The Uncertain Fate of L.B. 753 Under Article VII, Section 11 of the Nebraska Constitution's No-Aid Provision

Anthony B. Schutz*
Associate Dean for Faculty & Associate Professor of Law
University of Nebraska College of Law

Introduction

The Nebraska Legislature is considering a bill—Legislative Bill 753 (L.B. 753)—that would provide a non-refundable, 5-year carry-over tax credit for donations to qualifying scholarship-providing organizations.[1] To qualify, the scholarship organization must provide qualifying education scholarships. Those qualifying education scholarships must be used to pay tuition and fees at a qualifying school. Qualifying schools are "any nongovernmental, privately operated elementary or secondary school located in this state." The state administers the issuance of the tax credits through a program that keeps the budgeted caps in place. The program starts with a $25 million cap that gradually expands to $100 million if people take advantage of the program. This legislation is part of a national effort to enhance school choice by extending public support to private schools.[2]

This article addresses whether such a program violates article VII, section 11 of the Nebraska Constitution. This article does not delve into the Free Exercise or Establishment Clause issues under the U.S. Constitution associated with denying otherwise available private-school funding to religious institutions through tax provisions or other forms of government spending.[3] But for one small exception,[4] this article does not discuss other restraints under the U.S. Constitution that may affect the bill. This article also does not discuss other states' constitutions and case law. While appropriate in a long-form article, addressing other states' approaches to their constitutional language and history is marginally relevant. Each state uses its own language and has its own constitutional history to consider. Therefore, this article focuses on Nebraska. For those

* Many thanks to the Nebraska College of Law for its unrelenting support, as well as Adam Thimmesch and Peter Longo for helpful comments. Thanks as well to the *Nebraska Law Review*, including Grant Jones, Tom Simonson, and Matias Cava for help editing this article and producing it in extremely short order. All errors are mine.

[1] Legis. B. 753, 108th Leg., 1st Sess. (Neb. 2023) (https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=50326).

[2] *See, e.g.*, Jon Huske Davies, *School Choices in the Sunflower State: The Kansas Tax Credit Scholarship for Low-Income Students Program,* 28 KAN. J.L. & PUB. POL'Y 197 (2018); Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703 (2015); RICHARD D. KOMER & OLIVIA GRADY, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS (2d ed. 2017) (https://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf).

[3] Suffice it to say that the U.S. Supreme Court requires states to fund religious schools whenever they fund private schools. *See, e.g.*, Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020) (striking down Montana prohibition on aid to religious schools and upholding tax-credit scholarship program under the First Amendment); Carson v. Makin, 142 S. Ct. 1987 (2022) (striking down Maine prohibition on religious funding under First Amendment).

[4] *See infra* notes 18–19 and accompanying text.

interested in other states' experience in similar circumstances, a collection of relevant materials is included in the notes below.[5] Finally, for the sake of brevity, this article focuses solely on one of Nebraska's constitutional provisions and the extant Nebraska case law on the subject. It does not address possible arguments under the Nebraska Constitution's other provisions, including the preference for general laws,[6] our religion provisions,[7] our due-process and equal-protection provisions,[8] or our obligation to provide a free education in the state's common schools.[9]

Article VII, section 11 of the Nebraska Constitution states: "Notwithstanding any other provision in this Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof."[10] Given the history of this provision and existing Nebraska Supreme Court case law, L.B. 753 may be unconstitutional. But matters are far from clear. That uncertainty counsels in favor of pursuing a constitutional amendment that would directly present the matter of private-school support to Nebraska voters, like we have done at least twice before.

Below, this article first explores the functional and textual cases for unconstitutionality. The functional case is somewhat simple: this legislation is a laundering scheme that does indirectly what the Legislature cannot do directly. The textual case is more complicated, raising three significant interpretational problems currently unresolved in the case law. Each of the uncertainties is discussed below.

The article addresses the question of unconstitutionality primarily from a judicial perspective, attempting to predict what a court may or may not do with the legislature's product. However, legislator readers should remember that they take the same oath as judges. And, in some instances, the judiciary reviews constitutional questions with some deference to the political actors charged with living within the state constitution's bounds. Legislators would do well to consider

---

[5] *See, e.g.*, Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (upholding tax-credit scholarship program); Cain v. Horn, 202 P.3d 1178 (2009) (striking down voucher program); Commonwealth *ex rel.* Cameron v. Johnson, 2022 WL 17725769 (Ky. 2022) (striking down tax-credit scholarship program); Magee v. Boyd, 175 So. 3d 79 (Ala. 2015) (upholding tax-credit program for parents of students incurring costs to send children to non-failing or private schools from failing public schools); Toney v. Bower, 744 N.E.2d 351 (Ill. App. Ct. 2001) (upholding tax-credit system); Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (striking down scholarship program); Almond v. Day, 89 S.E.2d 851 (Va. 1955) (striking down voucher program). For commentary on the subject, collecting case law, *see, e.g.*, Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335 (2016); James N. G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141 (2013); Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703 (2015) (collecting case law).

[6] NEB. CONST. art. I, § 16; *id.* art. III, § 18; *see also* Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974) (striking down reimbursement grants for students in need attending private colleges under, inter alia, NEB. CONST. art. III § 18); *but see* Anthony B. Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2014) (arguing that restrictions on special legislation are misconceived and doctrinally flawed).

[7] NEB. CONST. art. I, § 4.

[8] NEB. CONST. art. I, § 3.

[9] NEB. CONST. art. VII, § 1. A helpful resource for researchers on any of these subjects is MIEWALD, LONGO & SCHUTZ, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE (2d ed. 2009).

[10] NEB. CONST. art. VII, § 11.

these constitutional questions, not just in terms of judicial guidance, but also in terms of their own interpretation of a constitutional text that was written to constrain them.

