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**ARTICLE:** The Constitutionality of School Choice in Pennsylvania: Educational Opportunity Grants and the Original Intent of Article III, Section 29 of the Pennsylvania Constitution

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**LEXISNEXIS SUMMARY:**

... The Pennsylvania Legislature, led by Representative William Adolph, has made several recent, unsuccessful attempts to pass some type of school choice legislation for the Commonwealth. ... Article III, Section 15 of the Pennsylvania Constitution states in part that "no money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." ... Hence, the funds used to implement Pennsylvania's choice plan would *neither* go directly to any sectarian school, *nor* originate from funds raised to support public schools. Therefore, the Pennsylvania Supreme Court's past interpretations of Article III, Section 15 suggest that a program primarily designed to help the student is constitutional, even if it ultimately happens to benefit a sectarian school. ... Article III, Section 29 of the Pennsylvania Constitution states in part that "no appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation, or association." ... Indeed, the specific prohibition intended by Section 29 cannot be clearly comprehended if viewed apart from the overall textual content of the Pennsylvania Constitution. ... The Educational Opportunity Grants to children clearly comports with the public benefit test set forth by both the framers of the Pennsylvania Constitution and subsequent rulings by the Pennsylvania Supreme Court.

**TEXT:**

I. INTRODUCTION

In June of 1997, The United States Supreme Court ruled that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis" did not violate the Establishment Clause of the First Amendment. n1 The *Agostini* decision constitutes the most recent chapter in a judicial trend n2 that suggests that the Supreme Court is willing to reevaluate the strict "wall of separation" doctrine which has governed Establishment Clause

challenges for decades. n3 Some constitutional scholars argue that *school choice* n4 programs will offer the High Court yet another opportunity to reevaluate the scope and meaning of the Establishment Clause. n5 They predict that, if given the chance, the Supreme Court would uphold school choice programs. n6 Under such a scenario, focus would shift to the state courts as they would determine whether school choice programs were compatible with their particular state's constitution. n7

The Pennsylvania Legislature, led by Representative William Adolph, n8 has made several recent, unsuccessful attempts to pass some type of school choice legislation for the Commonwealth. n9 Each time, the constitutionality of school choice formed the primary procedural concern and effectively blocked or delayed debate on the substantive issue. Three sections of the Pennsylvania Constitution are most often called into question with regard to school choice proposals: Article I, Section 3 prohibits the State from giving preference to any religion; Article III, Section 15 prohibits the legislature from applying money raised for public schools to or for any sectarian schools; and Article III, Section 29 prohibits the legislature from making "appropriation[s] . . . for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation, or association." n10

Because the school choice legislation most recently designed by the administration of Governor Ridge proposes to grant monies to individuals from general state revenues via Educational Opportunities Grants, rather than to private or sectarian schools directly, n11 it avoids conflict with either Article I, Section 3 or Article III, Section 15. This article will show that the only significant state constitutional challenge at issue with regard to school choice in Pennsylvania stems from Article III, Section 29. n12 Furthermore, this Article suggests that the prohibitory language of Article III, Section 29 does not extend to these Educational Opportunity Grants. n13

As mentioned above, the Educational Opportunity Grants Program proposed by Governor Ridge in 1995 is designed to distribute funds to persons, not to sectarian institutions. n14 The Educational Opportunity Grants seek to expand educational opportunities for school-age children, particularly economically and educationally disadvantaged children, and to encourage the improvement of all schools throughout Pennsylvania by giving parents the ability to choose the public or non-public school best suited to meet the educational needs of their child. n15 As designed, appropriations would be made from the Pennsylvania Legislature to individual parents of eligible grant recipients and not to educational establishments. n16 All non-public schools would be required to meet compulsory school attendance requirements, and the necessary federal requirements of Title VI of the Civil Rights Act of 1964, as well as other requirements of the Occupational Safety and Health Association in order to benefit from the program. n17

## II. BACKGROUND

### A. *School Choice and the Pennsylvania Constitution*

#### 1. Article I, Section 3

Article I, Section 3 of the Pennsylvania Constitution is the state's equivalent of the Establishment Clause of the Federal Constitution providing, in part, that "no preference shall ever be given by law to any religious establishments or modes of worship." n18 The Pennsylvania Supreme Court has held that this section of the state constitution may not be read more restrictively than the Federal Establishment Clause. n19 Because there is sufficient case evidence to suggest that Educational Opportunity Grants would not be ruled unconstitutional at the federal level, Article I, Section 3 of the Pennsylvania Constitution could not be used as a constitutional bar against such programs. n20 The following is a sampling of federal cases to illustrate this claim. n21

