by the Legislature by a majority vote of the elected membership of each house of the Legislature and expended exclusively for the education of the elementary and secondary school students and/or vocational and technical training in this state.</p>
<p>Missouri Article IX, §§ 3(a), 5</p>	<p>§ 3(a): All appropriations by the state for the support of free public schools and the income from the public school fund shall be paid at least annually and distributed according to law.</p> <p>§ 5: The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever.</p>
<p>Montana Article X, §§ 2, 5</p>	<p>§ 2: The public school fund of the state shall consist of:</p> <ul style="list-style-type: none"> (1) Proceeds from the school lands which have been or may hereafter be

	<p>granted by the United States,</p> <p>(2) Lands granted in lieu thereof,</p> <p>(3) Lands given or granted by any person or corporation under any law or grant of the United States,</p> <p>(4) All other grants of land or money made from the United States for general educational purposes or without special purpose,</p> <p>(5) All interests in estates that escheat to the state,</p> <p>(6) All unclaimed shares and dividends of any corporation incorporated in the state,</p> <p>(7) All other grants, gifts, devises or bequests made to the state for general educational purposes.</p> <p>§ 5: (1) Ninety-five percent of all the interest received on the public school fund and ninety-five percent of all rent received from the leasing of school lands and all other income from the public school fund shall be equitably apportioned annually to public elementary and secondary school districts as provided by law.</p> <p>(2) The remaining five percent of all interest received on the public school fund, and the remaining five percent of all rent received from the leasing of school lands and all other income from the public school fund shall annually be added to the public school fund and become and forever remain an inseparable and inviolable part thereof.</p>
Nebraska Article VII, § 9	<p>(1) The following funds shall be exclusively used for the support and maintenance of the common schools in each school district in the state . . . or distributed through the common schools . . . as the Legislature shall provide:</p> <p>(a) Income arising from the perpetual funds;</p> <p>(b) The income from the unsold school lands, except that costs of administration shall be deducted from the income before it is so applied;</p> <p>(c) All other grants, gifts, and devises that have been or may hereafter be made to the state which are not otherwise appropriated by the terms of the grant, gift, or devise; and</p> <p>(d) Such other support as the Legislature may provide.</p> <p>(2) No distribution or appropriation shall be made to any school district for the year in which school is not maintained for the minimum term required by law. [. . .]</p>
Nevada Article XI, § 10	<i>See Appendix A.</i>
New Hampshire Part 2, article 6-b	All moneys received from a state-run lottery and all the interest received on such moneys shall, after deducting the necessary costs of administration, be appropriated and used exclusively for the school districts of the state. Such moneys shall be used exclusively for the purpose of state aid to education and shall not be transferred or diverted to any other purpose.
New Jersey	None.
New Mexico Article XII,	§ 2: The permanent school fund of the state shall consist of the proceeds of sales of Sections Two, Sixteen, Thirty-Two and Thirty-Six in each township

<p>§ 2, 4</p>	<p>of the state, or the lands selected in lieu thereof; the proceeds of sales of all lands that have been or may hereafter be granted to the state not otherwise appropriated by the terms and conditions of the grant; such portion of the proceeds of sales of land of the United States within the state as has been or may be granted by congress; all earnings, including interest, dividends and capital gains from investment of the permanent school fund; also all other grants, gifts and devises made to the state, the purpose of which is not otherwise specified.</p> <p>§ 4: All forfeitures, unless otherwise provided by law, and all fines collected under general laws; the net proceeds of property that may come to the state by escheat; the rentals of all school lands and other lands granted to the state, the disposition of which is not otherwise provided for by the terms of the grant or by act of congress shall constitute the current school fund of the state.</p>
<p>New York</p>	<p>None.</p>
<p>North Carolina Article IX, § 6, 7</p>	<p>§ 6: 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.</p> <p>§ 7: (a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.</p> <p>(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.</p>
<p>North Dakota Article IX, § 1</p>	<p>All proceeds of the public lands that have been, or may be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that fall to the state by escheat; all gifts, donations, or the proceeds thereof that come to the state for support of the</p>

