

Testing the Constitutionality of School Vouchers in Oregon

Copyrights 2007: Tyler Smith

tylersmithis@wbcable.net

503-989-4811

503-982-5111

<u>SECTION CONTENTS</u>	<u>PAGE</u>
1. Introduction	2
2. Adequacy Requirement	7
3. Uniformity and Exclusivity	13
Exclusivity	13
Uniform, General and Common	18
4. School Voucher Funding	25
5. The Public Purpose Requirement	33
6. Establishment	35
No Aid to Religious Institutions	36
Aid as a Valid Public Purpose	40
7. Local and Special Legislation Requirements	41
8. Conclusion	42

1. INTRODUCTION

The United States has a long history of legal controversies relating to how we educate our children. A modern controversy in education is the battle for school choice. The term school choice has been used to describe educational systems that allow students and their parents to choose where and how the children receive their education. School choice has been facilitated by the growth of home schooling, educational tax credits, private schools, and charter schools but each of these options

has at least one significant negative.¹ Legislative programs to create school choice have commonly consisted of either tax credits for educational expenses, or school vouchers that pay for school tuition. In a school voucher program the state still pays the costs of educating the student, but that education comes from the school the student chooses. This choice could be a public school, or a qualified private school.

Each school voucher program that other states have created has faced legal challenges about its constitutionality. These attacks have come on a variety of legal theories. This article will explore the legal issues that have been the source of the constitutional challenges and explain how Oregon could create a constitutionally valid school voucher program.

The history of schooling in America can be traced back to the 1600's among the Puritans and Congregationalists in the New England colonies. These early schools were often run by churches and supported by private individuals. Shortly after the founding of the United States, government provided schooling became a national movement. However, the United States Constitution does not give the Federal government any express power to create or run schooling programs, that power was reserved to each of the states or their people.² States and local governments are responsible for any government schools. For those to whom it was available, private schooling was often preferred over government schools. Private, charitable, and religious schools remained the predominate form of child schooling until at least the 1840's. By the middle of the 19th century public school reformers such as Horace Mann in Massachusetts and Henry Barnard in Connecticut, successfully made public schooling to a forefront political issue, and more states began adopting legislation to create public schools. Since its creation in 1859 the Oregon Constitution has contained

¹ Home schooling may lack professional teaching skill; tax credits typically cover only a small part of private school expense; taxpayers who choose private schools pay both their normal share of taxes and the cost of tuition; charter schools are government schools and still remain constrained by budget considerations and prohibitions on religious teaching.

² *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, reh'g denied, 458 U.S. 1131, 103 S. Ct. 14 (1982).

a constitutional mandate that the legislature create a government school system.³ Article VIII, section 3 states, “The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of common schools”.⁴ By the end of the 19th century, public schooling was available for all children. Availability did not always result in children attending the schools, nor did available mean that the quality of the education was equal among the schools. To solve these attendance problems states enacted compulsory attendance laws. The first was enacted in 1852 and the last in 1918. Compulsory attendance laws required that children attend government schools and all but eliminated school choice. However the United States Supreme Court ruled that compulsory education laws could not be used to force children into public schools.⁵

Many of the controversial issues surrounding equality as well as the quality of education still plague states today. Progress toward equality was achieved through the judicial process and effects of *Brown v. Board of Education*.⁶ Equality does not indicate quality, and a large part of the modern issues in education still revolve around what level of quality our public school system is supposed to provide. There may not be an exact answer for this question, though politicians, parents and educators seem to agree that the quality of education needs to improve.

Proponents of a school voucher system insist that school vouchers will create competition among schools for the state education funds that follow enrollment. This competition should drive quality improvements. School vouchers are also seen as a way to rescue poor children who possess ability and desire from the worst of the worst public schools. Assuming these outcomes would take place with school vouchers, we must first answer the question of whether a school voucher program would even be constitutional in Oregon. If a school voucher program does not pass all the constitutional requirements then there is no reason to debate the merits and potential

³ OR. CONST., article VIII, section 3. (1859).

⁴ Id.

⁵ *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925).

⁶ *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S.Ct. 753 (1955).

improvements it may provide for the children in Oregon. The constitution itself could be changed, however this analysis will consider the current Oregon constitutional limits.

School voucher programs have been adopted in Wisconsin, Florida, Ohio, Maine, Colorado, Arizona, Washington D.C. and Vermont. Most of these school voucher programs have been challenged in court.⁷ This comment does not advocate for a particular form a school voucher system but does recommend some specific content. This comment intentionally uses a very general definition of a school voucher program so the focus can stay on analysis of the constitutional issues.

Throughout this comment I will refer to “a school voucher program”. By school voucher program, I am talking about a generic legislative program that uses state appropriated funds to pay for tuition vouchers that can then be redeemed by a student at a qualifying private or public school of their choice. The school voucher program would also have student eligibility criteria. A student’s eligibility for a voucher may be triggered when the performance of their existing public school is falling below a set standard, or all students may be eligible for a voucher if they choose to use it. There would also be school eligibility requirements that the choice schools must meet before they are eligible to receive voucher students. These eligibility requirements might include teacher hiring guidelines, substantive educational criteria, or performance standards that the private or choice school must meet before they are eligible receive voucher students. Existing non-discrimination requirements would prevent choice schools from discriminating or giving preferences to select races or religions.

This comment does not suggest the language for a drafter to use, but instead makes recommendations following some of the general concepts school voucher programs have employed in other states such as Florida, Ohio and Wisconsin.⁸ This

⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002); *Bush v. Holmes*, 919 So.2d 392, 206 Ed. Law Rep. 756 (2006); *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992).

⁸ See Ohio Pilot Project Scholarship Program; Milwaukee Parental Choice Program, and the Florida Opportunity Scholarship Program.

analysis intends to explain and analyze the many constitutional issues that have been used as the challenge to these school voucher programs and how these would apply in Oregon. Planning to avoid unconstitutionality may be a greater task than drafting the details and leaves room for political trade offs about those details during the legislative process.

Oregon's constitution contains some of the same limitations that were the basis for constitutional attack in other states. Any school voucher system must meet these arguments, or sidestep them completely, if it is to survive. This comment focuses on the constitutional issues that could make the entire program fail. For this reason, analysis of the current statutes is unnecessary because a school voucher program enacted with legislative power could simply supersede any prior legislation that conflicted.

Seven issues create constitutional pitfalls for an Oregon school voucher system. The first is whether a school voucher system would violate any education adequacy requirements imposed by the Constitution. The second issue is whether Article VIII, section 3 of the Oregon Constitution would apply to school voucher schools. The third issue is whether a school voucher program would violate any uniformity requirement that applied. A uniformity requirement is what invalidated Florida's school voucher program. The fourth issue is whether government funding a school voucher program would violate constitutional requirements on state spending. The fifth issue is whether government funding of a school vouchers program would cause a violation of Oregon's version of separation of church and state. This issue has been hotly debated in most school voucher court cases. The sixth issue is whether a school voucher program would violate the requirement that all state spending must be for a public purpose. A seventh issue is whether a school voucher system would violate constitutional bans on local and special legislation. If all of the pitfalls created by these constitutional requirements can be avoided, Oregon would be able to create and fund a school voucher system.

2. ADEQUACY REQUIREMENT

Many state constitutions have text associated with the level of funding mandated for education. These constitutional guarantees often refer to “adequate funding” and have been called adequacy clauses or adequacy requirements.⁹ A school voucher program would have to avoid violating any constitutional adequacy requirements. As an example, Florida’s Constitution expressly commands that, “Adequate provision shall be made by law for ... public schools.”¹⁰ Oregon has a constitutional clause titled, “Adequate and Equitable Funding.”¹¹ The text of the Oregon constitution does not specifically define adequate and the heading is the only location of the word. Generally section headings and titles do not control the meaning of a provision, but they can be consulted as a guide when the meaning of the clause is in question.¹² Article VIII, section 8 of the Oregon Constitution is titled “Adequate and Equitable Funding.”¹³ The provision states:

Section 8. Adequate and Equitable Funding. (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.

This language along with the title is probably enough to imply that there is a sufficiency or adequacy requirement attached to Oregon’s school funding. What does the adequacy requirement mean?

Unlike equitable or equal funding, adequacy concerns the total amount of money being spent on education. A legal claim based on adequacy or sufficiency would allege that the constitution requires more money to be given to education than is currently

⁹ Florida CONST. article IX, section 1(a) (2) and (3) (It is “a paramount duty of the state to make adequate provisions for the education of all children residing within its borders”, and “adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.”)

¹⁰ *Id.*

¹¹ OR. CONST., article VIII, section 8 (2000).

¹² *Earle v. Holman*, 154 Or. 578, 593, 61 P.2d 1242 (1936); *State v. Zook*, 27 Or.App 543, 545, 556 P.2d 989 (1976); AMJUR STATUTES, § 109.

¹³ OR.CONST., article VIII, section 8 (2000).

being allocated. Legal challenges over adequacy have become a new trend for invalidating education systems and have had recent success.¹⁴ This trend marks a turning away from the past practice of equality challenges, which were based on alleged violations of equal protection. Equal protection has only been a successful attack method when race, ethnicity or some other suspect classification causes the level of judicial scrutiny to be raised.¹⁵ Suspect classification analysis should not be applicable to school vouchers if the program does not take race, ethnicity, religion or other suspect classifications into consideration when accepting students. Other state educational funding programs have been challenged on equality of the levels of funding between the various schools in a state rather than the equality of the treatment of the individuals.¹⁶ Oregon has such a specific equitable funding requirement.¹⁷ The Oregon constitution's equitable funding provision requires the state to set up a system of equalization grants to be given to eligible districts that approve special local options taxes.¹⁸ School funding cases based on state equitable funding clauses have largely failed.¹⁹ A few equitable funding court challenges have partly succeeded in getting a court to judicially create, or force the legislature to create formulas to define equitable educational funding.²⁰ A school voucher system in Oregon would not be involved with the state funding formula so would not be directly involved in any inequalities between

¹⁴ Molly A. Hunter, *State-By-State Status of School Finance Litigations* (National Access Network, 2006) (Study reports that since 1989, twenty cases based on adequacy have been won by plaintiffs, seven have been won by the State, and twelve are currently pending).