#### 2. Relevant U.S. Supreme Court Decisions

Establishment Clause challenges are often based on the doctrine of neutrality as established in *Everson v. Board of Education*. n22 Neutrality simply refers to the concept that requires legislation to be devoid of religious preference. n23 The key to neutrality, as the United States Supreme Court argued in *Marsh v. Chambers*, n24 is that aid must be available to "a wide class of similarly situated nonreligious beneficiaries." n25 Since the 1980's, the Court has held that

legislation which challenges the Establishment Clause is not unconstitutional if aid is neutrally made available to individuals who are free to use such aid in either secular or sectarian settings. n26 This issue was directly addressed by the Supreme Court in 1986 in *Witters v. Department of Services for the Blind*, n27 when the Court held that monies from a program of vocational assistance to the blind could be used to pay tuition at a bible college. n28 Because the funding was directed to the student, the money only indirectly went to the religious institution "as a result of the genuinely independent and private choices of aid recipients." n29

Similarly, in *Mueller v. Allen*, n30 the Court held constitutional a Minnesota law allowing state taxpayers to deduct expenses for tuition, textbooks and transportation. n31 Because the deductions were available to all parents, not just to those using sectarian schools, the deductions did not have the effect of advancing sectarian aims. n32 The Court stated that "where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' . . . can be deemed to have been conferred on any particular religion generally." n33

In *Zobrest v. Catalina Foothills School District*, n34 the U.S. Supreme Court held that a child attending parochial school was entitled to an interpreter paid for by the public school. n35 The presence of an interpreter did not represent state decision-making in this instance. n36 Again, neutrality was the key for the Court when it stated:

We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also . . . benefit. Nowhere have we stated this principle more clearly than in *Mueller v. Allen*, and *Witters v. Washington Dept. of Services for the Blind*, two cases dealing specifically with government programs offering general educational assistance. n37

Because Educational Opportunity Grants would give monies to all parents of eligible recipients, whether their children attended public or private schools, the program would satisfy the neutrality test of the Establishment Clause. n38

In addition to the concept of neutrality, the Supreme Court established a three-part test to determine when government action violates the Establishment Clause in *Lemon v. Kurtzman*. n39 The *Lemon* Test provides that 1) a "statute must have a secular . . . purpose," n40 2) the "primary effect must . . . neither advance[] nor inhibit[] religion," n41 and 3) the statute may not create an "excessive . . . entanglement with religion." n42 In applying the test to various challenges of aid for education, certain forms of aid were treated differently. For example, textbook loans and aid for transportation were constitutional, while others like teacher salary supplements were unconstitutional. n43 Because the *Lemon* test has been difficult to apply, some legal scholars argue that the Court's reliance on it has weakened. n44 Even so, Pennsylvania's Educational Opportunity Grants would arguably hold up under this standard as well. n45 More importantly, however, one may argue that because the *Lemon* test was designed to determine the validity of aid given directly to sectarian schools, the test should not apply to Educational Opportunity Grants because the money is disbursed to individual parents, rather than to the schools directly. As such, one might further suggest that the payments received by sectarian schools flows from a private, not public source. Viewed accordingly, Educational Opportunity Grants closely resemble the indirect aid cases, such as *Mueller*, *Witters*, and *Zobrest* discussed above. Here, the Court has clearly stated that, "when the allocation of aid is determined through individual choice and not government direction, and is not skewed in favor of religion, the program satisfies constitutional structures." n46

In conclusion, the choice plan in Pennsylvania would likely pass federal constitutional challenges grounded in the Establishment Clause of the First Amendment, and would therefore conform with Article I, Section 3 of the Pennsylvania Constitution.

### 3. Article III, Section 15

Article III, Section 15 of the Pennsylvania Constitution states in part that "no money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." n47 In *Springfield School District v. Department of Education*, n48 however, the Pennsylvania Supreme Court held that a fundamental distinction exists between assistance provided to the parents of schoolchildren and assistance provided directly to schools. n49 In reaching this conclusion, the Court relied on two of its previous decisions. n50

In *Rhoades v. School District of Abington Township*, n51 the Pennsylvania Supreme Court held that government funded buses transporting children to and from public or private schools were constitutional because they were ultimately for the benefit of the student, and not for religious institutes which may be affiliated with the child's school. n52 The Pennsylvania Supreme Court, in *Schade v. Allegheny County Institution District*, n53 upheld the constitutionality of government appropriations to religious institutions for the care of neglected children because the grants were "payments to the child, -not to the institution supporting" the child. n54 Therefore, the Pennsylvania Supreme Court's past interpretations of Article III, Section 15 suggest that a program primarily designed to help the student is incidental, despite tax revenues ultimately benefiting sectarian schools even if the funds are given directly to a religious institution.