	<p>common schools, or not otherwise appropriated by the terms of the gift, and all other property otherwise acquired for common schools, must be and remain a perpetual trust fund for the maintenance of the common schools of the state. All property, real or personal, received by the state from whatever source, for any specific educational or charitable institution, unless otherwise designated by the donor, must be and remain a perpetual trust fund for the creation and maintenance of such institution, and may be commingled only with similar funds for the same institution. If a gift is made to an institution for a specific purpose, without designating a trustee, the gift may be placed in the institution's fund; provided that such a donation may be expended as the terms of the gift provide. Revenues earned by a perpetual trust fund must be deposited in the fund. The costs of administering a perpetual trust fund may be paid out of the fund. The perpetual trust funds must be managed to preserve their purchasing power and to maintain stable distributions to fund beneficiaries.</p>
Ohio Article VI, § 1	<p>The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.</p>
Oklahoma Article XI, §§ 1, 2	<p>§ 1: The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the State is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated.</p> <p>§ 2: All proceeds of the sale of public lands that have heretofore been or may be hereafter given by the United States for the use and benefit of the common schools of this State, all such per centum as may be granted by the United States on the sales of public lands, the sum of five million dollars appropriated to the State for the use and benefit of the common schools in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory, the proceeds of all property that shall fall to the State by escheat, the proceeds of all gifts or donations to the State for common schools not otherwise appropriated by the terms of the gifts, and such other appropriations, gifts, or donations as shall be made by the Legislature for the benefit of the common schools, shall constitute the permanent school fund, the income from which shall be used for the maintenance of the common schools in the State. The principal shall be deemed a trust fund held by the State, and shall forever remain inviolate. It may be increased, but shall never be diminished. The State shall reimburse said permanent school fund for all losses thereof which may in any manner occur, and no portion of said fund shall be diverted for any other use or purpose.</p>
Oregon	<p>(1) The sources of the Common School Fund are:</p>

<p>Article 8, § 2</p>	<p>The proceeds of all lands granted to this state for educational purposes, except the lands granted to aid in the establishment of institutions of higher education . . .</p> <p>All the moneys and clear proceeds of all property which may accrue to the state by escheat.</p> <p>The proceeds of all gifts, devises and bequests, made by any person to the state for common school purposes.</p> <p>The proceeds of all property granted to the state, when the purposes of such grant shall not be stated.</p> <p>The proceeds of the five hundred thousand acres of land to which this state is entitled . . .</p> <p>The five percent of the net proceeds of the sales of public lands to which this state became entitled on her admission into the union.</p> <p>After providing for the cost of administration and any refunds or credits authorized by law, the proceeds from any tax or excise levied on, with respect to or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas and the proceeds from any tax or excise levied on the ownership of oil or natural gas. However, the rate of such taxes shall not be greater than six percent of the market value of all oil and natural gas produced or salvaged from the earth or waters of this state as and when owned or produced. This paragraph does not include proceeds from any tax or excise as described in section 3, Article IX of this Constitution.</p> <p>(2) All revenues derived from the sources mentioned in subsection (1) of this section shall become a part of the Common School Fund . . . The remainder of the income derived from the investment of the Common School Fund shall be applied to the support of primary and secondary education as prescribed by law</p>
<p>Pennsylvania</p>	<p>None.</p>
<p>Rhode Island Article XII, § 2</p>	<p>The money which now is or which may hereafter be appropriated by law for the establishment of a permanent fund for the support of public schools, shall be securely invested and remain a perpetual fund for that purpose.</p>
<p>South Carolina</p>	<p>None.</p>
<p>South Dakota Article VIII, §§ 2, 7</p>	<p>§ 2: All proceeds of the sale of public lands that have heretofore been or may hereafter be given by the United States for the use of public schools in the state; all such per centum as may be granted by the United States on the sales of public lands; the proceeds of all property that shall fall to the state by escheat; the proceeds of all gifts or donations to the state for public schools or not otherwise appropriated by the terms of the gift; and all property</p>