¹⁵ *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, reh. den. 411 U.S. 959, 93 S.Ct. 1919 (1973) (holding that wealth is not a suspect classification, and that education is not a fundamental right); *Olsen v. State*, 276 Or. 9, 27, 554 P.2d 139 (1976) (holding that even under an arguably disfavored balancing approach, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system) and also citing *Rodriguez* supra this note and *McGowan v. Maryland*, 366 U.S. 420, 425 - 426 (1961); *School Administrative District No. 1 v. Commissioner*, 659 A.2d 854, (1995) (challenging the cuts on equal protection grounds under Maine's state constitution);

¹⁶ *Gould v. Orr*, 506 N.W.2d 349 (1993); *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989); *Vincent v. Voight*, 236 Wis.2d 588, 614 N.W.2d 388 (2000).

¹⁷ OR. CONST., article VIII, section 8 (2000).

¹⁸ OR. CONST., article VIII, section 8 (2) (2000).

¹⁹ *Olsen v. State*, 276 Or. 9, 27, 554 P.2d 139 (1976); *Gould v. Orr*, 506 N.W.2d 349 (1993), the Nebraska Supreme Court concluded that equal funding is not guaranteed by their constitution); *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989); *School Administrative District No. 1 v. Commissioner*, 659 A.2d 854, (1995) (challenging the cuts on equal protection grounds under Maine's state constitution); *Vincent v. Voight*, 236 Wis.2d 588, 614 N.W.2d 388 (2000).

²⁰ *Montoy v. State*, 138 P.3d 755 (Kan. Jul. 28, 2006); *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989).

school districts. However since a school voucher program would use public funds, it may change the overall level of funds spent. If so, then the adequacy requirement would become an issue. Remedies for violations of adequacy provisions in other states have included: invalidation of the school funding program²¹, injunctive relief, and writs of execution from a court to the legislature that demands the legislature comply with the adequacy requirements.²²

Any new Oregon school voucher legislation would likewise need to avoid violating any constitutional obligations on adequacy. Cases based on an adequacy challenges rely on either express or implied language in the state constitutions. This raises the issue of how Oregon defines adequacy. The Oregon Court of Appeals may soon address this question because a challenge to Oregon school funding based on an adequacy argument recently lost in an Oregon Circuit Court.²³ The critical question on this issue is whether Oregon's adequacy provision creates an objective standard that a court could measure and demand adherence too, or instead if the provision creates a flexible requirement that is left to the legislature's judgment.

A school voucher program could only violate the adequacy requirement if the program made otherwise adequate funding becomes inadequate. Any program that uses funds from the public treasury could arguably be said to be contributing to any inadequacy.²⁴ To determine if a school voucher program would have that effect on adequacy we must know the definition of adequacy and what controls that definition. Therefore the question is whether Article VIII, section 8 (excerpt above) would give

²¹ *Columbia Falls Elementary School Dist. No. 6 v. State*, 326 Mont. 304, 109 P.3d 257 (2005); *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004). (Cases showing invalidation of school funding program due to inadequacy).

²² *Londonderry School District #12 v. State of New Hampshire*, Opinion Issued: September 8, 2006 (New Hampshire Supreme Court ordered the state to define a "constitutionally adequate education" by June 2007). *Claremont School District v. Governor*, 635 A.2d 1375 (1993); *Douglas County v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005) (Nebraska school districts and other plaintiffs filed an "adequacy" suit against the governor and other state officials, in, claiming that the state education finance system is unconstitutional and does not afford students the opportunity to meet state learning standards); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Jun. 8, 1989).

²³ *Pendleton School District et. al. v. State of Oregon et. al.* (Multnomah County Circuit Court, Sept. 15, 2006).

²⁴ This was the argument made in *Bush v. Holmes*, 919 So.2d 392, 206 Ed. Law Rep. 756 (2006).

exclusive power to the legislature to define 'adequacy. For instance, if the legislature has exclusive power to define adequacy, then the court would have no choice but to leave that constitutional power to the legislature. In the alternative, if there is an objective definition of adequate found in that clause, then a court could demand that the legislature meet those requirements.²⁵ When statute is within the reach of legislative power and does not violate some other specific constitutional provision, a court's inquiry is supposed to end.²⁶ Furthermore in determining whether an act is in conflict or inconsistent with the constitution all reasonable doubts upon the question must be resolved in favor of the law thus assailed.²⁷ Normal jurisprudential philosophy may leave this definitional power with the legislature. Even though the Florida Supreme Court invalidated their school voucher program for other reasons, they also stated that in the absence of express language, it is the legislature's province to determine adequacy.²⁸ Furthermore, other states that have declared the amount of school funding inadequate, have consistently deferred to the legislature's prerogative to define a constitutionally adequate.²⁹ This line of reasoning favors upholding school voucher

²⁵ A few state courts have gone farther and specifically defined adequacy, or at least defined a minimum level at which anything below is not adequate; see *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993); *Montoy v. State*, 138 P.3d 755 (Kan. Jul. 28, 2006); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Jun. 8, 1989) (declaring Kentucky's entire system of common schools unconstitutional. The court ordered the legislature to provide funding sufficient to provide each child in Kentucky an adequate education and also ordered the legislature to reform the property tax system and in defining adequate education); *Abbeville County School District v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999) (court established base requirements for adequacy of: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills).

²⁶ *State v. Fasold*, 251 Or. 274, 279, 445 P.2d 489 (1968) (citing *State v. School District No. 3*, 78 Or. 188, 192, 152 P. 221 (1915) and *Becker v. Board of Education of Benton County*, 258 Iowa 277, 283, 138 N.W.2d 909, 912 (1965); see generally *Davis v. Grover*, 166 Wis.2d 501, 532, 480 N.W.2d 460, 471 (1992).

²⁷ *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263 (1891); *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37 (1892); *Simon v. Northrup*, 27 Or. 487, 40 Pac. 560 (1895); *Kadderly v. Portland*, 44 Or. 118, 143, 74 Pac. 710 (1903).

²⁸ *Coalition for Adequacy & Fairness in School Funding, Inc v. Chiles*, 680 So.2d 400, 406-407, 21 Fla. L. Weekly S271 (June 27, 1996).

²⁹ *Claremont School District v. Governor*, 138 N.H. 183, 193, 635 A.2d 1375 (1993); *Claremont II*, 142 N.H. 462, 474, 703 A.2d 1353 (1997); *Davis v. Grover*, 166 Wis.2d at 541; *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 55, 769 P.2d 684, 690 (1989), modified by 236 Mont. 44, 784 P.2d 412 (1990); *Columbia Falls v. State of Montana*, 326 Mont. 304, 109 P.3d 257 (2005); *Neeley v. West Orange-Cove*. 176 S.W.3d 746 (Nov. 22, 2005).

legislation under the assumption that the legislature has defined adequacy by creating legislation on the subject matter itself.

An Oregon Court of Appeals may soon review the Circuit Court's decision about adequacy from the *Pendleton* case.³⁰ A circuit court's ruling on a definition of adequacy is not binding on a court of appeals and can be reviewed if the case is appealed.³¹ When Oregon courts interpret statutes or voter initiated constitutional provisions they make an attempt to determine the intent of voters according to the analytical method laid out in *Ecumenical Ministries v. Oregon State Lottery Commission*.³² This process is not exact but has been ordered and explained in *Portland General Electric v. Bureau of Labor and Industries*.³³ Article VIII, Section 8 was adopted by initiative, thus this statutory construction technique is appropriate even though this is construction of a constitutional provision.³⁴ First the court looks at the text of the provision in context. This first stage can also include the use of any tools of statutory construction that apply to the text itself. If the intent is clear and unambiguous based on the text and context of the constitutional provision, the court does not look further.³⁵ Second, if the interpretive answer is not clearly found in the text, the court reviews the legislative history and possibly other extrinsic evidence.³⁶ Additionally when necessary the court will rely on maxims of statutory construction. Presumably following this process (although no opinion was written), Multnomah County Circuit Judge Christopher Marshall ruled for the State which argued that the adoption of Article VIII, section 8 was intended by the voters as a benchmark to measure the extent to which legislators were complying with

³⁰ *Pendleton School Dist. v. St. of Oregon*, (Multnomah County Circuit Ct, Sept. 15, 2006).

³¹ *Waldvogel v. Jones*, 196 Or.App. 446, 103 P.3d 124 (2004) (Once the construction of the statute is before a reviewing court, the court has the obligation to arrive at the correct construction, regardless of the parties' arguments); see also *J. R. Simplot Co. v. Department of Agriculture*, 340 Or. 188, 131 P.3d 162 (2006).

³² *Kerr v. Bradbury*, 193 Or. App 304, 311, 89 P.3d 1227 (2004) citing *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or. 551, 559-560, 871 P.2d 106 (1994); OR. REV. STAT. § 174.020 (2001); *State v. Person*, 316 Or. 585, 590, 853 P.2d 813 (1993); *Teeny v. Haertl Constructors, Inc.*, 314 Or. 688, 694, 842 P.2d 788 (1992).

³³ *Portland General Elec. Co. v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993).

³⁴ *Roseburg School District v. City of Roseburg*, 316 Or. 374, 378-79 & n. 5, 851 P.2d 595 (1993)

³⁵ See, *Comeaux v. Water Wonderland Improvement Dist.*, *supra*, 315 Or. 569, 570, 847 P.2d 841 (where the meaning of the phrase "governmental unit" in Ballot Measure 5 was determined based on text and context of the amendment).

³⁶ *Ecumenical Ministries*, 318 Or. at 560.

the constitutional mandates.³⁷ The text of the constitution indicates that adequacy is probably met when either funding is sufficient to meeting the goals established by law, or when the legislature publishes a report identifying the reasons for any insufficiencies.³⁸ The clause says,

“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 (emphasis added).”

Any adequacy requirement created by the other language in the text would be vastly weakened by the fact that the legislature is given an alternative to adequately funding schools. That alternative is simply to explain. A plain text interpretation of this adequate funding clause could mean that the legislature has no obligation under Art. VIII, section 8 to fund schools at all. The only affirmative obligation created is actually a choice, to fund or to explain. The legislature has an escape clause from any affirmative adequacy level.

Since the Pendleton Circuit Court decision may be appealed, this case may be an important one to watch for Oregon’s definition of adequacy. However it appears that an Oregon school voucher program would survive an adequacy challenge. The most likely interpretation of adequacy leaves the exact level of funding flexible. That flexibility should leave room for a school voucher program without causing inadequacy. In the alternative, if the program can get its funding from a source that is not currently being used for schools and does lessen Oregon’s current per-pupil funding formula, then it cannot be said to even negatively effect adequacy. In that case, the school voucher program could not violate an adequacy requirement. In fact one of the stated goals of school voucher systems is to use funds more wisely and get a higher quality education for the same or less cost to the public. A complete section is devoted later in this comment to the school funding options.