After this article considers the question of constitutionality, it explains why a constitutional amendment would be a better path for pursuing private-school support in Nebraska. Such a path is historically, practically, and theoretically more appropriate than passing this legislation. The Legislature may, however, prefer to hope for the best in litigation or put Nebraskans to the task of correcting minoritarian policy through the referendum or selecting different representatives at the polls. In any event, this is but another chapter in a state constitutional story that started in 1866, at the very dawn of Nebraska's statehood.

The Functional and Textual Cases for Unconstitutionality

Under L.B. 753, the ultimate recipients of scholarship aid (private schools) are not owned or exclusively controlled by the state or a political subdivision thereof. Clearly, the Legislature could not include private schools in its appropriations bill under article VII, section 11. Less clear, however, is whether tax-credit legislation that has the same functional effect (getting money to private schools) runs afoul of this prohibition.

From a functionalist perspective, the answer is yes. Reasonable people would agree that if the Legislature cannot directly give tens of millions of dollars of tax revenue to private schools, then it cannot use a dollar-for-dollar tax credit to entice donors to give tens of millions of dollars to qualifying entities that award scholarships to students for private schools. While such a move most immediately reimburses the donors for their expenditures, the state still spends tens of millions of dollars on private schools. To such observers, such a scheme sounds more like a laundering effort than sound policy, at least when considered against the backdrop of our long constitutional history of hostility to publicly funding private schools, which is detailed below.

But the law is not so simple. There is a text, and it is a constitutional text. The discussion below evaluates the textual application of this constitutional prohibition to the proposed legislation. This tax-credit legislation raises the question of whether the issuance of a pre-determined amount of non-refundable, carry-over eligible tax credits is the "appropriation of public funds . . . to" private schools. And this question raises at least three more: First, is there "appropriation"? Second, is it "of public funds"? And third, is it "to" a private school? The discussion below addresses each question in turn.

"Appropriation"

Supporters of L.B. 753 may argue that a tax credit is simply not an appropriation. That is, it involves no transfer of funds from the state treasury to any particular recipient.[11] However, the Nebraska Supreme Court has not interpreted the term so narrowly. It defines it as follows: "to appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use

[11] *See* NEB. CONST. art. III § 25 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law . . . .").

or employ for a particular purpose, or in a particular case."[12] The bill provides for a tax-credit issuance regime that keeps the overall amount of reduced revenue within a pre-determined limit that can be incorporated into the budgeting process. The tax credit can only be issued if the donation that creates it goes to a particular qualifying entity that then sends those funds to qualifying students and qualifying private schools.[13] Theoretically, non-refundable tax credits would not reduce revenue if issued to taxpayers with insufficient tax liability. But both the monetary cap on issuance and the 5-year carry-over provisions are strong evidence that these amounts will be "set apart" from and "in exclusion of other uses" for such revenue. Indeed, the purpose of the tax credit is to reimburse taxpayers for their donations through the income-tax system. It would be difficult to argue that such a system is not designed to set aside funding from general revenue for a particular purpose. As a result, there is a strong argument that issuing tax credits—reimbursements to taxpayers for their private-school scholarship donations that must go only to private schools—constitutes "appropriation".

There is, however, some danger in thinking of the issuance of tax credits as "appropriation" for purposes of this provision. Tax credits fall within a broader category of what some refer to as "tax expenditures."[14] Exemptions from gross income, deductions to taxable income, and preferential tax rates all involve forgone revenue. If one were to say that all tax expenditures are appropriations, it might cast too wide of a net, exposing all manner of tax expenditures to the substantive and procedural limits on appropriations.

The formalism of a tax credit is somewhat important to this analysis and distinguishes these tax credits from a broader set of tax expenditures. A tax credit is taken on a return after the calculation of income and tax liability. Economically, a tax-credit reduction to one's tax liability leaves the taxpayer with dollars they would not have in the absence of the credit. For example, if the Legislature were to exclude qualifying contributions from a person's adjusted gross income or provide a deduction to taxable income, only a portion of the contribution would be reimbursed through the application of a tax rate to the reduced income. Such amounts would be difficult to predict from a state-revenue perspective and, thus, would be difficult to cap (or "set aside"). As a result, such amounts may not constitute the appropriation of revenue. In this particular setting, however, the parameters of the tax-credit generate a different result. These credits are the functional equivalent of direct spending and, therefore, constitute "appropriation." Other tax expenditures may not.

This functionalist argument carries an evasion element as well. If setting an amount of forgone revenue for budgetary purposes is not within the scope of limits on appropriations, then it simply becomes too easy to avoid the constitutional text. Stated simply, it elevates form over

[12] Father Flanagan's Boys Home v. Dept. of Social Services, 255 Neb. 303, 315–16, 583 N.W.2d 774, 782 (1998) (quoting State *ex rel.* Creighton Univ. v. Smith, 217 Neb 682, 688, 353 N.W.2d 267, 271 (1984)).

[13] It is unclear from the bill text whether the funds will be issued to the student with instructions to spend them at a qualifying institution, or if the funds will be sent directly to the institution that the student selects.

[14] *See* U.S. DEPARTMENT OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures (last visited Feb. 14, 2023) (providing definition of "tax expenditures").

substance. If a legislature cannot appropriate for a particular purpose, then the solution is simply to issue the same amount of tax credits for the same purpose.

To be clear, however, some courts have elevated form over substance. The distinction between expenditures and tax credits has arisen in other contexts at the federal level. For standing purposes under the U.S. Constitution, the U.S. Supreme Court has concluded that tax credits are different enough from government expenditures that taxpayers have no standing to challenge programs like this under the Establishment Clause of the First Amendment.[15] However, whether they are different enough to fall outside the "appropriation" language of article VII, section 11 remains an open question in Nebraska.[16] Scholars have criticized the Court for this move which "endow[s] tax law with legal superpowers, giving it the astonishing ability to elude constitutional limits."[17] The Nebraska Supreme Court may, wisely, take a different path for state constitutional purposes.