Educational Opportunity Grants that are disbursed directly to the student via the parent, and not to the schools, do not support sectarian schools. n55 Furthermore, Educational Opportunity Grants would use monies appropriated separately and distinctly from monies raised to support public schools, thereby strengthening the argument in favor of constitutionality. n56 Hence, the funds used to implement Pennsylvania's choice plan would *neither* go directly to any sectarian school, *nor* originate from funds raised to support public schools. n57 Therefore, the Pennsylvania Supreme Court's past interpretations of Article III, Section 15 suggest that a program primarily designed to help the student is constitutional, even if it ultimately happens to benefit a sectarian school.

#### 4. Article III, Section 29

Article III, Section 29 of the Pennsylvania Constitution states in part n58 that "no appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation, or association." n59 Some have interpreted this section of the Pennsylvania Constitution to prohibit state legislative appropriations to sectarian educational institutions or to those institutions for basic educational purposes. n60 Accordingly, it is argued that Pennsylvania law forbids not only an educational voucher system in which public monies are distributed to non-public schools, but also the distribution of educational opportunity grants to students to be applied to the schools of their choice. n61 Arguably, Article III, Section 29 of the Pennsylvania Constitution presents a serious constitutional challenge to Educational Opportunity Grants because the aforementioned language appears to prohibit a state expenditure to individuals for educational purposes. n62 The pivotal issues, then, are whether the interpretation of the constitutional provision accurately reflects the intended meaning, and how the meaning is to be ascertained. n63

The authority of the Constitution of the Commonwealth of Pennsylvania is derived from the people of Pennsylvania. n64 The idea that the basis of all legitimate authority is the people and thus the law that they establish in the Constitution is the fundamental or supreme law (to which all ordinary acts of legislation must conform) is rooted in the principles of human equality and consent of the governed. n65 This doctrine of constitutionalism is apparent in both the state and federal constitutions. n66 Moreover, the doctrine of constitutionalism is the basis for the rules of legal interpretation in construing the law. As Alexander Hamilton remarked in *Federalist* 83, "the rules of legal interpretation are rules of *common sense* . . . . The true test, therefore, of a just application of [the laws] is its conformity to the source from which they are derived." n67 Thus, the original intent of the law is of paramount importance if the idea of the sovereignty of the people is understood to be the basis of all free and legitimate government.

In discovering the meaning of the law, most proponents of constitutionalism (or "originalism") agree that both the text of the Constitution and the general principles or cause that gave rise to the law must be considered. n68 The proper meaning affixed to the law can often be ascertained through an analysis of the text itself, including the specific provision in question as well as the full text of the document. n69 When the language of a particular section or clause is plain and consistent with the complete textual language and context, and when the principle that is intended to be protected is obvious, the task of understanding the law is relatively uncomplicated. However, in cases where the language of a particular provision is somewhat difficult, and the greater context of the law does not give a clear understanding, than the task of legal interpretation is more arduous.

In construing constitutional provisions of the latter sort, a principle must be sought to provide coherence to the overall text and offer a consistent reading of the various provisions. To accomplish this task the interpreter is led *outside* the text to search out the intent *implied within* the text. The legislative history of those who framed or ratified the constitution is the next step in the analysis of the law. n70

The prohibitory language of Article III, Section 29 is not plain. If interpreted strictly, for example, that language could be taken as prohibiting such "charitable" and "benevolent" programs as public assistance, foster care, or state unemployment compensation. n71 Further, prohibitory language cannot be generally applied to cases not mentioned as exceptions in Article III, Section 29, because this would be inconsistent with Article III, Section 19, in which appropriations to individuals for charitable and educational purposes are clearly authorized in some cases. n72 The provision, however, applies exclusively to widows and orphans. n73 By a comparison of section 19 and section 29, one must conclude that the principle upon which the prohibitions of Article III, Section 29 are based is not explicit or obvious and must be sought in the overall text and/or in the original intent of the framers and ratifiers of the document.