³⁷ *Pendleton School Dist. 16R v. State of Oregon*, (Multnomah County Cir. Sept. 15, 2006).

³⁸ OR. CONST. art. VIII, section 8 (1) (2000).

3. UNIFORMITY AND EXCLUSIVITY

Many states have a mandate in their constitution that their legislature set up and operate some equivalent of “uniform schools.”³⁹ Courts have called this a uniformity requirement. A school voucher system could only violate this uniformity requirement if the requirement applies to a school voucher program and the schools for the school voucher program are found to be not uniform, general or common. This requirement raises the interpretive question of what does uniformity require. The Oregon Constitution states that, “The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”⁴⁰ The text indicates that the legislature must establish a “system of Common schools,” and those schools must be “uniform” and “general.” There is first a threshold question of whether the uniformity requirement would even apply to school voucher schools. This answer depends upon whether the mandate in Article VIII, section 3 is the exclusive power the state has to create school programs or whether the legislature has additional power it can use to create other school programs. I call this an exclusivity requirement.

EXCLUSIVITY REQUIREMENT

An exclusivity requirement exists when the constitution allows only one version of government supported schooling and prohibits other alternatives. Florida invalidated a school voucher program under this rationale.⁴¹ Alternatively, if the state constitution mandates the creation of at least one educational system, but does not prohibit the legislature from creating others, then there is no exclusivity requirement. This section analyzes whether Oregon has such an “exclusivity requirement.”⁴² For instance, can Oregon create a public school system and offer special education scholarships, trade schools, trade school scholarships, or private school scholarships? There is no express text in Oregon’s constitution that excludes state programs that are outside the public

³⁹ OR. CONST. art. VIII, Section 3 (1859); WI. CONST. art. X, section 3; FL. CONST. art. IX, section 1(a) (2002).

⁴⁰ OR. CONST. art. VIII, section 3 (1859).

⁴¹ *Bush v. Holmes*, 919 So.2d 392, 206 Ed. Law Rep. 756 (2006).

⁴² An exclusivity requirement is not a formal name, but describes the implicit limitations found in the Florida Constitution and a different court did not find in the Wisconsin Constitution.

school system, however was also no express language in the constitution of Florida. Nonetheless the Florida Supreme Court interpreted their constitution to include an implicit exclusivity requirement.⁴³ An explanation of how the Florida Supreme Court found this requirement is necessary to see whether Oregon would have the same requirement.

In January of 2006, the Florida Supreme Court in *Bush v. Holmes* held that a newly enacted change the education provision of Florida's Constitution created an affirmative mandate and a limitation on the legislature's power related to the education of children.⁴⁴ The Florida Constitution states that it is the "paramount duty of the state to make adequate provision for the education of all children residing within its borders," and that those adequate provisions, "shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools."⁴⁵ The Florida court said that by reading these sections of the constitution *in pari materia* they found that the legislature was precluded from instituting any alternative educational programs that did not conform with the "high quality system of *free public schools*" mandated by the constitution (emphasis theirs).⁴⁶ The Florida court also viewed the statutory construction canon of *expressio unius est exclusio alterius* to lead them to the same conclusion.⁴⁷ Thus, in part, because the legislation violated this "free" requirement, this school voucher program violated the Florida Constitution.⁴⁸ The court said that because public money would go to students, who would then pay tuition at a private school, that this school becomes a "public school" and thus violates the Florida constitutional provision which mandates "free public schools."⁴⁹ First if the state paid for voucher that is then used to pay for private school tuition, then the private school would be equally free for the student as the public school. In addition, the logic that the Florida court used here seems to confuse public school, and private schools. Public schools are fully funded and run by the government and its agents. Private schools are owned and

⁴³ *Bush*, 919 So.2d 392.

⁴⁴ *Id.* at 406.

⁴⁵ FL. CONST., art. IX, section 1(a) (1998).

⁴⁶ *Bush v. Holmes*, 919 So.2d at 407.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Bush v. Holmes*, 919 So.2d at 407; FL. CONST., article IX, section 1(a).

operated by non-governmental agencies and vouchers come to the school through a private student or parent.

A wise drafter of any new Oregon school voucher program should note that the *Bush v. Holmes* court invalidated the Florida school voucher program in part also because they claimed it undermined the existing system of high quality free public schools by diverting earmarked funds away from that system.⁵⁰ If as described above, the school voucher program did not actually affect the “free” requirement in the Constitution then the courts invalidation holding would be left to rest on the claim that school vouchers undermined the system of ‘high quality’ by diverting money out of the system. This argument was true under the Florida system that called for a dollar for dollar diversion out of public schools. However, this argument would fail where there is a less than dollar for dollar allocation to a school voucher program such as in Wisconsin’s where only 40% of the normal cost of educating the same student in the public school system is diverted from the state education fund.⁵¹ The remaining 60% would remain in the public school fund with one less student. This means that a school voucher program could actually increase the per-student funding in the public system. Oregon could avoid the claim of undermining the public system funding by allocating less than the 100% per-student public school cost allocation to the school voucher system. Some accounting may be needed to calculate for a loss of cost savings by a smaller economy of scale, but that number should be proportionally related to how many students actually use the voucher program. In Wisconsin only about 1,000 students use the state’s school voucher system per year.⁵²

Wisconsin’s Supreme Court upheld their school voucher system when it was challenged based on an exclusivity requirement. Wisconsin’s uniformity clause says “district schools,” which, as the *Holmes* court pointed out, is different than Florida’s Constitution, which says “free public schools.”⁵³ It was necessary for the Florida court

⁵⁰ *Id.* at 409.

⁵¹ *Davis v. Grover*, 166 Wis.2d at 513.

⁵² WIS. STAT. ANN. § 119.23(2)(b); *Davis v. Grover*, 166 Wis.2d 501 at 515.

⁵³ *Id.*; see *Bush v. Holmes*, 919 So.2d at 407.

to make this distinction because the Wisconsin Supreme Court had previously looked at the same type of issue and held that since private schools are not “district schools” the limitations created by uniformity do not apply to private schools.⁵⁴

In Oregon, just as in Wisconsin, an exclusivity argument would probably fail. Again the issue is whether the Oregon constitution implicitly limits the educational alternatives. The lead case on Article VIII held that scope of the legislature’s power over education is plenary, and the legislature is a free agent to enact any law relating to education that it desires unless specifically prohibited from so doing by the constitution.⁵⁵ In *State v. Fasold* the Oregon Supreme court said, “it is our view that the provisions of our constitution and the literally uncontrolled power of the legislature to provide for, regulate and administer the public school system, dilute the authority of decisions from other states.”⁵⁶ Scholars analyzing Oregon’s constitutional convention have also stated that full power and authority for the organized system of common schools was placed on the legislature.⁵⁷ In *MacPherson v. DHS*, the Oregon Supreme Court just recently reminded that this is the rule:

“Our constitution, like all other state constitutions, is not to be regarded as a grant of power, but rather a limitation upon the powers of the legislature. The people[,] in adopting it, committed to the legislature the whole law making power of the state, which they *did not expressly or impliedly* withhold.” And further stating “even implied limitations must find their source in some constitutional provision.”⁵⁸

⁵⁴ *Davis v. Grover*, 166 Wis.2d 501, 532, 480 N.W.2d 460, 471 (1992).

⁵⁵ *Fasold*, 251 Or. at 280 (citing *State v. School District No. 3*, 78 Or. 188, 192-193, 152 P. 221, 222 (1915); Garber and Reutter, THE YEARBOOK OF SCHOOL LAW, THE STATE AND EDUCATIONAL ADMINISTRATION, p. 12, (1967); *Kinney v. City of Astoria*, 108 Or. 514, 217 P. 840 (1923).

⁵⁶ *Fasold*, 251 Or. at 278 (ruling that even when the constitution expressly provides for a Superintendent of Public Education, that does not limit or prohibit the legislature from creating a Board of Education and giving it authority to adopt and enforce rules).

⁵⁷ *Fasold*, 251 Or. at 278 (citing Lewis, *Education in the Oregon Constitutional Convention of 1857*, 23 –24 OREGON HISTORICAL SOCIETY QUARTERLY, 1922-23, p.220.

⁵⁸ *MacPherson v. Department of Administrative Services*, 340 Or. 117, 127-128, 130 P.3d 308 (2006) (citing *Wright v. Blue Mt. Hospital Dist.*, 214 Or. 141, 144-45, 328 P.2d 314 (1958) (emphasis added) and citing Hans Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 130 (1970)).

This logic has been supported in Oregon many times and suggests the legislature would have the power to create an alternative education system since it is not expressly prohibited.⁵⁹

This outcome of this exclusivity issue, and much of the authority for Oregon's legislature, or the people, to enact a valid school voucher program rests on the answer to whether it is within the scope of the legislative powers. As discussed in adequacy above, it is well established that the legislature has the plenary power to enact laws for all purposes of civil government; any prohibition upon the legislature is the exception rather than the rule and must be expressly provided for in the state or the federal constitution.⁶⁰ There is else outside of section 3 in Article VIII that even addresses the legislature's power on how education should be provided.

Nothing in the records of the Oregon Constitutional Convention indicates that there could be only one type of educational system. First there was not any debate over the limit of the states power to create school programs, rather the debate was whether Oregon should have public schools at all or simply stick to the private enterprise schools.⁶¹ Second, there are public schools that are not common schools. Oregon Revised Statutes § 330.005 states, "'Common school district' means a school district, other than a union high school district, formed primarily to provide education in all or part of kindergarten through grade 12 to pupils residing within the district." This indicates that there are other schools inside the Oregon school system that are not "Common schools". Additionally, since 1999, Oregon has had two forms of public schools, standard public schools, and the new independent charter schools. Charter

⁵⁹ *Fasold*, 251 Or. 274 (held that the specific constitutional creation of a state Superintendent of Public Instruction did not limit or prohibit the creation of a separate Board of Education.); *MacPherson*, 340 Or. 117 (Where the state constitution has not expressly or implicitly limited the legislature or the voters power to establish a compensation or waive system for regulatory takings then establishment is constitutional); *Utterback v. Department of Revenue*, 2003 WL 23002549, Or.Tax Regular Div.,(Dec 22, 2003) (Plenary power of the state to create taxes exists to the extent not forbidden by the constitution).

⁶⁰ *Wright v. Blue Mt. Hospital Dist.*, 214 Or. 141, 144--145, 328 P.2d 314 (1958); *Fasold*, 251 Or. at 279; see also citations in footnote 26.