Relatedly, government expenditures of revenue are treated differently than tax credits for purposes of the Dormant Commerce Clause Doctrine. Governmental distribution of collected tax revenue can favor in-state interests over out-of-state interests.[18] However, tax credits may not enjoy the same treatment. For example, the Court struck down a tax credit for in-state ethanol fuel production in *New Energy Co. of Indiana v. Limbach*.[19] Again, the U.S. Supreme Court's willingness to elevate form over substance is questionable and need not control the Nebraska Supreme Court's interpretation of the Nebraska Constitution.

As a brief aside into federal constitutional law, this distinction between tax credits and more direct forms of spending is important for the Legislature to consider. If L.B. 753 involves no "appropriation," then it opens the door to Dormant-Commerce-Clause-Doctrine scrutiny. L.B. 753, as it is currently drafted, provides tax credits only for activity that supports the buying and selling of educational services among Nebraska students and Nebraska private schools. Such favoritism is all but prohibited under the Dormant Commerce Clause Doctrine. However, extended analysis of this point is beyond the scope of this brief article.

In the end, it is reasonable to view L.B. 753's tax credits as involving "appropriation." The Court's definition of "appropriation" for purposes of article VII, section 11, the marginal risks

---

[15] *See* Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011); *see also* Gaddy v. Ga. Dep't of Revenue, 802 S.E.2d 225, 230 (Ga. 2017) (denying standing to taxpayer challenging education tax credits).

[16] *See* State *ex rel.* Steinke v. Lautenbaugh, 263 Neb. 652, 657–58, 642 N.W.2d 132, 137–38 (2002) (enunciates the standing exception that allows taxpayer standing in cases involving "illegal expenditure of public funds or an increase in the burden of taxation."). Arguably, the issuance of tax credits increases the burden of taxation on the remaining revenue of the state.

[17] Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777 (2013).

[18] *See, e.g.*, White v. Mass. Council of Const. Emps., Inc., 460 U.S. 204 (1983); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

[19] 486 U.S. 269 (1988); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (concluding a charitable property tax exemption provided only to charitable organizations serving in-state residents was unconstitutional); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989) (explaining the parameters of this aspect of the dormant commerce-clause doctrine).

associated with applying it to this narrow band of tax expenditures, and the evasion concerns that arise all support such a conclusion.

"Public Funds"

Even if the issuance of a tax credit is "appropriation" for purposes of article VII, section 11, the constitutional text prohibits only the appropriation "of public funds." The Nebraska Supreme Court's cases decided under this provision of the state constitution (discussed in detail below) involve the appropriation of funds collected by the state or an arm thereof. Therefore, it is at least clear that collected revenue constitutes "public funds." What is less clear is whether forgone revenue involves "public funds." None of the Court's cases involve the question of whether forgone revenue through a tax-credit mechanism involves "public funds."

A tax credit relieves a taxpayer of a tax liability when the taxpayer spends in a way that the state wants to reward. By forgiving tax liabilities, the state is, in substance, spending. It could, of course, reimburse the tax-credit recipient with actual dollars drawn from the treasury. It is not doing that here formally, but it is in substance. As discussed above, with the question of whether this constitutes appropriation, the functional equivalence of the two spending methods strongly counsels in favor of an interpretation that regards the two as equivalent for purposes of article VII, section 11. To conclude otherwise elevates form over substance.

The constitutional text and history provide few answers. Historically, the constitutional text has expanded its scope of concern for educational funding over time. The Constitution of 1866 referred to "school funds" and then protected it from religious sects. It required the Legislature to

> make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state.[20]

The 1866 Constitution was, however, replaced by the 1875 Convention, which framed our present constitution. The Constitution of 1875 provided, "[n]o sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes."[21] Here, the language changes from "school funds" to "public funds," which carries a broader scope of concern, extending perhaps to general revenue. However, its focus still seems to be on specific funds collected and "set part for educational purposes."

The 1875 Constitution's broader concern expanded further in 1920, with amendments changing the language to "from any public fund":

> Neither the State Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any

[20] NEB. CONST. of 1866, art. VII, § 1.
[21] NEB. CONST. art. VIII, § 11 (1875).

> sectarian or denominational school or college, or any education institution which is not wholly owned and controlled by the state or a governmental subdivision thereof.[22]

This change arguably brings with it a broad concern for general funding, expressing the protection as not just for "school funds" or "public funds set aside for educational purposes" but rather for "any public fund."

The Nebraska Supreme Court has examined the 1919–1920 Constitutional Convention Proceedings "for the purpose of demonstrating the transcendent purpose and thrust of the design and purpose of this amendment."[23] That record indicates that the 1919–1920 Convention adamantly opposed any aid to schools not owned and controlled by the state.[24] Mr. Peterson, the most vocal participant on this front, stated, for example, "As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under any guise to any educational institution other than the public school."[25] He remarked later about his strong desire to avoid this perpetual fight about state aid to private schools, "those who are opposed to having a continual warfare in the making of laws along that line must be interested in keeping this question out of the legislative assemblies."[26] The Convention agreed, adopting his language and prohibiting aid to schools that were not both owned and controlled by the state or a subdivision of it.[27]

The 1970 Constitutional Revision Commission recommended the current language (along with some other changes),[28] which was adopted in 1972.[29] That language, of course, prohibits "appropriation of public funds."[30] The minutes of that commission's work indicate that it had no

---

[22] NEB. CONST. VIII, § 11 (1920).

[23] Gaffney v. State Dep't of Ed., 192 Neb. 358, 363, 220 N.W.2d 550, 553 (1974).