	<p>otherwise acquired for public schools, shall be and remain a perpetual fund for the maintenance of public schools in the state. It shall be deemed a trust fund held by the state. The principal shall never be diverted by legislative enactment for any other purpose, and may be increased; but, if any loss occurs through any unconstitutional act, the state shall make the loss good through a special appropriation.</p> <p>§ 7: All lands, money, or other property donated, granted, or received from the United States or any other source for a university, agricultural college, normal schools, or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased, but shall never be diverted by legislative enactment for any other purpose, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses that may occur through any unconstitutional act or where required under the Enabling Act.</p>
Tennessee	None.
Texas Article VII, §§ 2–4	<p>§ 2: All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the State out of grants heretofore made or that may hereafter be made to railroads or other corporations of any nature whatsoever; one half of the public domain of the State; and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a permanent school fund.</p> <p>§ 3: (a) One-fourth of the revenue derived from the State occupation taxes shall be set apart annually for the benefit of the public free schools. (b) It shall be the duty of the State Board of Education to set aside a sufficient amount of available funds to provide free text books for the use of children attending the public free schools of this State. (c) Should the taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State. (d) The Legislature may provide for the formation of school districts by general laws, and all such school districts may embrace parts of two or more counties. (e) The Legislature shall be authorized to pass laws for the assessment and collection of taxes in all school districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts for the further maintenance of public free schools, and for the erection and equipment of school</p>

	<p>buildings therein; provided that a majority of the qualified voters of the district voting at an election to be held for that purpose, shall approve the tax.</p> <p>§ 4: The lands herein set apart to the Permanent School fund, shall be sold under such regulations, at such times, and on such terms as may be prescribed by law; and the Legislature shall not have power to grant any relief to purchasers thereof. The proceeds of such sales must be used to acquire other land for the Permanent School fund as provided by law or the proceeds shall be invested by the comptroller of public accounts, as may be directed by the Board of Education herein provided for, in the bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law; and the State shall be responsible for all investments.</p>
<p>Utah Article X, §§ 5, 7</p>	<p>§ 5: (1) There is established a permanent State School Fund which shall consist of revenue from the following sources:</p> <ul style="list-style-type: none"> (a) proceeds from the sales of all lands granted by the United States to this state for the support of the public elementary and secondary schools; (b) 5% of the net proceeds from the sales of United States public lands lying within this state; (c) all revenues derived from nonrenewable resources on state lands, other than sovereign lands and lands granted for other specific purposes; (d) all revenues derived from the use of school trust lands; (e) revenues appropriated by the Legislature; and (f) other revenues and assets received by the fund under any other provision of law or by bequest or donation. <p>(2)</p> <ul style="list-style-type: none"> (a) The State School Fund principal shall be safely invested and held by the state in perpetuity. (b) Only the interest and dividends received from investment of the State School Fund may be expended for the support of the public education system as defined in Article X, Section 2 of this constitution. (c) The Legislature may make appropriations from school trust land revenues to provide funding necessary for the proper administration and management of those lands consistent with the state's fiduciary responsibilities towards the beneficiaries of the school land trust. Unexpended balances remaining from the appropriation at the end of each fiscal year shall be deposited in the State School Fund. (d) The State School Fund shall be guaranteed by the state against loss or diversion. <p>(3) There is established a Uniform School Fund which shall consist of revenue from the following</p>

	<p>sources:</p> <ul style="list-style-type: none"> (a) interest and dividends from the State School Fund; (b) revenues appropriated by the Legislature; and (c) other revenues received by the fund under any other provision of law or by donation. <p>(4) The Uniform School Fund shall be maintained and used for the support of the state's public education system as defined in Article X, Section 2 of this constitution and apportioned as the Legislature shall provide. [. . .]</p> <p>§ 7: The proceeds from the sale of lands reserved by Acts of Congress for the establishment or benefit of the state's universities and colleges shall constitute permanent funds to be used for the purposes for which the funds were established. The funds' principal shall be safely invested and held by the state in perpetuity. Any income from the funds shall be used exclusively for the support and maintenance of the respective universities and colleges. The Legislature by statute may provide for necessary administrative costs. The funds shall be guaranteed by the state against loss or diversion</p>
Vermont	None.
Virginia Article VIII, § 8	<p>The General Assembly shall set apart as a permanent and perpetual school fund the present Literary Fund; the proceeds of all public lands donated by Congress for free public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the Commonwealth by forfeiture except as hereinafter provided, of all fines collected for offenses committed against the Commonwealth, and of the annual interest on the Literary Fund; and such other sums as the General Assembly may appropriate. But so long as the principal of the Fund totals as much as eighty million dollars, the General Assembly may set aside all or any part of additional moneys received into its principal for public school purposes, including the teachers retirement fund [. . .]</p>
Washington Article IX, § 3	<p>The principal of the common school fund as the same existed on June 30, 1965, shall remain permanent and irreducible. The said fund shall consist of the principal amount thereof existing on June 30, 1965, and such additions thereto as may be derived after June 30, 1965, from the following named sources, to wit:</p> <p>Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state when the purpose of the grant is not specified, or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of stone, minerals, or property other than timber and other crops from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating stone, minerals or property other than timber and other crops from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said</p>