⁶¹ Claudia Burton, *A Legislative History of the Oregon Constitutional Convention of 1857, Part III*, 40 WILLAMETTE.L.REV. 225, 251-253 (2004).

schools are government funded but are not run by the city or county school districts. All of these historical factors add weight to the interpretation that the legislature has the power to create alternative school programs such as school vouchers. Article VIII, section 3 creates an affirmative mandate for the legislature to “provide by law for the establishment of a uniform, and general system of common schools.”⁶² A school voucher system would not alter the existing system of common schools and would also not create any new schools. Someone might argue that school vouchers would change our common schools to no longer be uniform or general. However the two adjectives “uniform” and “general” only modify the type of system of common schools that must be created. As is discussed fully in the following section, private schools are probably not within the definition of common schools, so that argument would not apply. The state’s plenary legislative power should allow the creation of a program to fund school vouchers that exists outside the purview of the common school system.

To summarize, a school voucher program in Oregon should not have a problem defeating a legal challenge based on exclusivity. Oregon probably does not have an exclusivity requirement, because private schools would not be considered common schools in Oregon. The history of education in Oregon demonstrates a well-defined difference between private schools and common schools. Further the legislature possesses plenary power to create educational programs for the benefit of the state. Since the creation of a school voucher program is within the scope of the legislature’s power, the only further limitations on the legislative power toward the common schools would have to come from other sections of the constitution. The rest of this comment will discuss those sections.

UNIFORM, GENERAL AND COMMON SCHOOLS

Next I will turn to analysis of the uniformity requirement itself. The uniformity requirement would apply in the event that an Oregon court, contrary to the conclusion above, did find that the Constitution implicitly requires the “Common schools” to be the

⁶² OR. CONST. article VIII, section 3 (1859).

exclusive method for state funded education. In this scenario we must take the hypothetical position that a court says that the private schools serving a school voucher system are “Common schools” as expressed in the Oregon Constitution. Then all private schools serving the school voucher program would need to conform to the requirements applied to common schools. The requirements that are applied to common schools arise from the terms uniformity, general and common.⁶³ These three requirements are expressly created in the Oregon constitution by Article VIII, section 3 that states, “The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools” (emphasis added). This provision raises a number of questions. Would a school voucher program be valid under the uniformity requirement? The uniformity requirement, by definition, would only be violated if the general system of common schools is not “uniform”.⁶⁴ What are the characteristics of a common school? What characteristic needs to be uniform, and how do we measure uniformity? What is a general system of schools? If Oregon’s school voucher program fit within all of these definitions then it would not violate Oregon’s uniformity requirement. Analysis of each question in turn is below.

COMMON SCHOOLS

Would a private school participating in the school voucher program become a “common school”? If so, the uniformity and general requirements would apply. Oregon has not expressly defined “common schools”. Some states like Arizona have statutorily defined common schools.⁶⁵ Other states have allowed their courts to define the phrase when a legal challenge is raised.⁶⁶ This issue has come up most frequently when a

⁶³ OR. CONST., article VIII, section 3.

⁶⁴ *Id.*

⁶⁵ Arizona defines common schools as, “Common schools were defined 'to include the first to eighth grades, inclusive,' and high schools were defined 'to include the grades nine to twelve.

⁶⁶ *State v. Becker*, 132 Wash.2d 54, 935 P.2d 1321 (1997)(stating the characteristics of common schools in Washington); *Board of Education of City of Lawrence v. Dick*, 70 Kan. 434, 78 P. 812 (1904) (holding that 'Common schools,' as that term is used in the Kansas Constitution, mean free schools common or accessible to all. The court discussed the following definitions of common schools from various 1904 dictionaries: "Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainments, free of expense, and under the control of agents appointed by the voters." "Schools maintained at the public expense and administered by a bureau of the state, district, or municipal government, for the gratuitous education of the children of all citizens, without distinction." "Common or public

particular school program has been challenged for having limited enrollment, racial preferences, and other student access issues. None of those are at issue with school vouchers. The most frequently discussed qualities discussed by courts about common schools are: the grade of the school (i.e. whether it is a grade or grammar school, a high school, or a school of higher education); whether it is open to all children without charge; whether it is under public or private supervision and management; and whether it is supported by private or public means.⁶⁷ Among these possibilities there is little dispute that common schools are the publicly funded government schools that are operated by the state or local governments and open to all citizens of a certain age range. An Oregon court may have to ultimately decide the definition of common schools in Oregon.

Article VIII, section 3 of the Oregon Constitution contains the use of “common schools” and is an original clause from the 1857 Constitution. When interpreting an original provision of the Oregon Constitution Oregon courts considers the specific wording of the provision, the historical circumstances that led to its creation, and the case law surrounding it.⁶⁸ During the interpretation of the wording a court may look to common usage, definitions, and the material as part of the whole constitution in order “to understand the wording in the light of the way that wording would have been understood and used by those who created the provision.”⁶⁹ As discussed above, many definitions (both statutory and dictionary), and synonyms that other courts have examined seem to exclude private schools from the meaning of common schools because they are not state run, not state funded, and not open to every person that wants to enroll. Common school has been used synonymously with public school, and a plain meaning interpretation of “public” would lean heavily toward a definition

schools are schools supported by general taxation, open to all free of expense, and under the control of agents appointed by the voters.” “Public or free schools, maintained at public expense, for the elementary education of children of all classes.” “Schools for general elementary instruction, free to all the public.”).

⁶⁷ Id; see also 113 A.L.R. 697 (1938)

⁶⁸ *Priest v. Pierce*, 314 Or. 411, 415-416, 840 P.2d 65 (1992).

⁶⁹ *Vannatta v. Keisling*, 324 Or. 514, 530, 931 P.2d 770 (1997).

excluding private schools.⁷⁰ This meaning demonstrates more about why the exclusivity requirement discussed above would probably not be implied by “Common schools”, but it does not yet tell us what other meanings may be included in the definition of common schools.

If a court still found the meaning of common schools to be ambiguous they would look further at legislative history, and any canons of construction that are helpful in solving the question. Oregon Revised Statutes § 330.005 says, “‘Common school district’ means a school district, other than a union high school district, formed primarily to provide education in all or part of kindergarten through grade 12 to pupils residing within the district.” This seems to indicate that there are other types of schools inside the Oregon school system that are not “common schools”. Prior drafts of Article VIII, section 3 that were rejected at the constitutional convention included more detail about this clause, but do not add much meaning to the phrase common schools.⁷¹

For this type of interpretive inquiry, a court may also try to determine the purpose of the provision, they may gather clues from the place it was copied from or a court may glean understanding from the function it is intended to have in the section where it resides. Claudia Burton reports that there was strong circumstantial evidence that Article VIII of the Oregon Constitution was taken from Wisconsin’s constitution.⁷² The meaning of common schools was debated some, specifically regarding whether common schools would be created just for “white” children or would be for all children.⁷³

⁷⁰ Oregon has statutorily defined private schools as, “a private elementary or secondary school operated by a person or by a private agency ...offering education in pre-kindergarten, kindergarten, or grades 1 through 12 or any part thereof. OR. REV. STAT. § 345.505 (2) (1999).

⁷¹ Claudia Burton, *A Legislative History of the Oregon Constitutional Convention of 1857, Part III*, 40 WILLAMETTE.L.REV. 225, 250 (2004); (Text Draft: The Legislature may provide by law for the establishment of a uniform and general system of common schools which schools shall be free and without charge for tuition to all children between the ages of four & twenty years-- and the instruction in such schools shall be free from party or sectarian bias As introduced: The Legislature shall provide by law for the establishment of a uniform and general system of common schools, which schools shall be free and without charge for tuition to all children between the ages of four & twenty years, and the instruction in such schools shall be free from party or sectarian bias).

⁷² *Id.* at 240.

⁷³ *Id.* at 252 (citing the Oregon Statesman, Sept. 15, 1857, at 2, reprinted in Charles H. Carey, Creation of Oregon as a State, in *The Oregon Constitution and Proceedings and Debates of the*

Those in favor of all children won, Oregon’s common schools have been open to all children since the day the constitution was adopted. The Oregon statesman analogized common schools to state schools and opposed section 3 because they feared the common schools would be inferior to the voluntary schools that existed at the time.⁷⁴ This additional evidence would add weight to the interpretation that common schools are government schools, open to all whom enroll. Private schools do not fit into that definition, so private schools are probably not includable into any judicial definition of common schools. In contrast, if the private schools were pulled inside this definition, they would probably then be forced to enroll every student that qualifies, and they would be subject to the “general” and “uniform” requirements of Article VIII, section 3.

UNIFORM SCHOOLS

What does a uniformity requirement mean? There are a number of possible definitions. Uniformity may mean that schools are required to teach the same subjects and have the same curriculum;⁷⁵ have the same quality standards;⁷⁶ have the same character of instruction given;⁷⁷ or have the same amount of funding provided.⁷⁸ In *Olsen v. State* the Oregon Supreme Court answered this question when it was alleged that the Oregon school financing system not uniform because it was creating unequal educational opportunities.⁷⁹ The court ruled that Oregon’s uniformity clause, “is complied with if the state requires and provides for a minimum of educational opportunities in the district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum.”⁸⁰ This ruling clarifies that the Oregon

Constitutional Convention of 1857 at 5, 21 (Charles Henry Carey ed., 1926) at 334; Weekly Oregonian, Oct. 3, 1857, at 2, reprinted in Oregon Constitution and Proceedings.

The report in the Oregon Argus was similar: "Logan moved to so amend the 3d section that none but white children be educated at the public expense; carried. Bristow moved to strike out all the section except that portion requiring the legislature to organize a system of common schools--carried--and the section was adopted." Oregon Argus, Sept. 26, 1857, at 1).

⁷⁴ *Id.* at 253.

⁷⁵ See 113 A.L.R. 697 (1938)

⁷⁶ *Id.*

⁷⁷ *Kukor v. Grover*, 148 Wis.2d at 486.

⁷⁸ *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976).