[24] *See* 2 CLYDE H. BARNARD, JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 2626, 2629–31, 2660–64, 2677–81 (1920).

[25] *Id*. at 2661.

[26] *Id*. at 2678. His hostility to enlisting private schools in education was firmly grounded in his legislative experience:

> I am opposed to that principle. I think anyone who has gone through a parochial school fight in the legislature must be opposed to it; not because he is opposed to parochial schools, but rather because he believes in it. A fight along that line must invariably tend to the extension of governmental regulation over those institutions.

Id.

[27] The premise that led Mr. Peterson to such lengthy debate was that "the state has control over all the schools in the state" through compulsory attendance laws, standards for private and denominational schools, and even English language requirements. *Id*. at 2678. Therefore, he did not believe a prohibition on aid to schools that were merely controlled by the state was enough.

[28] *See* CHAIRMAN RAMEY C. WHITNEY, ET AL., REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION 76–77 (section 11), 78–79 (section 13) (1970). The 1970 Commission's recommendation involved reconfiguring Article VII, but some of the changes were never put to voters.

[29] Amended 1972, Laws 1971, L.B. 656, sec. 1.

[30] The inclusion of sectarian schools as an object of hostility was also tempered by the 1920 and 1972 amendments, which added (1920) and then focused on (1972) state ownership and control, rather than sectarian status. This is a significant modification, as the United States Supreme Court has held that prohibitions on funding sectarian schools are unconstitutional under the Free Exercise Clause of the United States Constitution, when private schools are funded. *See* Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020) (striking down Montana prohibition on aid to religious schools and upholding tax-credit scholarship program under the First Amendment); Carson v. Makin, 142 S. Ct. 1987 (2022) (striking down Maine prohibition on religious funding under First Amendment). Notably, the

intention of expanding or contracting the scope of article VII, section 11's prohibition, but for two exceptions.[31] The first was immaterial and not forwarded to voters. The second is more evidence of hostility to the idea of state funding. It proposed an amendment that would allow the state to receive federal funding for private schools, but no state funding could be added to it.[32]

Constitution drafters did not have tax credits on their minds in 1875, 1920, and 1972. The lineage and onset of tax-credit spending would be a helpful topic for further research on this point, but it would appear safe to suggest that tax-credit spending was not widely used in 1920, or even 1970. But, the question of whether a tax credit involves public funds remains uncertain. But the 1920 and 1970 changes provide some evidence of a concern for the broader public fisc and an overwhelming concern for providing aid to private schools.

If the underlying goal of prohibiting appropriations to private schools is to limit public spending on a particular thing, then a strong argument can be made that forgoing revenue in a defined and quantified way for private schools is as much public spending as collection and further distributions to such schools. The subterfuge argument returns as well. If forgone revenue does not constitute public funds, then there is effectively no constitutional restraint on what the Legislature can reimburse through a tax credit. Protecting the public funds available for education becomes a dead letter if the state can simply drain the fund by turning off the tap.

In most cases, turning off the tap may not be constitutionally problematic. But when there exists a specific constitutional bar on spending money on private schools, turning off that particular tap for that particular reason looks more like subterfuge than constitutional fidelity. Either a direct expenditure or a quantified, planned, and administered tax credit presents the same pressure on the general fund, and those public funds are simply not to be spent on private schools.

"To"

One final piece of the constitutional text remains, and though it is a small word, it has been very powerful. Article VII, section 11, only prohibits certain types of appropriations of public funds. That is, such appropriations must be "to" private schools. In this setting, arguably, the issuance of tax credits is to taxpayers, not to private schools. In fact, another layer of exchange lies between the taxpayer and the private school: the qualifying scholarship program provider. The state gives the donor taxpayer a tax credit, the taxpayer gives money to the scholarship provider, the scholarship provider gives money to the student, and the student gives money to the private school. In a sense, the state never gives money to a private school, even though that is the result. However, every conveyance is required as a condition for getting the tax credit. The proposed

Court has not suggested that prohibitions on private-school funding are unconstitutional. The prohibition on sectarian *instruction*, which is not constitutionally problematic, persists in the law.

[31] *See infra* notes 44–48 and accompanying text.

[32] REPORT OF THE CONSTITUTIONAL REVISION COMMISSION, *supra* note 28, at 84. The 1972 amendments also changed Mr. Peterson's "and" to an "or" and moved the term "exclusively" to modify control. This may constitute a slight relaxing of the 1920 prohibition on eligible schools. In 1920, the only way to qualify for an appropriation was to be "exclusively owned and controlled". Post-1972 a school would qualify if it was either "owned or exclusively controlled." No discussion of this change appears in the commission's reports or its minutes, and it may well have been a logic error. However, it may allow public funding for privately owned schools if they are "exclusively controlled" by the state or a political subdivision thereof.

statute effectively says that the state will reimburse taxpayers (up to their otherwise applicable tax liabilities in a five-year period) so long as the taxpayer gives money to Nebraska's private schools. But is that appropriation "to" the private school?

This word "to" has some constitutional history that has been important in the case law attending article VII, section 11. The broader constitutional history is detailed above, but the focus here is on the word "to." The 1875 constitution took a circuitous route to prohibit state funding of religious schools by simply prohibiting sectarian instruction in any school that was "supported in whole or in part by the public funds set aside for educational purposes."[33] The 1920 constitution's language was hardly a model of clarity, given its punctuation. It says that neither the state nor others "shall ever make any appropriation from any public fund, or grant any public land in aid of any" private school.[34] The "in aid of" language clearly refers to the grant of public land. What is less clear is how it relates to the text preceding the comma. Had there been a "to" after "public fund," the sentence would have made more sense. Had there been a comma after "public land," it would have also made more sense. Instead, the reader is left to surmise that the text reads as "appropriation from any public fund . . . in aid of any" private school. Perhaps it was the timing and process of the convention's consideration of the issue,[35] but this textual travesty helps explain why the 1970 Commission instead chose the word "to" when it proposed the language we have now.