During the 1873 debates at the Pennsylvania Constitutional Convention, the delegates, who framed the prohibitions within Article III, Section 29, clearly intended this section to be understood as comprehending two distinct clauses. n74 These two clauses are: (1) the prohibition of appropriations for charitable, educational or benevolent purposes to any person or community, and (2) the prohibition of such appropriations to any denomination or sectarian institution, corporation or association. n75 Early in the debate over this section, Delegate Ewing remarked that "this section may fairly be divided into two portions." n76 Ewing later clarified that "there is a marked distinction between appropriations for the aid of sectarian or denominational institutions and appropriations to 'persons and communities.'" n77 Other delegates, including Mr. Sharpe from Franklin County, concurred: "The section has two distinct branches. The one prohibits the appropriation of money to any denominational or sectarian institution or corporation for charitable, educational or benevolent purposes; the other prohibits the appropriation of money to any person or community for like purposes." n78 Accordingly, the prohibitory clauses of Section 29 shall be treated as distinct subsections.

*a. Appropriations for Charitable, Educational or Benevolent Purposes to any Denominational and Sectarian Institution, Corporation or Association*

Section 29, which prohibits the state from granting public monies to any denominational and sectarian organizations for educational, charitable or benevolent purposes immediately calls to mind the prohibitions in Article I, Section 3, and Article III, Section 15. Indeed, the specific prohibition intended by Section 29 cannot be clearly comprehended if viewed apart from the overall textual content of the Pennsylvania Constitution. Whereas Article III, Section 15 prohibits the appropriation of any funds "raised for the support of public schools[,]'" n79 to or for the support of any religious schools, the second clause of Article III, Section 29 refers not simply to monies earmarked for public schools in the general education fund, but to *all* monies appropriated by the general assembly. n80

Further, the specific language of this clause prohibits the appropriation of all public monies not only to sectarian schools, but to sectarian and denominational institutions, associations or corporations for the support of certain non-educational purposes as well. n81 Thus, the prohibitory language of this clause applies to hospitals, asylums, poor houses and so forth which are affiliated with a religious sect or denomination. The delegates to the 1873 Convention which formulated this prohibitory principle of Section 29 intended this clause not merely as a repetition of the prohibition established in current Section 15, but as a significantly more far-reaching limitation on public expenditures and their legitimate recipients. n82

Moreover, neither is the second clause of Article III, Section 29 a mere redundancy of the third section of the first article. Article I, Section 3 legally prevents any public preference to one religious establishment or mode of worship over another, thereby clearly prohibiting the distribution of public monies to churches or to other establishments for sectarian purposes. n83 Article III, Section 29, on the other hand, prohibits grants of public funds to a broader array of sectarian and denominational societies for certain *non-sectarian* purposes, *viz.*, for educational, charitable or benevolent ends. n84 When these two sections of the Pennsylvania Constitution are conjoined and interpreted strictly, the text

establishes a general prohibition against appropriations to any religious, sectarian and denominational organization for virtually any purpose. n85 Indeed, the vast majority of the framers of the 1873 Constitution intended a strict reading of section 29. n86 Moreover, it is within the context of this particular discussion that the general principle which forms the entirety of Section 29 clearly emerges. This principle, which distinguishes between private and public gain or benefit, demonstrates the logical theoretical connection between the two otherwise distinct clauses of Section 29. Recognizing this principle shows why the two prohibitions, which the delegates claimed to be separate and distinct ideas, are nonetheless grouped together in a single section. n87

In the debates concerning Section 29, delegate after delegate took the floor to argue that freedom of religion and conscience necessitated a rather strict separation between church and state. n88 This separation, they said, required not only a prohibition against public support for sectarian purposes, but also against public financial support to sectarian organizations for ostensibly nonsectarian purposes. n89 In framing this section the delegate from Allegheny County, Mr. Ewing, argued that their goal was not the former, because the prohibition against state support of secular ends was already established in the Bill of Rights of the Pennsylvania Constitution, *i.e.*, in Article I, Section 3 and, therefore, a further declaration would only be redundant. n90 Rather, the Committee on Legislation that reported this article intended that appropriations under the guise of *other* purposes, namely charitable and educational purposes, should also be prohibited. n91 In fact, Ewing claimed, the (ultimately unsuccessful) amendment to the committee's report offered by Mr. Dallas from Philadelphia, that "*no appropriation shall be made to certain institutions and persons . . . for denominational or sectarian purposes* [was an attempt] to completely emasculate the section and render it worthless."<sup>n92</sup> Ewing continued:

I presume there never has been a time, in the history of this State, where there was an attempt made to obtain an appropriation of money for any society, *ostensibly* for denominational and sectarian purposes . . . Where an appropriation has been actually made for denominational and sectarian purposes, it has been made under the *form* of an appropriation, not for "sectarian and denominational purposes," but for *educational or charitable purposes*. That is the form such appropriations have uniformly taken, and I think the power has been greatly abused, and is likely to be abused in the future. I conceive it to be an objectionable practice, and that it should be entirely prohibited. n93

Whether Ewing's indictment of Dallas's motives was justified or not, Dallas went on official record to deny the charge. n94 According to Mr. Dallas, his object was not at all to emasculate the section, but to make sure that public funds to non-sectarian charities be permitted. n95 In fact, he claimed, he agreed with Ewing and others that permitting the distribution of funds to denominational and sectarian institutions, even for charitable and other allegedly non-sectarian purposes, is tantamount to permitting appropriations for sectarian and denominational objects. n96 The substance of his intent, Dallas summarily argued, was "that no appropriation shall be made for any denominational or sectarian objects . . . Therefore the Legislature should be prohibited from making appropriations to any sectarian or denominational institution, and so place the whole subject permanently at rest." n97

Thus, even Dallas ultimately agreed with a majority of the delegates that a broader prohibition than that against monies "for secular purposes" was needed. n98 In addition, the problem with simply retaining the previous language, as Bartholomew pointed out, was that the legal structure against giving preference to any religious organization might be construed as applicable only to churches and places of worship. n99 Therefore, it seems clear that the 1838 Constitution was not interpreted as a prohibition against sectarian organizations in general.

As a result, the framers of the 1873 Constitution generally believed it was necessary to include language in the amended Constitution which definitively established the broader and stricter prohibition. n100 Nevertheless, their own understanding of the prohibition against legal preference to any religious establishment was that, technically, the prohibition covered not only sectarian purposes, but also the ostensibly non-sectarian objects of education, charity and benevolence when those objects were managed and/or controlled by a church or any other sectarian organization, despite the manner in which the prohibition had been historically construed. n101 Such objects or purposes, the delegates overwhelmingly argued, were *not general or public* in their nature; rather, such instances actually resulted in preference or benefit (whether monetarily or not) to a *particular* and private sect or denomination and discriminated

against another. n102

Whenever the state grants monies to *any* denominational association for whatever purpose, Ewing declared, it is "giving preference to one [denomination] over the other." n103 Even when, for example, a sectarian hospital claims to be "open to all the world" he said, the services it provides are not tantamount to public benefits or charities because its mere existence as a denominational establishment promotes its own particular cause or church. n104 If it were genuinely and simply for the good of the public, why not abandon the denominational affiliation and make it a public institution? n105 In actuality, Ewing asserted that charitable institutions managed and controlled by a denomination "are just as much denominational as a church." n106

Delegates Mann, Carter, Broomall, Bartholomew, and Dallas emphatically agreed: No matter how broad and beneficial the stated purpose of a sectarian organization, it virtually always discriminates against some taxpayers and citizens. n107 According to Bartholomew, appropriations should be of a truly "public nature, so that all alike shall have the door open, whether they be Baptists or Presbyterians, Jews or Gentiles, that alike those doors shall be open to them all." n108 Mr. Dallas remarked, "every charitable institution established and supported by the members of one denomination becomes a propagander of its faith." n109 Whether you establish a church or a charity under the auspices of that church, Bartholomew declared, "I do not care" what it is called or how you situate it, "it is one and the same thing." n110 Continuing, Bartholomew appealed to the inalienable right of freedom of conscience. n111 Invoking the name of Thomas Jefferson, he said:

It is a violation of the principle of liberty, [and] of conscience . . . Let us follow the teachings of the past; let us live in the light of our own history; let us follow the guides who made this land a land of freedom of conscience, without recognition of condition or sect, and place all men, christian or unchristian, alike before the Constitution and the law. n112

The delegate representing Chester and Delaware Counties, Mr. Broomall, concurred: "You cannot give charity for any purpose whatever to denominations, to sects, without giving some preference; and [further,] you cannot give the aid of the State to these charities without destroying their . . . christian character." n113

The delegates' general agreement regarding the prohibition of public grants to any denominationally affiliated organization because those grants would be analogous to public support for a particular religion or secular group was not, however, intended as an abandonment of the practice of public support and funding for genuinely public charity and other truly non-sectarian benevolences or duties, whether to secular institutions or associations or persons or communities. The distinction that guided the convention in formulating Section 29 was between legitimate public support and illegitimate support; between genuine benefit to the public, and preference or support for any sectarian organization or other person or association to whom funds might be distributed for a gratuitous or invidious purpose of a non-public nature. n114 The effort by the delegates to distinguish between legitimate recipients of public funds for charitable, educational or benevolent purposes and illegitimate recipients, and thereby firmly establishing the principle which protects the taxpayers and citizens against the distribution of public funds for non-public ends, and at the same time permitting the appropriation of monies for objects of public benefit or governmental duty, is the discussion to which we now turn.