⁷⁹ *Id.*

⁸⁰ *Olsen*, 276 Or. at 27; *Withers v. State*, 133 Or.App. 377, 891 P.2d 675 (1995).

uniformity clause does not mean that the levels of school funding must approach equality it only must ensure a minimum.⁸¹

Since the *Olsen* court gave its definition of uniform schools, there has been a constitutional amendment to Article VIII of the constitution. This change added a new section, section 8, which both: 1) establishes an appropriation requirement (which is discussed in detail in the adequacy section); and 2) created an equitable funding requirement creating a system of equalization grants allowing voters to approve local option taxes.⁸² Neither of the Article VIII, section 8 requirements have anything specific to do with uniformity or the qualities of the schools themselves. There may be an argument that this constitutional change supersedes *Olsen* however this change only affects the method and sources of funding, not any substantive characteristics of schools. The only qualitative references that are even in the new constitutional section are a referring to quality goals that are subsequently created by statute and thus could be changed by the same statutory power. Reading the text of the constitution itself and holding to prior judicial interpretations, we can realize that Oregon's uniformity requirement is only a mandate to offer a minimum level of educational opportunity.

The uniformity requirement in Oregon is thus a floor, or a lowest limit on the qualities of the educational program that the state school educational opportunities cannot go below without violating the constitution. The Oregon uniformity requirement does not create a ceiling or other limit on how good one school or school district can become. This distinction about Oregon uniformity requirement is important because the Florida Supreme Court interpreted its constitution to establish a floor and a ceiling. It was a ceiling because it included a limitation that capped the Florida legislature's discretion in creating new educational programs.⁸³ Uniformity should not be violated by a school voucher program which creates an alternative source of obtaining at least the required "minimum level of educational opportunities."

⁸¹ *Olsen*, 276 Or. at 26.

⁸² OR. CONST., article VIII, section 8 (2000).

⁸³ *Bush v. Holmes*, 919 So.2d at 406.

GENERAL SCHOOLS

Article VIII, section 3 of the Oregon Constitution mandates that the common schools be both uniform and general. This requirement for the common schools to be general, is probably the least controversial issue in the section of Article VIII. There are a few possible meanings that could be interpreted from the term. The drafters of the constitution may have added 'general' to be a modifier to describe the subject matter of education, the grade advancement structure, or maybe even the nature of the schools as a source of basic education as opposed to a specialized education. There has not been any litigation in Oregon suggesting a definition for "general" schools. Under any of these interpretations it seems that the requirements of any definition would be already met or obtainable for any private or public school that followed the same standard school subject matters of reading, writing, math, history etc., grade advancement from one to twelve, and a foundational education approach. The "general" requirement has not caused problems for school programs in the past, and would probably not obstruct the creation of a school voucher program.

In summary, the uniformity requirement or exclusivity requirement would probably not be violated by a school voucher system where the students are given a tuition voucher from the school to be used at a school of their choice. First, and most critically, because there is probably no exclusivity requirement in Oregon, the private schools in the school voucher system would not even be subject to the uniformity requirement. Alternatively, if a court were to hold that an exclusivity requirement is implied in the Oregon Constitution, then the uniformity requirement would apply. Applying the uniformity requirements of Article VIII, section 3 to a school voucher system would cause problems for a school voucher program. A private school should be able to meet the minimal requirements to be uniform and general by modifying their educational programming, but a private school would have problems fitting inside the definition of common. This could be overcome if a private school only accepted students from the voucher program and no other privately paying students could be admitted. However, to restate the more likely outcome, because there is no exclusivity requirement, a uniformity requirement should not be a problem for a school voucher

program. Private schools would not be required to be uniform, or general like the common schools.

4. SCHOOL VOUCHER FUNDING

There are constitutional requirements that apply to almost all legislative appropriations which prohibit certain uses of funds. Other restrictions on the use of funds come specifically from the constitutional clause that raises or allocates the funds. Some of Oregon's constitutional provisions that create educational revenue prohibit using that revenue for anything other than public school funding. Other constitutional provisions may expressly or implicitly limit the use of these funds. This section will explore all the limitations on spending in the Oregon constitution that affect where a school voucher system could get its funding. A violation of one of these constitutional spending mandates would invalidate at least the appropriation, and possibly the entire program. An Oregon school voucher program would need to avoid these violations. Oregon has many sources of revenue for education funding. Each of these will be explored in turn to see if they could be used to fund a school voucher program.

The General Fund and lottery receipts comprise the two main sources of Oregon school funding.⁸⁴ General Fund revenues for schools come largely from income taxes.⁸⁵ Lottery receipts are received from a constitutionally set percentage of the net proceeds of the state lottery.⁸⁶ These two sources combine into what is called the State School Fund (\$2.5 billion in '06-'07).⁸⁷ Other sources of educational funding include: federal funding, local revenue (primarily property taxes approximately \$1.2 billion '06-'07), the County School Fund (\$81,000,000 in '03-'05), the Common School Fund (\$54,000,000 in '03-'05), state managed timber trust land, and other sources such as donations, and escheats.⁸⁸ All state spending must avoid violating the constitution such as public purpose requirements, prohibitions on aid to religious institutions, and avoid

⁸⁴ BACKGROUND BRIEF, LEGISLATIVE COMMITTEE SERVICES, May 2004, Volume 2, Issue 1.

⁸⁵ *Id.*

⁸⁶ OR. CONST., article XV, section 4 (2003).

⁸⁷ BACKGROUND BRIEF, LEGISLATIVE COMMITTEE SERVICES, May 2004, Volume 2, Issue 1; funding amount from OREGON DEPARTMENT OF EDUCATION, RESEARCH REPORT #1-05, (2005) available at <http://www.leg.state.or.us/comm/lro/publications.htm>, p.610 (2005).

⁸⁸ *Id.*

violating any establishment of religion provisions. This paper dedicates entire sections to each of those separate issues. The following section on funding analyzes whether the text of the constitution or judicial interpretations have created any express or implicit limitations on the use of funds from the source in question. If there is no express or implied restriction on the use of the funds, then the source should be available to fund a school voucher program as long as it did not violate some other constitutional requirement.

LOTTERY PROCEEDS

Article XV, section 4 of the Oregon Constitution provides that lottery proceeds can be used for a number of specific purposes including “financing public education.”⁸⁹ What does “financing public education” mean here? The constitution does narrow the available uses for this money. Article XV, section 4(4)(D) states the purposes for which the lottery proceeds must be used, but these purposes are general, non-descript purposes such as: “creating jobs, furthering economic development, financing public education in Oregon, restoring and protecting Oregon’s parks, beaches, watersheds and critical fish and wildlife habitats.” This raises the interpretive question of whether “financing public education” could include giving school tuition vouchers to students to use at private schools. When interpreting an initiated constitutional provisions Oregon courts attempt to discern the intent of the voters, because it is the people's understanding and intended meaning of the provision in question.⁹⁰ The best evidence of the voters' intent is the text of the provision itself.⁹¹ If the voters' intent is clear after consideration of text, then a court’s inquiry is concluded.⁹² In the first steps of interpretation the court will be looking closely at the text of a voter initiated constitutional amendment to determine the intent of the voters and often using the aid of textual

⁸⁹ OR. CONST., article XV, section 3.

⁹⁰ *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 57, 11 P.3d 228 (2000).

⁹¹ *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or. 551, 559, 871 P.2d 106 (1994); *Roseburg School Dist. v. City of Roseburg*, 316 Or. 374, 378, 851 P.2d 595 (1993).

⁹² *Ecumenical Ministries*, 318 Or. at 559.

canons of construction, definitional techniques, and common usages to assist in finding the meaning.⁹³

Three textual canons of construction that would be very helpful here are *in pari materia* (as a part of the whole material), *ejusdem generis* (where a list of terms precedes a generic term the generic term is interpreted to be of the same sort as the prior terms), and *noscitur asocis* (you can define a term by the terms around it). All of the phrases surrounding public education in that constitutional section are very general (creating jobs, furthering economic development, etc.). Applying both *ejusdem generis* and *noscitur asocis* would attach a broad general meaning to public education because everything around it is a broad general purpose. Reading “financing public education” this way gives it a broad general purpose consistent with the rest of the material, specifically section 4(4)(d), which says the funds can be used for any of the “public purposes” ... as provided for by law.⁹⁴ This does not seem to add to the meaning of public, but it does indicate there seems to be an intent by the drafter to give the legislature discretion on how to spend the public education financing portion of the lottery proceeds.⁹⁵ Aiding toward this construction, we can see that the drafters of this section know how to specifically allocate funds, they did so in the same section by allocating eighteen percent of the lottery net proceeds specifically to the narrow educational purposes of the education stability fund.⁹⁶ However, even in that narrow allocation the legislature is again given broad power to use that education stability fund allocation, “for the public purpose of financing public education in Oregon as provided by law.”⁹⁷ There are separate mandates and limitations on the use of other portions of the lottery proceeds, however the remainder of lottery proceeds not specifically allocated are given to the legislature for discretionary spending.⁹⁸

⁹³ *Id.* at 560.

⁹⁴ OR. CONST., article XV, section 4(4)(d) (2003).

⁹⁵ OR. CONST., article XV, section 4(4)(d) (funds can be “expended ... as provided for by law”) (2003).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ OR. CONST., article XV also provides for minimum allocations on lottery proceeds of: 15% for a school capital matching account, 15% for parks and natural resources and salmon habitat restoration. These could not be touched for education without constitutional amendment.

This lottery revenue combined with income taxes creates about 68% of current school funding.⁹⁹ Statutory construction would probably pull a very generalized meaning into “public education”. This may leave room for a court to say that the definition of public education is broad, and includes all types of education of the public. If this was the interpretation, then in the absence of some other constitutional violation, lottery proceeds could be used as a source of funding for school vouchers. This interpretation may have some academic merit, but given the political realities of the issue a court might well say that this broad definition of public education does not overcome the plain meaning that public could also be defined as not private. Since this issue would surely be litigated if a school voucher program tried to use lottery revenue, thus it may be better to find financial resources for school vouchers elsewhere. In addition, the state Lottery system is set to sunset in 2014 unless renewed, so the longevity of lottery proceeds as a funding source may be questionable.

COMMON SCHOOL FUND

The Common School Fund is another source of funds that could be considered for a school voucher program. The Common School Fund is created and provided for in Article VIII, section 2 of the Oregon Constitution and has produced more than \$50,000,000 of revenue the last few biennium.¹⁰⁰ The Common School Fund consists of:

- a) all proceeds of lands granted to Oregon for educational purposes (except higher education grants).
- b) Money and proceeds accruing to the state by escheat.
- c) Proceeds of gifts, devises and bequests made to the state for common school purposes.
- d) Proceeds of all property granted to the state, when no specific purpose has been stated.
- e) Proceeds of a certain 500,000 acres that Oregon obtained under a Sept. 4, 1841 Act.
- f) Five percent of the net proceeds of the sales of public lands that the state is entitled to under the terms of admission to the Union.