The Court, however, has not seen this as a mere technical change—the impact of the shift from "in aid of" to "to" was profound. Before the change, the Nebraska Supreme Court had gone so far as to strike down the Nebraska Textbook Loan Act, which provided private-school students access to public-school textbooks. To Chief Justice White and the Court, the language was clear: "[B]y its terms, by its history, and by its purpose, . . . the intent of the amendment was, and is, to prohibit the extension of aid from public funds to non-public schools, in any manner, shape, or form."[36] The textbooks were purchased with tax dollars and contributing the books to students constituted aid. Judges Clinton and McCown dissented.

Similarly, under the pre-1972 language, the Court struck down a student reimbursement program designed to reimburse qualifying students for their tuition costs at private colleges in *Rogers v. Swanson*.[37] Even though that legislation purported to aid students in their choice of an educational institution, the Court concluded that "the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Here the grant is not

---

[33] NEB. CONST. art. VIII, § 11 (1875).
[34] NEB. CONST. art. VIII, § 11 (1920).
[35] The 1919–1920 convention proceedings indicate that this language was heavily debated on the motion to move it to third reading, sent back to various committees, and returned in short order to the committee of the whole. Perhaps this accounts for some of the textual difficulty. *See* 2 CLYDE H. BARNARD, JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 2626, 2629–31, 2660–64, 2677–81 (1920).
[36] Gaffney v. State Dept. of Ed., 192 Neb. 358, 220 N.W.2d 550 (1974), *see also* Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974) (striking down grant program for students in need of tuition aid for private colleges).
[37] 192 Neb. 125, 219 N.W.2d 726 (1974) (striking down Legis. B. 1171, 82nd Leg. (Neb. 1972) on various grounds). The Court refused to consider post-1972 amended language because the prior language was in effect at the time the legislation was adopted. *See Rogers v. Swanson*, 192 Neb. at 128, 219 N.W.2d at 729. It appeared to follow suit in *Gaffney*.

directly to a private school but rather to a student, but it must be used for tuition at a private school."[38] Judges Clinton and McCown were, again, dissenters.

After the 1972 amendment, however, the Court changed its approach, reading "to" more narrowly than "in aid of." In *Lenstrom v. Thone*, [39] Judge Clinton, writing for the entire Court, concluded that a state-sponsored college scholarship program did not violate the constitutional provision where it provided aid to students that could be spent at any public or non-public institution. Similarly, in *Bouc v. Sch. Dist. of the City of Lincoln*,[40] the Court concluded that public school bus transportation was constitutionally permissible when given to private schools pursuant to a statute that required school districts providing public-school bussing services to extend the service to private-school students. In fact, the Court came full circle in *Cunningham v. Lutjeharms*,[41] concluding a textbook lending program was now constitutional because it involved the loaning of textbooks to public and non-public school students alike. Any benefit to the private school was incidental. The focus of the aid was on students.[42]

Given these cases, there is an argument that tax credits issued to taxpayers for donations to qualified scholarship funds that give money to students who must spend the money on private schools are not appropriations "to" private schools. Such an argument would posit that the tax credits are an appropriation to donors, scholarship-providing organizations, or private school students. But they are not "to" private schools, under *Lenstrom* and its progeny. The response to that line of argument is to focus on the ultimate beneficiary of the expenditure: the private school. The route is, in a sense, long but not necessarily indirect or incidental. It is specifically directed by statute only to such qualifying private schools, much like the legislation struck down in *Rogers*.

There is much to recommend regarding the "this is 'to' donors" line of argument. In *Lenstrom*, the Court adhered to a literal interpretation, despite pleas to ignore the "to" change.[43] Those pleas were very well-founded beyond the materials the Court cited. There is little evidence

---

[38] *Id*. at 129, 219 N.W.2d at 730.

[39] 209 Neb. 783, 311 N.W.2d 884 (1981) (citing Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976)) (allowing tuition grant program to students of both public and private colleges).

[40] 211 Neb. 731, 320 N.W.2d 472 (1982).

[41] 231 Neb. 756, 437 N.W.2d 806 (1989).

[42] The court has also concluded that contracts with private schools are permissible because they do not "set aside state money for [the private school's] special use" and "vest in [the private school] any right to receive state funds." *See* Creighton v. Smith, 217 Neb. 682, 690, 353 N.W.2d 267, 272 (1984); *see also* Father Flanagan's Boys Home v. Dept. of Social Services, 255 Neb. 303, 316, 583 N.W.2d 774, 782 (1998) (the court cited *Creighton* in holding that the state contract with Boy's Town School is not impermissible for the sole reason that the School, a nonpublic institution, benefitted from that contract). The cases involving payments for services are, perhaps, the hardest to reconcile with the constitutional text. The Nebraska Supreme Court's conclusion that those cases involved constitutional expenditures makes the express exception in the first paragraph of article VII, section 11 unnecessary. *Creighton* involved a contract for cancer research that has little if any bearing on the institution's status as an education provider. *Father Flanagan's Boys Home* involved a payment for services that a state agency chose to incur to fulfill its duty to state wards. Those aspects of the cases are perhaps the soundest basis for reconciling them with the constitution's text and purpose.