*b. "Appropriations for Charitable, Educational or Benevolent Purposes to any Person or Community"*

The first clause of Article III, Section 29 is a prohibition against expenses for "charitable, educational, or benevolent purposes to any person or community." n115 This section is of particular relevance to the proposed Educational Opportunity Grants legislation, which would appropriate public monies *to individuals* for educational purposes.

There was heated debate surrounding the meaning of "charitable, educational, or benevolent purposes" by delegate members to the Constitutional Convention of 1873 who feared that it might be construed to prohibit the distribution of public monies for legitimate public purposes. n116 Yet time and again, delegates who favored this section argued that

such concern was unwarranted. The overwhelming intention of the delegates with regard to this section was the prohibition against *inappropriate* expenditures for "invidious" charitable, educational, or benevolent purposes. n117 As Delegate Mann explained:

Whenever the Legislature undertakes to make these appropriations for local and special charities, they are always of such an invidious nature that they confer relief upon a very few, while the great mass of the people . . . are entirely deprived of the beneficial influences . . . . This section simply is a recommendation on the part of the committee to prevent invidious appropriations to local individuals or communities. n118

According to many of the delegates present at the Convention, the practice of legislators being lobbied by agents to give public monies for private charities was widespread at the time. n119 Mr. Lilly, a delegate-at-large, was particularly concerned with the corruption among legislators who, "under the cover of charity claim large donations of public moneys." n120 Indeed, he argued that the corruption involved in these kinds of appropriations made by the state to charities earned certain legislators ten percent of the gross amount! n121 One wit at the Convention referred to these types as "professional Harrisburg borer[s]." n122

One of the primary reasons for calling the Convention in the first place was the general perception that corruption had seeped into the legislature. It was charged that special legislation was "'the great and gigantic evil of the day,'" n123 and constituted "'one of the most prolific sources of the corruption'" which threatened to engulf the government, enabling the legislator to "put up the rights of his constituents for sale to the highest bidder." n124

Special legislation was understood to be of two kinds: private laws enacted to meet the needs or benefit of a private individual or corporation; and laws enacted for the needs or benefit of a local unit of government. n125 Accordingly, the source of this corruption was special legislation consisting of *private* and *local* bills or legislation. n126 The convention delegates removed this corruption through Section 29's prohibition against public expenditures to "any person or community," respectively. n127 Furthermore, while legislators willing to move these kinds of bills were considered partly to blame for the corruption, the "lobby" or "third house" was seen as largely responsible for corrupting the legislators. n128 Put simply, the temptations surrounding special legislation were too great for agents and politicians alike, thus the Committee on Legislation which proposed the various sections of Article III were generally charged with remedying this problem. n129 According to Mahlon H. Hellerich, the noted scholar of the Pennsylvania Constitution of 1873, this committee's task was twofold: "first, to place limitations upon the enactment of special legislation; second, to safeguard the legislative process against fraud, bribery and the influence of lobbyists." n130

A common example of this fraud involved legislation giving monies to towns such as Chambersburg and Somerset that were destroyed by fire from border raids during the Civil War. n131 As Delegate White pointedly argued, this kind of special legislation reduced the State to little more than an insurance company. n132 Corruption, or at least the potential for corruption, in these instances was infamous. n133 In one scheme, for example, agents for the claimants of the destroyed towns would entice legislators to vote for relief legislation by offering them money for their votes. n134 The agents would then skim off a percentage of the claim for themselves. n135 Delegate Howard of Allegheny County documented the scam in the following colorful account:

I remember very well, at Harrisburg, in 1870, when an agent of what were called the border raid claims came there, opened up shop in one of the committee rooms of the House, and there undertook to set up his three million bill to make a raid upon the Treasury of the Commonwealth, having first made a contract with all these different persons who pretended to have, or who may have had, these claims. He had a bargain for fifteen or twenty per centum of the amount, and he came to Harrisburg to buy up the representatives of the Commonwealth, and boldly and openly this man took charge of one of the committee rooms. Into that room members [were] taken one at a time, their names put down, and the amount arranged which they were to receive for voting for these bills . . . . I got a member of the House to go into that committee room, under the idea that he would take part in that game that was being played