	<p>lands; five per centum of the proceeds of the sale of public lands lying within the state, which shall be sold by the United States subsequent to the admission of the state into the Union as approved by section 13 of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been, and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund.</p> <p>There is hereby established the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools. The sources of said fund shall be: (1) Those proceeds derived from the sale or appropriation of timber and other crops from school and state lands subsequent to June 30, 1965, other than those granted for specific purposes; (2) the interest accruing on said permanent common school fund from and after July 1, 1967, together with all rentals and other revenues derived therefrom and from lands and other property devoted to the permanent common school fund from and after July 1, 1967; and (3) such other sources as the legislature may direct. That portion of the common school construction fund derived from interest on the permanent common school fund may be used to retire such bonds as may be authorized by law for the purpose of financing the construction of facilities for the common schools.</p> <p>The interest accruing on the permanent common school fund together with all rentals and other revenues accruing thereto pursuant to subsection (2) of this section during the period after the effective date of this amendment and prior to July 1, 1967, shall be exclusively applied to the current use of the common schools.</p> <p>To the extent that the moneys in the common school construction fund are in excess of the amount necessary to allow fulfillment of the purpose of said fund, the excess shall be available for deposit to the credit of the permanent common school fund or available for the current use of the common schools, as the legislature may direct.</p>
West Virginia Article XII, § 4	<p>The existing permanent and invested school fund, and all money accruing to this state from forfeited, delinquent, waste and unappropriated lands; and from lands heretofore sold for taxes and purchased by the state of Virginia, if hereafter redeemed or sold to others than this state; all grants, devises or bequests that may be made to this state, for the purposes of education or where the purposes of such grants, devises or bequests are not specified; this state's just share of the literary fund of Virginia, whether paid over or otherwise liquidated; and any sums of money, stocks or property which this state shall have the right to claim from the state of Virginia for educational purposes; the proceeds of the estates of persons who may die without leaving a will or heir, and of all escheated lands; the proceeds of any taxes that may be levied on the revenues of any corporations; all moneys that may be paid</p>

	<p>as an equivalent for exemption from military duty; and such sums as may from time to time be appropriated by the Legislature for the purpose, shall be set apart as a separate fund to be called the "School Fund," and invested under such regulations as may be prescribed by law, in the interest-bearing securities of the United States, or of this state, or if such interest-bearing securities cannot be obtained, then said "School Fund" shall be invested in such other solvent, interest-bearing securities as shall be approved by the governor, superintendent of free schools, auditor and treasurer, who are hereby constituted the "Board of the School Fund," to manage the same under such regulations as may be prescribed by law; and the interest thereof shall be annually applied to the support of free schools throughout the state, and to no other purpose whatever. But any portion of said interest remaining unexpended at the close of a fiscal year shall be added to and remain a part of the capital of the "School Fund": Provided, That all taxes which shall be received by the state upon delinquent lands, except the taxes due to the state thereon, shall be refunded to the county or district by or for which the same were levied.</p>
<p>Wisconsin Article X, § 2</p>	<p>The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) and all moneys and the clear proceeds of all property that may accrue to the state by forfeiture or escheat; and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, and all moneys arising from any grant to the state where the purposes of such grant are not specified, and the 500,000 acres of land to which the state is entitled by the provisions of an act of congress, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September 4, 1841; and also the 5 percent of the net proceeds of the public lands to which the state shall become entitled on admission into the union (if congress shall consent to such appropriation of the 2 grants last mentioned) shall be set apart as a separate fund to be called "the school fund," the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:</p> <ol style="list-style-type: none"> (1) To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor. (2) The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor.
<p>Wyoming Article VII, §§ 2-4</p>	<p>§ 2: The following are declared to be perpetual funds for school purposes, of which the annual income only can be appropriated, to wit: Such per centum as has been or may hereafter be granted by congress on the sale of lands in this state; all moneys arising from the sale or lease of sections number sixteen and thirty-six in each township in the state, and the lands selected or that may be selected in lieu thereof; the proceeds of all lands that have been or may hereafter be granted to this state, where by the terms and conditions</p>

of the grant, the same are not to be otherwise appropriated; the net proceeds of lands and other property and effects that may come to the state by escheat or forfeiture, or from unclaimed dividends or distributive shares of the estates of deceased persons; all moneys, stocks, bonds, lands and other property now belonging to the common school funds. Provided, that the rents for the ordinary use of said lands shall be applied to the support of public schools and, when authorized by general law, not to exceed thirty-three and one-third (33 1/3) per centum of oil, gas, coal, or other mineral royalties arising from the lease of any said school lands may be so applied.