Funds in the Common School Fund can be expended by the State Land Board to carry out its powers and duties. The remainder of the money in the Common School

⁹⁹ OREGON DEPARTMENT OF EDUCATION, RESEARCH REPORT #1-05, (2005) available at <http://www.leg.state.or.us/comm/lro/publications.htm>.

¹⁰⁰ *Id.*

Fund is available for the legislature to invest and apply to the support of primary and secondary education as proscribed by law.¹⁰¹

A second part of Article VIII, states that the legislature shall provide for “the distribution of the income of the common school fund ... to the several Counties.”¹⁰² This is an express limitation on the use of the Common School Fund. The constitution does not explain any requirements upon the counties for the use of these funds. The Oregon Constitution demands that the Common School Fund be paid to the counties, but does not exclude the possibility that the counties could spend that money for an educational program such as school vouchers. Discretion is given to the state and counties to use the money for primary and secondary education as provided by law, however the fund is titled the “Common School Fund.”¹⁰³ This leaves two alternatives. First, if the name of the fund, “Common School Fund” expressly limits the use of its funds to the common schools, then schools outside the scope of “common schools” would be prohibited from using these funds. This alternative fits with the most likely interpretation of common schools as explored above.¹⁰⁴ Second, if schools participating in the voucher program are included in the definition of “common schools” then these funds could be used, so long as it was first sent to the counties. The county is a municipal corporation and an instrumentality of the state so it is bound by the same constitutional limitations as the state.¹⁰⁵ Thus the use of these funds would depend on whether a school serving a school voucher system could be considered using the funds for “common schools”. This question was also specifically addressed in the common schools section above and the same result would be applied here.¹⁰⁶ That section concluded that “common schools” generally means government funded and run schools that are open to all applicants within the geographic area. Private schools often have a limited enrollment based on meeting eligibility requirements and are not publicly run. There has been some disagreement in other states whether

¹⁰¹ OR. CONST. article VIII, section 2 (1989).

¹⁰² OR. CONST. article VIII, section 4 (1859).

¹⁰³ OR. CONST., article VIII, section 2 (1989).

¹⁰⁴ See Common Schools p. 19 *supra*.

¹⁰⁵ *Carpenter v. Yeadon Borough*, 208 Pa. 396, 399, 57 A. 837 (1904).

¹⁰⁶ See page 19 on “Common schools”.

commons schools includes just lower level grade schools or also includes high schools, but there is near unanimity that privately run and operated schools would not be considered a “Common schools”. Therefore, even though the Common School Fund section of the constitution does allow some spending discretion by the counties in the use of those funds, that discretion is probably limited to the public schools. This would probably mean that neither the state, nor the counties could authorize the use of Common School Funds for a school voucher program.

FEDERAL FUNDING

Federal funds are another source of revenue used for education.¹⁰⁷ Federal funding in Oregon provided approximately 6.5% of the total 2002-2003 funding for Oregon Schools.¹⁰⁸ Federal money is generally attached to specific federal programs so it may not be available on a year-to-year basis and may not allow any legislative discretion. There are existing federal programs that provide funding to private schools in Oregon. Under the No Child Left Behind Act twelve specific programs mandate that local educational agencies (LEAs) provide a fair distribution of services to eligible private school students and teachers that are comparable to services provided to public school students and teachers.¹⁰⁹ The ability of the Oregon Legislature to allocate any money out of these programs would depend on the terms of the federal grant. Thus diverting federal money earmarked for educational programs to a school voucher program is probably not an option. The state does not have ultimate control of those funds and any system based on receiving those funds would be in continual jeopardy of losing all funding. Federal school choice funds which, by the terms of the grant, are already available to students to use at private schools do not need re-allocated since they already fulfill some of the same purposes that school vouchers would fill. Any discretionary federal money given to Oregon for the general fund is still subject to all other constitutional limitations discussed in this paper.

¹⁰⁷ BACKGROUND BRIEF, LEGISLATIVE COMMITTEE SERVICES, May 2004, Volume 2, Issue 1
¹⁰⁸ OREGON DEPARTMENT OF EDUCATION, RESEARCH REPORT #1-05, p.G3 (2005) available at <http://www.leg.state.or.us/comm/lro/publications.htm>.
¹⁰⁹ U.S. Dept. of Education website, available at <http://www.ed.gov/nclb/choice/schools/onpefacts.html> (last updated 11/22/05).

LOCAL TAXES

Local property taxes are another source of school funding that currently amount to over 83 million per year. In 1990, Oregon voters passed an initiative that limits the property taxes that can be imposed on real property (Measure 5).¹¹⁰ Oregon voters have also established a growth cap on property tax assessment values (Measure 50).¹¹¹ As a result of these two property tax limitations, revenue from these sources has diminished so that Oregon schools now receive only about twenty-one percent of their funding from local revenue, far less than the approximately sixty percent raised through local taxes before Measure 50.¹¹² These two taxing limitations did include stipulations on the tax revenues and how they should affect schools.

Measure 5 creates two categories of taxes imposed on real property. One category is a taxes that raise funds for the public school system; the second category is for taxes raised to fund other government operations.¹¹³ The maximum tax for school funding is \$5 per \$1000 of assessed value; the maximum tax for non-school government funding is \$10 per \$1000 of assessed value.¹¹⁴ The school funding limit creates a cap or limit on the tax. These two categories cannot be mixed to create a school property tax revenue source that exceeds the \$5 per \$1000 of assessed property value.¹¹⁵ These local property tax revenues are regulated by constitutional provisions so they can only be used as allowed by the constitution. The constitution limits the use of these funds by saying that Measure 5 school revenues are for “the public school system,” which is further defined as educational services ... provided by some unit of government.¹¹⁶ Thus a school voucher program could probably not use funds from the \$5 school capped tax. In contrast, since the public school category created by Measure 5 is for “public” schools, a necessary implication is that the general government revenues raised under the “other that public schools” category would only

¹¹⁰ OR. CONST., article XI, section 11b (1990).

¹¹¹ OR. CONST., article XI, section 11b (1990).

¹¹² OREGON DEPARTMENT OF EDUCATION, RESEARCH REPORT #1-05, (2005) available at <http://www.leg.state.or.us/comm/lro/publications.htm>.

¹¹³ OR. CONST. article XI, section 11b (1990).

¹¹⁴ *Id.*

¹¹⁵ *Urhausen v. City of Eugene*, 341 Or. 246, 142 P.3d 1023 (2006).

¹¹⁶ OR. CONST. article XI, section 11b (1990).

be limited by the \$10 cap and the other constitutional limitations explored in this paper. These “other than public schools” tax revenues would be available as a revenue source for a school voucher program. The counties would still need to approve these levies, which may be a political contest, but constitutionally they are available as a funding source.

STATE TIMBER REVENUES

State timber receipts and the “County School Fund” create two other sources of the funding for schools. These two sources, mostly the county school fund provided about \$80 million for 2005.¹¹⁷ State timber receipts are part of the pool of resources that accumulate into the Common School Fund under Article VIII, section 2 of the Oregon Constitution from the sale of timber from state lands.¹¹⁸ The revenues derived under this section are expressly required to become part of the Common School Fund.¹¹⁹ However as discussed previously the Common School Fund is to be applied to the support of primary and secondary education as prescribed by law.¹²⁰ Section 4, further limits the use of common school fund incomes by stating that the legislature must make law for the distribution of the income of the common school fund among the several Counties.¹²¹ This may completely prohibit the state from paying Common School Fund monies to parents and students for use in the school of their choice. By inclusion of timber receipts into the Common School Fund, these would likewise be unavailable as a funding source for school vouchers.

COUNTY SCHOOL FUND

The county school fund is a separately raised revenue source that comes from both, tax levies upon the taxable property of the counties, and from the Federal timber revenues received from federal forest reserves in Oregon’s counties.¹²² This property tax portion of the county school fund was discussed previously in the section on local

¹¹⁷ OREGON DEPARTMENT OF EDUCATION, RESEARCH REPORT #1-05, (2005) available at <http://www.leg.state.or.us/comm/lro/publications.htm>.

¹¹⁸ OR. CONST. article VIII, section 2

¹¹⁹ OR. CONST. article VIII, section 2 (2).

¹²⁰ *Id.*

¹²¹ OR. CONST., article VIII, section 4 (1859).

¹²² OR. REV. STAT. § 293.560, § 294.060, and § 328.005.

option taxes.¹²³ The allocation of this federal timber revenue is statutorily set, and it is under the discretion of the county.¹²⁴ This statutory allocation formula could be changed by new legislation. Federal timber revenue would be an available funding source.

In summary, the revenue sources that are not available for funding a school voucher program include the state lottery profits, the Common School Fund, the public school category of the local option property taxes, and the portion of the County School Fund that comes from the Common School Fund. Federal Funds are not specifically available either, except those that are dedicated by the federal government for school choice type programs. The sources of revenue that would be available to fund a school voucher program would be the general government portion of the local option property taxes, federal timber revenues, and the general fund. Funding could also come from a new tax. One requirement on new taxes is that every law imposing taxes must state distinctly the purposes of the revenue.¹²⁵ New taxes have been very unpopular in Oregon, so politically this may be a difficult way to fund a school voucher program. The revenue already provided into the general fund could be sufficient if the legislature or voters were to approve re-allocation. Spending from the general fund is a separate issue and has constitutional limitations of its own. One of those limitations is known as the public purpose requirement.

5. THE PUBLIC PURPOSE REQUIREMENT

A public purpose requirement mandates that all spending by the legislature be allocated for a valid public purpose. Oregon has a public purpose requirement that has also been discussed with “purpose” stated as the public object of legislation.¹²⁶ Tax

¹²³ See OR. CONST. art. XI, section 11(b) and discussion pages 28-29 supra.

¹²⁴ *School Dist. No. 24J v. McCarthy*, 244 Or. 379, 418 P.2d 817 (1966); *School District No. 4, Lane County, v. Bayly*, 192 Or. 548, 235 P.2d 911 (1951).

¹²⁵ OR. CONST. art XI, section 3 (1980).