[43] *See* Lenstrom v. Thone, 209 Neb. 783, 787–88, 311 N.W.2d 884, 887–88 (1981) (rejecting argument based on the Nebraska Legislative Council's *A Summary of Constitutional Amendments Proposed by the Nebraska Legislature* (March 1972)).

of any intent on the part of the 1970 Commission to narrow the scope of prohibited appropriations, much less any evidence of voter intent to do so.[44]

In fact, and of particular relevance to the legislation currently being considered, the 1970 Commission did its work after a proposal for a constitutional amendment had passed the Legislature and was awaiting a statewide vote. L.B. 1083 (1969) would have amended article I, section 4, to allow the Legislature to create a program for tuition reimbursement for private-school students.[45] Such a program was unconstitutional under the pre-1972 provision, which is why the Legislature proposed the amendment.[46] Indeed, the Court came to that very conclusion five years later, in *Rogers*.

Against that backdrop, the 1970 Commission considered article VII, section 11, and repeatedly explained that it operated only as a restatement of the existing 1920 language, widely prohibiting public funding of private schools.[47] It discussed, at length, the relationship between their proposed amendments to article VII, section 11, and L.B. 1083. By a vote of 8 to 2, the Commission agreed that their amendment was a substitute for L.B. 1083 and a rejection of it.[48] It is abundantly clear from the minutes that the 1970 Commission believed state aid to private schools would, even if it was given to students, be unconstitutional under the amendments it proposed, just as it was unconstitutional under the pre-1972 text, as the Court concluded in *Rogers*.[49]

Despite the constitutional history (which has not yet been fully presented to the Court), the cases have been somewhat clear in requiring that the appropriation be "to" the private school to transgress the prohibition in the post-1972 text of article VII, section 11. The Court's stubbornness,

---

[44] As Professor Dow explained to the commission,

> The present Section 11 deals with two things. It deals with the conflict between church and state and state and non-church educational institutions. Because we thought we could do a better job, we did redraft the language. There was no intention in our redraft to change any of the ideas we thought were trying to be expressed in Section 11 as it now stands with one exception.

MINUTES OF THE 1970 NEB. CONST. REV. COMM'N 279 (March 6, 1970). That exception was a proposal to give the state the ability to partner with other states to provide educational services, which was never presented to voters. Mr. Lauritsen also explained to the Commission, "There is no part of the gist of it that has been left out. This is one section that we though we couldn't make more understandable." *Id.* at 281.

[45] Legis. B. 1083, 80th Leg. (Neb. 1969) (https://www.nebraskalegislature.gov/FloorDocs/80/PDF/Slip/LB1083.pdf).

[46] Its reasons for choosing article I, section 4, rather than article VII, section 11, may appear in the legislative history of L.B. 1083, which I have not studied. But it is important to remember that such an amendment would have displaced the prohibition in the pre-1972 text of article VII, section 11. Section 11, at that time, had no "notwithstanding any other provision in this constitution" language. That language was not added to the constitution until 1976. Legis. B. 666, 84th Leg. (Neb. 1976).

[47] *See* MINUTES, *supra* note 43, at 280. Professor Dow explained to the commission,

> Now it would be foolish to say that there are not many people who have specifically contacted us, and I dare say you, for the purpose of modifying the ideas presented in this particular section. As a matter of fact, the Legislature has proposed an amendment to the constitution, LB 1083, which specifically would permit the state of Nebraska to pay a part of the tuition of funds for students enrolled in any non-public institution, be it sectarian or otherwise.

Id. at 280.

[48] *Id*. at 1495-97.

[49] Notably, there is no argument that the constitutional provision was changed to overturn *Rogers* or *Gaffney*. *Rogers* was decided after the 1970 Commission's work.

however, requires closer examination. The circumstances under which it has been willing to tolerate legislative assistance have been characterized by expenditures that can reasonably be viewed as appropriations "to" students, rather than "to" schools. To characterize an expenditure as student-focused, the Court has developed two nascent lines of doctrine. The first involves cases where there is some extension of a public benefit that public schools provide to students. The textbook and district bussing programs were extensions of public support directed to students (public and non-public alike) and only incidentally benefitted the private school. In that sense, the Court has been unwilling to view legislative aid as an appropriation to a private school when it appears to be an extension of services that public schools provide to public-school students. Including private-school students in such programs is not an appropriation "to" a private school.

The current legislation appears to try to align itself with this doctrinal thread. The argument lies deep within the bill. It requires qualifying scholarship-granting entities to

> limit scholarship amounts awarded to students in a manner that assures that the average of the scholarship amounts awarded per student does not exceed seventy-five percent of the statewide average general fund operating expenditures per formula student for the most recently available complete data year as such terms are defined in section 79-1003.[50]

The terms "formula student," "general fund operating expenditures," and "most recently available complete data year" are defined in section 79-1003, which is the definitions section of the Tax Equity and Educational Opportunities Support Act (TEEOSA).[51] TEEOSA governs the allocation of state aid to public schools by providing state aid to schools based on resource shortfalls relative to school-district needs.[52] Those needs are, in turn, calculated from "general fund operating expenditures" among a host of other factors.[53]

While the details of the TEEOSA are beyond the scope of this article (and beyond the expertise of nearly everyone in the state, including me), the incorporation of a limit on scholarship outlays that references a very technical measure of public spending (developed in a much different context) holds the seed for an argument that the bill tries to give private-school students something that public-school students also get: public funding.

There are several reasons why the judiciary may not conclude that this is like textbook and bussing availability. A cursory glance at any of the statutes in the TEEOSA will reveal that such calculations are difficult and infused with several political choices that don't necessarily align with tuition and fees at private schools. More importantly, the argument that this tax-credit scheme gives private-school students the public funding that public-school students get misconstrues the nature of public-school provisioning. The public-school system does not fund students; it funds schools for students. It is difficult to argue that the tax-credit scheme is an extension of a benefit provided to public-school students in an entirely different manner. In fact, it proves a bit too much:

---

[50] Legis. B. 364 § 4(g), 107th Leg., 1st Sess. (Neb. 2021) (https://www.nebraskalegislature.gov/FloorDocs/107/PDF/Intro/LB364.pdf).
[51] NEB. REV. STAT. § 79-1003.
[52] § 79-1008.01.
[53] § 79-1007.11 (formula need, which includes "basic funding"); § 79-1007.16 (calculating basic funding, which involves general fund operating expenditures).

if the goal is to help private schools by funding private-school students, then it follows that the appropriation is "to" private schools. Such a benefit is in no sense indirect or incidental; it is the purpose of the legislation. Perhaps that purpose will be fleshed out more in debate, but it appears very difficult to argue that private-school scholarships are like textbooks and bus rides.