§ 3: To the sources of revenue above mentioned shall be added all other grants, gifts and devises that have been or may hereafter be made to this state and not otherwise appropriated by the terms of the grant, gift or devise.

§ 4: All money, stocks, bonds, lands and other property belonging to a county school fund, except such moneys and property as may be provided by law for current use in aid of public schools, shall belong to and be invested by the several counties as a county public school fund, in such manner as the legislature shall by law provide, the income of which shall be appropriated exclusively to the use and support of free public schools in the several counties of the state.

Appendix D

State constitutional provisions most similar to Article XI, § 6

State Constitutional Provision	Text
Alabama Article 14, § 256	The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race
Alaska	None.
Arizona	None.
Arkansas Article XIV, § 3(a)(3)	The uniform rate of tax shall be assessed and collected in the same manner as other school property taxes, but the net revenues from the uniform rate of tax shall be remitted to the State Treasurer and distributed by the state to the school districts as provided by law. No portion of the revenues from the uniform rate of tax shall be retained by the state. The revenues so distributed shall be used by the school districts solely for maintenance and operation of schools.
California Article IX, § 6	<p>[. . .] The Legislature shall add to the State School Fund such other means from the revenues of the State as shall provide in said fund for apportionment in each fiscal year, an amount not less than one hundred eighty dollars (\$180) per pupil in average daily attendance in the kindergarten schools, elementary schools, secondary schools, and technical schools in the Public School System during the next preceding fiscal year.</p> <p>The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, kindergarten schools, elementary schools, secondary schools, and technical schools except that there shall be apportioned to each school district in each fiscal year not less than one hundred twenty dollars (\$120) per pupil in average daily attendance in the district during the next preceding fiscal year and except that the amount apportioned to each school district in each fiscal year shall be not less than twenty-four hundred dollars (\$2,400).</p>
Colorado Article IX, § 3	The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX. The state treasurer shall be the custodian of this fund, and the same shall be

	securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur. In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts. Distributions of interest and other income for the benefit of public schools provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes.
Connecticut Article VIII, § 4	The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require.
Delaware Article X, § 2	In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the State as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law.
Florida Article IX, § 6	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.
Georgia Article VI, para. 1, § b	School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes.
Hawaii	None.
Idaho Article IX, § 3	The public school permanent endowment fund of the state shall forever remain inviolate and intact; the earnings of the public school permanent endowment fund shall be deposited into the public school earnings reserve fund and distributed in the maintenance of the schools of the state, and among the counties and school districts of the state in such manner as may be prescribed by law. No part of the public school permanent endowment fund principal shall ever be transferred to any other fund, or used or

	<p>appropriated except as herein provided. Funds shall not be appropriated by the legislature from the public school earnings reserve fund except as follows: the legislature may appropriate from the public school earnings reserve fund administrative costs incurred in managing the assets of the public school endowment including, but not limited to, real property and monetary assets. The state treasurer shall be the custodian of these funds, and the same shall be securely and profitably invested as may be by law directed. As defined and prescribed by law, the state shall supply losses to the public school permanent endowment fund, excepting losses on moneys allocated from the public school earnings reserve fund.</p>
Illinois	None.
Indiana Article VIII, §§ 3, 7	<p>§ 3: The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.</p> <p>§ 7: All trust funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.</p>
Iowa	None.
Kansas	None.
Kentucky § 186	All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.
Louisiana Article VIII, § 13(B)	<p>The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior</p>