¹²⁶ *Carruthers v. Port of Astoria*, 249 Or. 329, 341, 438 P.2d 725 (1968); *Stovall v. State By and Through Oregon* 324 Or. 92, 119-120, 922 P.2d 646 (1996); *Hunter v. City of Roseburg*, 80 Or. 588, 156 P. 267 (1916); *Churchill v. City of Grants Pass*, 70 Or. 283, 141 P. 164 (1914); *La Grande/Astoria v. PERB*, 281 Or. 137, 576 P.2d 1204, *aff'd on reh'g*, 284 Or. 173, 586 P.2d 765 (1978).

money cannot be appropriated for private purposes.¹²⁷ In Oregon it is implied that appropriations from the state treasury, since they require a legislative vote, are for a public purpose.¹²⁸ The legislature is the primary authority of deciding what constitutes an interest sufficient to serve a public purpose and the courts role is to ensure that the purported state interest does not violate the constitution.¹²⁹ Judicial practice is to give deference to the stated purpose of the legislature.¹³⁰ Public purpose requirements go hand in hand with the Article IV, section 23 prohibitions on local and special legislation.¹³¹ These requirements are created to avoid abuse of the state powers by logrolling, or playing favorites for a few well-connected persons. If the appropriation act does not violate Article 1, section 20 (the equal protection provision); nor the special legislation ban of Article IV, section 23, then there is a presumption that the law is a general law. A law is general if it is generally applicable to all similarly situated persons. If the law is a general law, then by necessity it is a public law.¹³² Thus a school voucher program would be a valid appropriation as long as the law was written to be a general law, applicable to all similarly situated students and otherwise procedurally valid.

In Wisconsin a challenge to the state's first school voucher program turned partly on whether a localized experimental first step in implementing their school voucher program served a public purpose.¹³³ That Supreme Court pointed out that improving the quality of education is clearly an important public purpose.¹³⁴ A generally applicable program creating and funding a school voucher system that is equally available to students should pass the constitutional public purpose requirement. Even a pilot

¹²⁷ *Id.*; *Stevenson v. Port of Portland*, 82 Or. 576, 582, 162 Pac. 509 (1917); *In re Relief Bills*, 21 Colo. 62, 39 Pac. 1089 (1895).

¹²⁸ *Kinney v. City of Astoria*, 108 Or. at 525.

¹²⁹ *Kinney v. City of Astoria*, 108 Or. at 533-534.

¹³⁰ *Id.*; *Eastern & Western Lumber Co. v. Patterson*, 124 Or. 112, 137 258 P. 193 (1927).

¹³¹ *Farrell v. Port of Columbia*, 50 Or. 169, 172, 91 P. 546 (1907) (explaining that a special act of the legislature to incorporate a port was valid, despite newly enacted home rule constitutional amendment. "Statutes are often classified as public or general and private or special, a public statute being one of which the courts will take judicial notice... because the Constitution provide[s] that every statute shall be a public law unless otherwise declared by the statute itself. "Public" and "general" as applied to statutes are sometimes synonymous, depending upon the context); OR. CONST. article IV, section 27 (1859).

¹³² *Farrell v. Port of Columbia*, 50 Or. at 172.

¹³³ *Davis v. Grover*, 166 Wis.2d 513.

¹³⁴ *Id.*

program created to start addressing a statewide issue like education should be held valid.

6. ESTABLISHMENT

An Oregon school voucher system would have to avoid violating religious establishment issues. Aside from the U.S. Constitution, the Oregon Constitution has two religion clauses that a school voucher program would need to avoid violating.¹³⁵ The first amendment to the U.S. Constitution states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹³⁶ This clause has been the subject of dozens of U.S. Supreme Court cases and volumes of academic writing. However, for now, the federal question about school voucher programs has been laid to rest. In 2002, a formula for creating a valid school voucher program has been established by the U.S. Supreme Court in *Zelman vs. Simmons-Harris*. The Supreme Court ruled that the Florida school voucher program was valid under the 1st Amendment.¹³⁷ Other such voucher programs could be created to also avoid violating the establishment clause. A government program is valid under the U.S. Constitution when the 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.¹³⁸ Even prior to *Zelman*, the Supreme Court had repeatedly stated that a government education program does not violate the Establishment Clause when any incidental benefits to a religious group are the result of purely private individual choices.¹³⁹ Recent articles and law reviews have reviewed school voucher programs under the federal establishment clause generally, but school voucher proponents should

¹³⁵ U.S. CONST. art 1, Section 1. (1787); OR. CONST. art. I, sections 3 and 5 (1859).

¹³⁶ *Id.*

¹³⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002).

¹³⁸ *Id.* citing *Mueller v. Allen*, 463 U.S. 388, 388 (1983); *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481, 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 1-2 (1993).

¹³⁹ *Mitchell v. Helms*, 530 U.S. 793, 793-94 (2000); *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct 1997 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. at 1-2; *Bowen v. Kendrick*, 487 U.S. 589, 589-91 (1988); *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481; *Mueller v. Allen*, 463 U.S. 388.

feel comfortable following the formula established in *Zelman* to create a federally valid school voucher program.¹⁴⁰

The Oregon Supreme Court used to parallel 1st Amendment law, but since the 1970's has acknowledged differences in the clauses. Justice Hans Linde pointed out, the Oregon Constitution does not exactly parallel the U.S. Constitution and in fact has many distinct differences.¹⁴¹ Therefore Oregon's constitutional requirements demand a separate analysis to make sure the requirements of the Oregon Constitution have not been violated.¹⁴² Oregon's constitution does not refer to establishment as the U.S. Constitution does, instead, Oregon's provisions might be better classified as one "no aid" provision and two "free exercise" provisions.

NO AID TO RELIGIOUS INSTITUTIONS

The establishment issue in Oregon originates from Article I, section 3 and section 5. These are the two specific constitutional provisions that relate to religion and the state. Article I, section 5 states that "no money shall be drawn from the Treasury for the benefit of any religious [sic], or theological institution".¹⁴³ Article I, section 2 states, "All men shall be secure in the Natural right, to worship almighty God according to the dictates of their own consciences."¹⁴⁴ Article I, section 3, states, "No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interference with the rights of conscious."¹⁴⁵ Article I, sections 2 and 3 about free exercise are not directly implicated by a voluntary school voucher program. The real issue here rests in the "no aid" provision of section 5. When it last addressed this issue in the case *Dickman v. School District 62C*, the Oregon Supreme Court said that the constitution's prohibition on aid to religious institutions does not forbid all aid, no matter

¹⁴⁰ John C. Eastman, THE MAGIC OF VOUCHERS IS NO SLEIGHT OF HAND: A REPLY TO STEVEN K. GREEN, 39 WILLAMETTE.L.REV. 195, (Winter 2003).

¹⁴¹ Hans Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970).

¹⁴² School District no. 12 v. Wasco County, 270 Or. 622, 628, 529 P.2d 386 (1975); also recognized in *State v. Olsen*, 276 Or. 9, 554 P.2d 139 (1976) (court found that differences in Oregon and U.S. Constitution were not relevant for equal protection analysis of a school funding dispute).

¹⁴³ OR. CONST. article I, section 5 (1859).

¹⁴⁴ OR. CONST. article I, section 2 (1859).

¹⁴⁵ OR. CONST. article I, section 3 (1859).

how remote or indirect.¹⁴⁶ In addition the court also explained that in some instances aid can even be direct and substantial.¹⁴⁷ However, the *Dickman* court held invalid the state program in that case which was essentially buying the school books for children at religious schools. The remaining questions after *Dickman* can be narrowed to two main issues; 1) whether aid directly to a student (such as a school voucher), which indirectly benefits a sectarian school, would violate the Oregon Constitution; and 2) whether state financial aid to students is a public benefit sufficient to be serving the public welfare. I will first address whether state financial aid to a student benefits a religious institution. The second question refers to the general constitutional requirement that all legislation serves a valid public purpose and the public purpose analysis is included in a separate section following this section.

To answer the question whether any benefit is improper aid to a religious institution, an Oregon court could follow the U.S. Supreme Court precedent in interpreting educational aid legislation. However, in *Dickman*, the Oregon Supreme Court addressed this question by diverging from the federal analysis and the U.S. Supreme Court precedent set in *Everson v. Board of Education*.¹⁴⁸ As previously pointed out, Oregon courts will often analyze state constitutional requirements separately from the method established by the U.S. Supreme Court. The *Dickman*

¹⁴⁶ *Dickman v. School Dist. No. 62C*, 232 Or. 238, 366 P.2d 533 (1961) (stating that a simple solution would be to declare that Article I, § 5 prohibits the legislature from conferring *any* benefit upon religious institutions including church supported schools, no matter how indirect it might be, but the court noted that the principle of separation of church and state has not been applied in such strict form. A certain amount of interplay of influences exercised by state and church has been permitted).

¹⁴⁷ *Id.* at 247-248 (citing valid direct appropriations found valid in: *Bradfield v. Roberts*, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899) (appropriation for building a ward on property owned by a Catholic hospital); *St. Hedwig's Industrial School for Girls v. Cook County*, 289 Ill. 432, 124 N.E. 629 (1919) (state payment to a church owned and operated industrial school); *Dunn v. Chicago Industrial School for Girls*, 280 Ill. 613, 117 N.E. 735, L.R.A.1918B, 207 (1917) (state payment to a church owned and operated industrial school); *Millard v. Board of Education*, 121 Ill. 297, 10 N.E. 669 (1887) (parochial school supported as a public school); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940) (parochial schools operated as a part of the public school system); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky.1956) (parochial school supported as a public school)).

¹⁴⁸ *Dickman v. School Dist. No. 62C*, 232 Or. 238; compared to *Everson v. Board of Education of Township of Ewing, in County of Mercer*, 330 U.S. 1, 67 S.Ct. 504, petition for rehearing denied, 330 U.S. 855, 67 S.Ct. 962 (1947); *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183 (1929).

court stated that it interprets the Oregon Constitution separately, but also went on to say that neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization.¹⁴⁹ If Oregon was to stick to its individualized approach in future establishment cases, the language, “accrue to the institution as a religious organization” may be critical.¹⁵⁰ However, since *Dickman* (and a following case *Fisher*), Oregon courts may be abandoning the individual analysis approach because they have followed the Supreme Court as it has shifted to the *Lemon* test, and now possibly to the endorsement test.¹⁵¹ Neither the *Dickman* holding, nor the following case *Fisher*, has been re-analyzed by the Oregon Courts, but both have been criticized.¹⁵² A critique by Christopher Bishop points out that, modernly when the Oregon Supreme Court interprets an original provision of the Oregon Constitution, it considers the "specific wording of the provision, the historical circumstances that led to its creation, and the case law surrounding it."¹⁵³ This was not done in *Dickman*, and has not been done with Article I, Section 5.¹⁵⁴

The inconsistent analytical approach of the Oregon courts does create uncertainty for proponents of a school voucher system. It leaves two alternative methods for analyzing a case challenging the constitutionality of a school voucher program. First, if the Oregon Court followed the federal courts, a school voucher program should be valid just as it was in *Zelman*. Second, if Oregon again used an independent analysis approach, it should be tested under the approach explained in *Amini* and would be also under the pressure of stare decisis.¹⁵⁵ A properly written

¹⁴⁹ *Dickman v. School Dist. No. 62C*, 232 Or. at 256.