. . . He ascertained the names of some who were to vote for it, and the prices that were to be paid . . . . This member came immediately to the Senate chamber and told me what had occurred; he was followed into the House of Representatives by another person, and the question was put to him, "Are you dissatisfied with the amount that you are to get? If you want a higher sum for your vote you can have it." n136

As more delegates addressed the issue, Section 29's intent became ever clearer. Delegate Corbett, for example, explained: "We have made appropriations to communities, to towns destroyed by fire, and this section is intended to strike at such appropriations." n137 When asked if this section would prevent the state from giving pensions to wounded soldiers, Corbett responded that "it was not intended to reach any [such case], but it was intended to reach the case of appropriations to merely private charities." n138

At still another point in the debates, Mr. Bartholomew clearly spelled out the misunderstanding regarding this section:

The whole point and the whole weight of the argument of those who are opposed to this section is that by introducing it into the Constitution of our State[,] we blight and suspend charity. God forbid. I do not take this to be the proposition at all; but I take the proposition to be that in the time past we have had abuses by the misdirection and misappropriation of public funds by the Legislature. n139

Hence, the delegates were generally agreed and were consistent in their aim to strike at special legislation and its accompanying "misappropriation of public funds." They intended to target *private* and *local* bills, which by definition were *not* general or public in the benefit they provided. n140 Private and local bills, however, were to be distinguished from general or public bills, which were considered a legitimate and proper means of appropriation. n141 The marked target they struck down, then, was not "any person or community," but rather all private or local bills which were directed to the benefit of a private person or local community, *i.e.*, that is invidious and gratuitous legislation. n142 Thus, it is not the category of the recipient(s) that is covered by the blanket prohibition, but the kind or purpose of the appropriation which is, *viz.*, private and local, or "special" legislation.

On the basis of this critical distinction, the delegates set forth what was *not* the target of Section 29's prohibitory language. Mr. Dallas stated emphatically: "Certainly it is not intended to provide that *no* appropriation shall be made to *any* person." n143 For example, he continued, this section would not prohibit expenditures for "rightful salaries of State officers." n144 Mr. Bartholomew further distinguished that "the duty and the obligation of the state to the individual demand that it shall extend relief . . . upon the proposition that such a grant is *general* in its character." n145

At one point in the Convention Mr. Alricks tested this interpretation by offering an amendment to Section 29, which prohibited appropriation of public monies to "any person or community *whatever*." n146 Mr. Ewing quickly pointed out the problem with this amendment:

What we want to prohibit here . . . is simply those powers which . . . are likely to be abused in their exercise; and experience shows that appropriations to denominational institutions, under the pretence and form of being for educational or charitable purposes, is the only way in which any attempt is made to appropriate money to those institutions. We have already put that in. Now, if we adopt the amendment offered by this gentleman, *it would prohibit an appropriation for any purpose whatever.* n147

The quick rejection of this amendment helped to clarify Mr. Alrick's earlier claim, that Section 29 was intended to put a halt to a certain class of appropriations to individuals and communities -- those that were gratuitous -- and not to prohibit all appropriations to persons or communities.

The delegates understood the principle informing the prohibition of appropriations for charitable, educational, or benevolent purposes to any person or community to be identical to the principle informing the prohibition of appropriations to any denominational and sectarian institution, corporation or association. Namely, the prohibitory language of Article III, Section 29 extends to appropriations -- secular or sectarian, to the individual or to the community -- which are devoid of any public benefit. It is this principle that links the otherwise distinct clauses of this

section. n148

### III. THE PENNSYLVANIA SUPREME COURT AND THE APPLICATION OF SECTION 29

In applying the original intent of Section 29, the Pennsylvania Supreme Court's previous interpretation bodes well for the constitutionality of Educational Opportunity Grants. In 1969, the Pennsylvania Supreme Court invoked the original intent of Section 29 in the case of *Basehore v. Hampden Industrial Development Authority*. n149 The court responded that if legislation is designed to address a problem within the competence of the legislature from which the public will benefit, then the legislation will withstand constitutional challenge. n150