	to making the appropriation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of funds appropriated.
Maine Article IX, § 8(3)	The Legislature shall have power to provide that taxes, which it may authorize a School Administrative District or a community school district to levy, may be assessed on real, personal and intangible property in accordance with any cost-sharing formula which it may authorize.
Maryland Article VIII, § 1; Article III, § 52(4)	Art. VIII, § 1: The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance. Art. III, § 52(4): Each Budget shall embrace an estimate of all appropriations in such form and detail as the Governor shall determine or as may be prescribed by law, as follows: . . . (f) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution and with the laws of the State; and (g) for such other purposes as are set forth in the Constitution or laws of the State.
Massachusetts	None.
Michigan	None.
Minnesota	None.
Mississippi Article VIII, § 206	There shall be a state common-school fund, to be taken from the General Fund in the State Treasury, which shall be used for the maintenance and support of the common schools. Any county or separate school district may levy an additional tax, as prescribed by general law, to maintain its schools. The state common-school fund shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be determined by data collected through the office of the State Superintendent of Education in the manner to be prescribed by law.
Missouri Article IX, § 9(b)	The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary.
Montana Article X, § 1(3)	The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.
Nebraska Article VII, §§ 2, 9(2)	§ 2: The State Department of Education shall be comprised of a State Board of Education and a Commissioner of Education. The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct. § 9(2): No distribution or appropriation shall be made to any school district for the year in which school is not maintained for the minimum term

	required by law.
Nevada Article XI, § 6	<i>See Appendix A.</i>
New Hampshire	None.
New Jersey	None.
New Mexico Article XII, § 3	The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.
New York	None.
North Carolina Article IX, § 7	<p>(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.</p> <p>(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.</p>
North Dakota Article IX, § 2	<p>Distributions from the common schools trust fund, together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law.</p> <p>Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.</p> <p>For the biennium during which this amendment takes effect, distributions from the perpetual trust funds must be the greater of the amount distributed in the preceding biennium or ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. Thereafter, biennial distributions from the perpetual trust funds must be ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. The average value of trust assets is determined by using the assets' ending value for the fiscal year that ends one year before the beginning of the</p>

	biennium and the assets' ending value for the four preceding fiscal years. Equal amounts must be distributed during each year of the biennium.
Ohio Article VI, § 2	The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state [. . .]
Oklahoma Article XIII, § 1(a)	The Legislature shall, by appropriate legislation, raise and appropriate funds for the annual support of the common schools of the State to the extent of forty-two (\$42.00) dollars per capita based on total state-wide enrollment for the preceding school year. Such moneys shall be allocated to the various school districts in the manner and by a distributing agency to be designated by the Legislature; provided that nothing herein shall be construed as limiting any particular school district to the per capita amount specified herein, but the amount of state funds to which any school district may be entitled shall be determined by the distributing agency upon terms and conditions specified by the Legislature, and provided further that such funds shall be in addition to apportionments from the permanent school fund created by Article XI, Section 2, hereof.
Oregon Article VIII, § 8	(1) The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals. (2) Consistent with such legal obligation as it may have to maintain substantial equity in state funding, the Legislative Assembly shall establish a system of Equalization Grants to eligible districts for each year in which the voters of such districts approve local option taxes as described in Article XI, section 11 (4)(a)(B) of this Constitution. The amount of such Grants and eligibility criteria shall be determined by the Legislative Assembly.
Pennsylvania	None.
Rhode Island Article XII, § 4	The general assembly shall make all necessary provisions by law for carrying this article into effect. It shall not divert said money or fund from the aforesaid uses, nor borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretence [sic] whatsoever.
South Carolina	None.
South Dakota Article VIII, § 14	The Legislature shall provide by law for the protection of the school lands from trespass or unlawful appropriation, and for their defense against all unauthorized claims or efforts to divert them from the school fund.
Tennessee	None.
Texas Article VII, § 5(c)	The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school. The available school fund shall be distributed to the