¹⁵⁰ *Id.*

¹⁵¹ *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463 (1973) (Lemon test used in *Eugene Sand & Gravel, Inc.*, 276 Or. 1007, 558 P.2d 338 (1976) and endorsement used by 9th Circuit in *Separation of Church and State Committee v. City of Eugene of Lane County*, 93 F.3d 617 (9th Cir. Aug. 20, 1996).

¹⁵² Bishop, 38 WILLAMETTE. L. REV. at 435.

¹⁵³ *Id.* at 436-437 (citing *State v. Amini*, 331 Or. 384, 389, 15 P.3d 541 (2000)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

school voucher program should be distinguishable from *Dickman* and valid even under Oregon's independent state constitutional analysis.

Dicta in *Dickman* leaves the door open to a *Zelman* type holding in Oregon. The *Dickman* court said, "We recognize that whether an expenditure is an aid to a religious institution in its religious function or in some other capacity is a question of degree."¹⁵⁶ The facts in *Dickman* make the school book program and a school voucher program very distinguishable. In *Dickman*, the state program was buying schoolbooks for the students to use "as a pupil of a religious school," the court equated this to the state buying the classrooms or furniture for the schools. This is different than the state paying for tuition. Neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization.¹⁵⁷ In *Dickman*, the state's decision to buy books for the school was directly aiding the school in its inseparable function of providing a religious education, thus the benefit "accrued" in the school so the court held the program invalid.¹⁵⁸

Would a benefit accrue to the school under a school voucher program? What does the court mean by accrue? Black's Law Dictionary has two definitions for accrue; 1) to come into existence as an enforceable claim or right, to arise; or 2) to accumulate periodically.¹⁵⁹ Under a school voucher program where the funds follow the student, the decision about where voucher money will be used is made separately and subsequently to the allocation of the funds, so the state would not have the ability to even choose to directly aid a religious institution. The benefit is gone when the student is gone. A school voucher program where the voucher goes directly to the student, similar to Florida's Opportunity Scholarship Program, would not lead to any benefits accumulating at a religious institution.¹⁶⁰ In his analysis of Oregon establishment Bishop concludes,

¹⁵⁶ *Dickman v. School Dist. No. 62C*, 232 Or. at 258.

¹⁵⁷ *Id.* at 256.

¹⁵⁸ *Id.* at 258.

¹⁵⁹ Black's Law Dictionary, Second Edition 2001, West.

¹⁶⁰ Fl. Stat. Ann. § 1002.38 (2005).

and I would agree, that a neutral aid program that gives vouchers only to student to selectively use at different public school, a private school, or to not use at all, without regard to whether the school is sectarian or non-sectarian, would not be found to improperly aid a religious institution.

There are significant hurdles to assure a school voucher program does not violate the no-aid provision of the Oregon Constitution. However if the program is created to be a true, voluntary, private choice and remains completely religiously neutral then it should be upheld under the federal standard, and pass the Oregon prohibition. The Oregon Supreme Court has held that denial of an educational benefit to religious schools does not violate the equal protection clause.¹⁶¹ So if necessary, a school voucher program could even forbid its funds from being used at religious schools. The establishment issue would never arise if private religious schools were eliminated from the equation. However this might make passage of the legislation politically impossible to enact, or the program ineffective due to the dominance of sectarian private schools.

AID AS A VALID PUBLIC PURPOSE

The second part of the establishment question and possibly one of the most frail lines of reasoning in the *Dickman* holding was that expenditures, “which aid a child as a pupil of a religious school cannot in that respect be regarded as serving the public welfare.”¹⁶² The *Dickman* court relied on two foreign jurisdiction dissents in support for its majority opinion on this issue.¹⁶³ While the facts in *Dickman* relating to establishment, may have made the courts logic work in that case, that logic presumes that if something violates the constitution, then it necessarily must not be serving the public welfare. I would argue that this logic is weak. Many expenditures and other government actions could serve the public welfare but may nevertheless be unconstitutional. For example, the state assuming city or county’s debt might be in the

¹⁶¹ *Dickman v. School Dist. No. 62C*, 232 Or. at 260.

¹⁶² *Id.* at 253-254 (following the dissents in *Everson v. Board of Education*, 330 U.S. 1, 53, 67 S.Ct. 504, 529 (1946); and *Borden v. Louisiana State Board of Education*, 168 La. 1005, 1030, 123 So. 655, 664 (1929).

¹⁶³ *Id.*

public welfare, yet not constitutional.¹⁶⁴ Public taking of private property for a public use without compensation might be for the public welfare, yet is unconstitutional. Taxing property to funding schools in excess of the 5% limit imposed by Article XI, section 11 may be in the best interests of public welfare but is not constitutional.

An Oregon voucher program would have to overcome this argument and avoid violating the public purpose requirement. This concept is not new, and in the appropriations field of law is generally known as the Sharpless doctrine. A simplification of the Sharpless Doctrine says that the legislature does not have any constitutional right to raise funds ... for a mere private purpose.¹⁶⁵ Oregon's method for determining whether a law or appropriation is for a public purpose is discussed above.¹⁶⁶ In Oregon it is implied that legislative appropriations from the state treasury are for a public purpose when the appropriations bill is not special legislation or a local law.¹⁶⁷ There are few who would argue that state scholarships, for the poor student, for the exceptionally gifted student, or for teenage student mothers, would not be a valid public purpose. The Sharpless Doctrine or public purpose challenge evaporates when the appropriation is for a nameless person or an individual in a broad open class for their health, safety or general welfare. Thus, if the appropriation passes the establishment issue, the special/local legislation issue, and avoids the other constitutional violations discussed in this paper, then it should pass the public purpose requirement.

7. LOCAL AND SPECIAL LEGISLATION REQUIREMENTS

A school voucher program would also be subject to Oregon's constitutional prohibitions on local or special legislation. Article IV, Section 23 of the Oregon Constitution provides, "The Legislative Assembly, shall not pass special or local laws, in any of the following enumerated cases, ... Providing for supporting Common schools, and for the preservation of school funds..." This prohibition of special laws and local

¹⁶⁴ *Kinney v. City of Astoria*, 108 Or. at 525; *Eastern & Western Lumber Co. v. Patterson*, 124 Or. 112, 137 258 P. 193 (1927); *Farrell v. Port of Columbia*, 50 Or. 169, 172, 91 P. 546 (1907).

¹⁶⁵ *Sharpless v Mayor of Philadelphia*, 21 Pa. 147, 2 Am. Law Reg. 1 (1853).

¹⁶⁶ (see section 5, THE PUBLIC PURPOSE REQUIREMENT).

¹⁶⁷ *Kinney v. City of Astoria*, 108 Or. 514; *Carruthers v. Port of Astoria*, 249 Or. 329, 341, 438 P.2d 725 (1968); *Stovall v. State By and Through Oregon* 324 Or. 92, 119-120, 922 P.2d 646 (1996).

laws prohibits the legislature from enacting laws that grant direct financial support to one or more school districts that is not made available on the same terms to all school districts.¹⁶⁸ Legislation for the school voucher program should not name any specific schools and should make the benefits of the school voucher program equally available to all students.

Local laws and special laws within the subject matter covered in Article 4, section 23 of the Oregon Constitution are invalid in Oregon. A local law is a law that applies only to a specific city, county or region. These are normally invalid when there is no reason of statewide importance to make such distinction that excludes other similarly situated cities, counties or regions from having the benefit of the legislation. Prohibitions like these force the legislature to make open classes of beneficiaries if they want to make a localized program. A special law is one conferring upon certain individuals or residents of a certain locality rights, powers or liabilities not granted to, or imposed upon, others who are similarly situated.¹⁶⁹ General laws, by definition, avoid this problem. A general law is one by which all persons or localities complying with its provisions may be entitled to the powers and enjoy the rights and privileges conferred.¹⁷⁰ A regional pilot program for school vouchers could be established in that manner if it consists of only open classes or is local but is of statewide importance. The school voucher program would need to be written so it is open to all students or geographies that comply with the law's provisions and fit into the qualifications (and without violating Article I, section 20, or the 14th amendment).

8. CONCLUSION

Oregon's options for school choice are constrained by a number of constitutional limitations, but each of these should be able to either be sidestepped, or made inapplicable by a careful drafter. Applying each of the conclusions in the above sections we can see that a valid school voucher program could be created in Oregon. First we

¹⁶⁸ *Sherwood School Dist. 88J v. Washington County Educ. Service Dist.*, 167 Or.App. 372, 6 P.3d 518, review denied 331 Or. 361, 19 P.3d 354 (2000).

¹⁶⁹ *City of La Grande v. Public Employees Retirement Bd.*, 281 Or. 137, 576 P.2d 1204 (1978); *Farrell v. Port of Columbia*, 50 Or. 169, 174, 91 P. 546 (1907).

¹⁷⁰ *Id.*

saw that Oregon's adequacy requirement would not be violated as long as a school voucher system did not divert so many funds that the current public system could not provide a minimally good system of educational opportunity. Further, creation of a school voucher program would be within the scope of legislative powers given to the Oregon legislature, and reserved by the people. Thus, there should be no problems created by exclusivity or ultra vires arguments. The private schools participating in a school voucher program would be outside the scope of Article XIII, section 3 so they would side-step the general, uniform, and common, requirements from that section. Funding for the school voucher program could come from any newly created revenue source if the political will existed. Funding could also come from a portion of the general government property tax, federal timber revenues, or from the states general fund. Spending this money to offer scholarships, vouchers and educational options for the poor students, handicapped students, students stuck in failing schools, or exceptionally gifted students, would be constitutionally valid public purposes. As long as the program allows the use of the funds, and the choice of the school, to remains a true private choice, a school voucher program should be able to include public schools and both religious and secular private schools. The program could avoid local and special legislation prohibitions as long as it is a general law and creates an open class of people and locations that could participate. The school choice movement has been growing over the last few decades. If positive results continue to come from the existing school choice programs, we may see a push for school vouchers in Oregon. The Oregon Constitution could support a school voucher program.