The second nascent thread of doctrine arises in a context more like the present legislation, where public funding is provided to students. Nebraska does this beyond the K-12 setting. The cases dealing with that subject indicate that student aid is "to" students (rather than private schools) when students have a choice in providing the funding to a public or a private school. In *Lenstrom*, the Court upheld the scholarship program, carefully noting the students' ability to direct the funding to public or private schools.[54] In fact, that seems to be what distinguishes the constitutional scholarship program in *Lenstrom* from the unconstitutional private-school-tuition-reimbursement program in *Rogers*, which went only to students attending private schools. Granted, the constitutional text had changed, but the *Lenstrom* Court did not overrule *Rogers*. It also drew support from a Missouri case, noting specifically that the case involved "a tuition grant program to students of both public and private colleges, much like the one before us."[55] The *Lenstrom* Court was also very furtive in its effort to reconcile itself with *Rogers*, stating, "*Hartness v. Patterson* . . . , upon which we relied heavily in . . . *Rogers* . . . has no application under the present constitutional language *when applied to the statutory plan before us in this case*."[56] That statutory plan, of course, involved aid that was available to both public and private students. The aid in *Rogers* was only available to private-school students.

One reasonable synthesis of these cases is that the presence of student choice is another way of establishing that state support is going "to" the student rather than the private school. If that is true, then L.B. 753 is unconstitutional. While "school choice" has entered the fray as a justification for this program, the donations that get tax credits do not go to scholarship funds that can be spent on public or private schools. Rather, they are no different than the reimbursements available only to the private-school students in *Rogers*. And while the constitutional text has changed, the doctrinal threads emerging from *Lenstrom* and its progeny suggest that "to" does not necessarily mean that the Legislature can indirectly support private schools however it wants.

Failing to extend the program to public schools is understandable. Public schools have no tuition or fees associated with them. For K-12 students, education must be "free."[57] To accomplish that, we do not fund public education through students. Rather, we provide schools to students, using tax revenue from several different sources. There may be ways to create a program that would provide tax credits for donations to funds that can be directed to public schools for qualifying students to support their education at those institutions. Such a program would stand on firmer constitutional footing than the proposed legislation, with its singular focus on private schools. Such a program would involve spending that is "to" those students, rather than effectively

---

[54] *See* Lenstrom v. Thone, 209 Neb. 783, 790–91, 311 N.W.2d 884, 889 (1981).
[55] *Id*. at 789, 311 N.W.2d at 888 (citing Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976)). *Americans United* appears to establish a no-benefit theory, but it is not clear that the *Lenstrom* Court used it for that proposition.
[56] *Id.* (emphasis added).
[57] NEB. CONST. art. VII, § 1.

going only to private schools in violation of article VII, section 11. But L.B. 753 is not designed in that way.

* * *

Practically speaking, the magnitude of L.B. 753's contribution to private education cannot be ignored. Twenty-five million dollars, with a forecasted expansion to $100 million, is a difficult tax expenditure to paint as student aid when the funds generated by the tax credit can only be spent on private-school tuition. While the text of the constitution and the case law do not necessarily prohibit the legislation, the functional view that many people have of the effort, especially when viewed against the backdrop of our state constitutional history, counsels in favor of a different path.

A Different Path

The aid this bill provides will take Nebraskans down an arguably unconstitutional path, one that is contrary to the political culture of the state. Do Nebraskans really want to provide private school aid? Do private schools really want Nebraska tax dollars influencing their respective educational endeavors? Students of our constitutional history might also ask: Do Nebraskans really want to spend any money? Perhaps we should ask them.[58]

State constitutional amendments are a common way to clear the stage for legislation that raises constitutional problems. By my last count, the 1875 Nebraska Constitution has been amended 237 times since its adoption, of the 365 times the People have been asked to make a change.[59] Indeed, the last general election involved a legislatively proposed constitutional amendment based upon the Attorney General's skepticism about airport authorities providing airline revenue guarantees.[60] And, in matters with more intense political pressure, initiated constitutional amendments are often presented to voters because political pressure deadlocks the legislative process, just enough to forestall efforts to generate the three-fifths legislative vote necessary to present such a question to the voters. Casino gaming is a recent example.[61] In both cases, however, the people are presented with important questions about changing the constitutional text to allow what it prohibits or that which seems questionable.

Both options are available in this setting. Proponents of this legislative effort would be free to initiate a constitutional amendment to article VII, section 11, or create an entirely new section

---

[58] Other states have asked. *See* Cauthen, *supra* note 5.

[59] MIEWALD, LONGO & SCHUTZ, *supra* note 9, at 30 (reporting statistics through the 2008 election); SCHUTZ, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE (2d ed.), On-Line Update (2023), available at, https://digitalcommons.unl.edu/nebraskaconstitution/2/.

[60] *See* Att'y. Gen. Op. 20-001 (2020), 2020 WL 2570880; Legis. Res. 283CA, 107th Leg., 2d Sess. (Neb. 2022); NEB. CONST. art XV, § 26.