	several counties according to their scholastic population and applied in the manner provided by law.
Utah Article X, §§ 5(4)	The Uniform School Fund shall be maintained and used for the support of the state's public education system as defined in Article X, Section 2 of this constitution and apportioned as the Legislature shall provide.
Vermont	None.
Virginia Article VIII, § 2	Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly. The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.
Washington	None.
West Virginia Article XII, § 5	The Legislature shall provide for the support of free schools by appropriating thereto the interest of the invested "School Fund," the net proceeds of all forfeitures and fines accruing to this state under the laws thereof and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.
Wisconsin	None.
Wyoming Article VII, §§ 2-4	<p>§ 2: The following are declared to be perpetual funds for school purposes, of which the annual income only can be appropriated, to wit: Such per centum as has been or may hereafter be granted by congress on the sale of lands in this state; all moneys arising from the sale or lease of sections number sixteen and thirty-six in each township in the state, and the lands selected or that may be selected in lieu thereof; the proceeds of all lands that have been or may hereafter be granted to this state, where by the terms and conditions of the grant, the same are not to be otherwise appropriated; the net proceeds of lands and other property and effects that may come to the state by escheat or forfeiture, or from unclaimed dividends or distributive shares of the estates of deceased persons; all moneys, stocks, bonds, lands and other property now belonging to the common school funds. Provided, that the rents for the ordinary use of said lands shall be applied to the support of public schools and, when authorized by general law, not to exceed thirty-three and one-third (33 1/3) per centum of oil, gas, coal, or other mineral royalties arising from the lease of any said school lands may be so applied.</p> <p>§ 3: To the sources of revenue above mentioned shall be added all other grants, gifts and devises that have been or may hereafter be made to this state and not otherwise appropriated by the terms of the grant, gift or devise.</p> <p>§ 4: All money, stocks, bonds, lands and other property belonging to a</p>

	<p>county school fund, except such moneys and property as may be provided by law for current use in aid of public schools, shall belong to and be invested by the several counties as a county public school fund, in such manner as the legislature shall by law provide, the income of which shall be appropriated exclusively to the use and support of free public schools in the several counties of the state.</p>
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Appendix E

State constitutional provisions most similar to Article XI, § 10

State Constitutional Provision	Text
Alabama Article 14, § 263	No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.
Alaska Article 7, § 1	The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.
Arizona Article XI, § 7	No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.
Arkansas	None
California Article IX, § 8	No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.
Colorado Article IX, § 7	Neither the general assembly, nor 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, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.
Connecticut	None.
Delaware Article X, § 3	No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.
Florida Article I, § 3	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.
Georgia	No money shall ever be taken from the public treasury, directly or indirectly,

Article I, § 2, para. VII	in aid of any church, sect, cult, or religious denomination or of any sectarian institution.
Hawaii Article X, § 1	The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution [. . .]
Idaho Article IX, § 5	Neither the legislature nor 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, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose [. . .]
Illinois Article X, § 3	Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.
Indiana Article I, § 6	No money shall be drawn from the treasury, for the benefit of any religious or theological institution.
Iowa	None.
Kansas Article VI, § 6(c)	No religious sect or sects shall control any part of the public educational funds.
Kentucky § 189	No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.
Louisiana	None.
Maine	None.
Maryland	None.
Massachusetts Articles of Amendment, article XVIII, § 2	All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning,

	whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both [. . .]
Michigan Article VIII, § 2, paragraph 2	No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.
Minnesota Article XIII, § 2	In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.
Mississippi Article VIII, § 208	No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor 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.
Missouri Article IX, § 8	Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.
Montana Article X, § 6(1)	The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
Nebraska Article VII, § 11, paragraphs 1–3	¶ 1: Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; Provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of

	<p>twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.</p> <p>¶ 2: All public schools shall be free of sectarian instruction.</p> <p>¶ 3: The state shall not accept money or property to be used for sectarian purposes; Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.</p>
Nevada Article XI, § 10	No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.
New Hampshire Part 2, article 83	Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government [. . .] Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. [. . .]
New Jersey	None.
New Mexico Article XII, § 3	The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.
New York Article XI, § 3	Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.
North Carolina	None.
North Dakota Article VIII, § 5	All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.
Ohio Article VI, § 2	The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but 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.
Oklahoma Article II, § 5	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or

	support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.
Oregon Article I, § 5	No money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution, nor shall any money be appropriated for the payment of any religious [sic] services in either house of the Legislative Assembly.
Pennsylvania Article III, § 14	No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.
Rhode Island	None.
South Carolina Article 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.
South Dakota Article VIII, § 16	No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.
Tennessee	None.
Texas Article VII, § 5(c)	The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school. The available school fund shall be distributed to the several counties according to their scholastic population and applied in the manner provided by law.
Utah Article X, § 9	Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.
Vermont	None.
Virginia	None.
Washington Article IX, § 4	All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.
West Virginia	None.
Wisconsin Article X, § 3	The legislature shall provide by law for the establishment of district school . . . and no sectarian instruction shall be allowed therein [. . .]
Wyoming Article VII, § 12	No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.