[61] *See* ROBERT B. EVNEN, INFORMATIONAL PAMPHLET: INITIATIVE MEASURE NO. 428, 429, 430, 431 APPEARING ON THE 2020 GENERAL ELECTION BALLOT 8–11 (2020) (ballot measure to amend the Nebraska Constitution to allow the enactment of law to permit and regulate gambling), https://sos.nebraska.gov/sites/sos nebraska.gov/files/doc/elections/2020/Init.%20Measures%20428-431%20Pamphlet.pdf.

in article VII. Such efforts are costly and fraught with uncertainty, given recent Nebraska Supreme Court opinions,[62] but it is a viable option.

To avoid those costs and that uncertainty, the Legislature could propose such an amendment. It would be at least[63] the third time the question has been put to voters. In 1970, L.B. 1083 (which was on the minds of the 1970 Commission) proposed an amendment to article I, section 4, that would have allowed grants to non-public K-12 school students for a part of their private-school tuition. The voters rejected that amendment in the 1970 General Election.[64] In 1976, the matter was put to voters again by L.B. 666, this time for postsecondary education to authorize a program like what was litigated in *Lenstrom*. The voters rejected that amendment in the 1976 General Election.[65] The Legislature created the program anyway in 1978, and the matter was litigated in *Lenstrom*. The *Lenstrom* Court noted this failure but refused to use it to interpret the post-1972 language: "Even if voters in 1976 expressed disapproval of a proposed amendment, such disapproval does not affect a change in constitutional interpretation."[66] Whatever the merit of that observation, the 1976 presentation to voters is some evidence of legislative caution, perhaps followed by legislative luck in the judiciary. The first part of that path would be well-suited to the present situation, before counting on the second.

Presenting the matter to voters again would also have the salutary effect of avoiding litigation under the state constitution, a prospect that appears likely and has a reasonable basis for success. And presenting it to voters is also well-suited to deliberative governance. Crafting the amendment, of course, takes great care and forethought. But once the legislative branch works out a compromise that can be presented to the people, an amendment would more clearly open the door for public aid to private-school students and their schools. The singularity of the subject matter would also give lawmakers a more concrete foundation for policymaking. Partisan influences that may dominate the legislative body have difficulty roping the People to a party or platform. And voters would be squarely presented with the question of whether a program that supports private-school education ought to diminish the public's tax revenue. Passage would provide the political license to proceed. Rejection would perhaps settle the matter (at least for a time) and free the Legislature to focus on other important questions.

---

[62] *See* Wagner v. Evnen, 307 Neb. 142, 948 N.W.2d 244 (2020); McNally v. Evnen, 307 Neb. 103, 948 N.W.2d 463 (2020); Anthony B. Schutz, *Direct Democracy: From Theory to Practice Symposium, Introduction*, 101 NEB. L. REV. 1 (2022) (introducing a series of articles in a symposium devoted to state constitutional amendments and the initiative process in the wake of *Wagner* and *McNally*).

[63] My research has uncovered these two incidents of presenting the matter to voters, but they were uncovered while researching the text and history of the amendments. The 1970 submission was mentioned in the minutes of the 1970 Commission's work. The 1976 bill involved two questions put to voters, one of which added the "Notwithstanding" language of the current provision and the text on providing education for handicapped children. I have not waged an exhaustive search for other amendments that were rejected at the polls.

[64] Proposed Amendment No. 12 failed by a vote of 250,529 to 182,827. FRANK MARSH, OFFICIAL REPORT OF THE BOARD OF STATE CANVASSERS OF THE STATE OF NEBRASKA: GENERAL ELECTION 24 (1970).

[65] Proposed Amendment No. 6, Part 2, failed, but the precise numbers are illegible in the Canvasser Book available on the Secretary of State's website. *See* ALLEN J. BEERMANN, OFFICIAL REPORT OF THE BOARD OF STATE CANVASSERS OF THE STATE OF NEBRASKA: BICENTENNIAL GENERAL ELECTION 49 (1976).

[66] Lenstrom v. Thone, 209 Neb. 783, 788, 311 N.W.2d 884, 888 (1981).

Moreover, the legislature could design a constitutional amendment that would not require the donation, tax credit, qualifying scholarship provider, and qualifying-school structure of L.B. 753. Grant programs or more efficient spending tools might be easier to implement and administer. Those options are off the table in the current setting precisely because the Legislature must work around the constitutional text. If the constitutional text changes, these options become viable.

It is also worth mentioning that if neither the Legislature nor proponents of this policy present the matter to the people in the first instance, there remains the prospect of direct democracy entering the fray. The referendum would appear to be a likely candidate for the People to intervene. Such measures, of course, take money. The most recent successful presentation of a referendum to voters was supported by a sitting Governor and well-heeled political backers.[67] Whether such a force would emerge in this situation is far from clear. But asking the people first would avoid the difficulties associated with someone asking them later.

For those interested in a direct-democracy solution to this political fight, getting there is in the hands of the Legislature. It could propose an amendment to the people at virtually no cost, with tremendous potential upside. It could also simply conclude that if the People want a say, the referendum and subsequent elections are the way. Litigation remains an option, but that path only adds uncertainty.

[67] *See* JOHN A. GALE, INFORMATIONAL PAMPHLET: INITIATIVE MEASURE NO. 426 APPEARING ON THE 2016 GENERAL ELECTION BALLOT (2016) (ballot measure to decide whether to reinstate the death penalty in Nebraska), https://sos.nebraska.gov/sites/sos nebraska.gov/files/doc/elections/2016/426-Pamphlet.pdf; *Nebraska Referendum 426—Nebraska Death Penalty Repeal Veto—Results: Rejected*, WASHINGTON POST (Aug. 1, 2017, 11:26 AM), https://www nytimes.com/elections/2016/results/nebraska-ballot-measure-426-repeal-lb-268; Kait Madsen, *Execution on the Ballot: Lessons for Judicial Review of Ballot Measures from the Death Penalty Referendum in Nebraska*, 99 NEB. L. REV. 254, 271–77 (2020).