Referring to *Basehore* and to *Loomis v. Board of Education of School District of Philadelphia*, n151 Pennsylvania Attorney General Creamer in *Official Opinion 154* stated: "The Court there set down the rule that the section [Article III, Section 29] of the Constitution applied only to charitable gratuities made without any corresponding benefit derived by the public from the class to be benefited." n152 The "public benefit" standard was subsequently applied in 1978 by Attorney General Gornish to uphold the distribution of public funds for medical benefits to the dependents of state police officers killed in the line of duty, n153 and has been applied in numerous other cases as well. n154

The argument that Governor Ridge's Educational Opportunity Grants to individuals is unconstitutional because it is a violation of Article III, Section 29 of the Pennsylvania Constitution does not comport with the intent of the framers of the Pennsylvania Constitution, the place of this section within the overall constitutional context, or with subsequent rulings by the Pennsylvania Supreme Court which are based on a careful and accurate interpretation of the section's meaning. The clause referring to "any person or community" of Section 29 cannot be legitimately construed as a universal prohibition against public funding to individuals for educational purposes. The means test in this case must necessarily be whether such public funding is gratuitous or invidious, or whether the governmental appropriation is directed to a legitimate public object and may result in public benefit. The Educational Opportunity Grants to children clearly comports with the public benefit test set forth by both the framers of the Pennsylvania Constitution and subsequent rulings by the Pennsylvania Supreme Court.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Rights Law  
Civil Rights Acts  
Civil Rights Act of 1964  
Constitutional Law  
Bill of Rights  
Fundamental Freedoms  
Freedom of Religion  
Establishment of Religion  
Education Law  
Religion in Schools  
Establishment Clause Protections

#### **FOOTNOTES:**

n1 *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997).

n2 See *Witters v. Washington Dep't. of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

n3 See *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 16 (1947).

n4 School choice as referred to in this article is defined as grants of money from the state to individual parents to be used for a child's tuition at either a public or non-public school of the parents' choosing. It can also be defined in a broader context as simply giving parents the option to choose the educational setting that is right for their children, rather than requiring them to send their children to a school based on where they live.

n5 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW VOL. II: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS 203 (1995).

n6 *Id.* at 207. For example, in September of 1998, the U.S. Supreme Court, by an eight to one vote, refused to hear a challenge to a Milwaukee voucher program. *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998). While the Court did not explain its reasoning, voucher proponents interpreted it as a victory for future constitutional challenges. Aaron Epstein & Mary Otto, *Vouchers for Wisconsin Schools Allowed*, PHILADELPHIA INQUIRER, Nov. 19, 1998, at A1.

n7 See John Paul Jones, *Pennsylvania's Choice: "School Choice" and the Pennsylvania Constitution*, 66 TEMP. L. REV. 1289, 1289 (1993).

n8 R 165th Legislative District, Delaware County.

n9 See S.B. 953, 175th Reg. Sess. (Pa. 1991); H.R. 1133, 175th Reg. Sess. (Pa. 1991); H.R. 1655, 177th Reg. Sess. (Pa. 1993); H.R. 38, 179th Reg. Sess. (Pa. 1995).

n10 PA. CONST. art. I, § 3; art. III, § 15; art. III, § 29.

n11 H.R. 38, 179th Reg. Sess. (Pa. 1995) § 11(B).

n12 See *infra* notes 58-78 and accompanying text.

n13 See *infra* notes 79-114 and accompanying text.

n14 H.R. 38, 179th Reg. Sess. (Pa. 1995) § 11(B). School choice was not born in a vacuum, but out of the frustration of parents and students who believed that the current educational system is in need of serious reform. Recent trends in student achievement suggest that many students are not being sufficiently challenged to meet higher academic standards. JEANNE ALLEN & ANGELA DALE, THE SCHOOL REFORM HANDBOOK: HOW TO IMPROVE YOUR SCHOOLS 8 (1995). For example, students in the United States "spend less than half of their school day on core academic subjects." *Id.* Students in Germany and Japan, in contrast, "spend almost twice as much time on such subjects." *Id.* Furthermore "only 71% of all students entering ninth grade will graduate four years later," and in the last 22 years, the national average of SAT scores has declined by 35 points. *Id.*

n15 Pa. H.R. 38, 179 Reg. Sess. (Pa. 1993), § 11(A)(1)-(9).

n16 *Id.* at § 11(B).

n17 *Id.*

n18 PA. CONST. art. I, § 3.

n19 See *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366-67 (Pa. 1974); *Springfield Sch. Dist. v. Dep. of Educ.*, 397 A. 2d 1154, 1170 (Pa. 1979).

n20 See *infra* notes 22-46 and accompanying text.

n21 *Id.*

n22 330 U.S. 1, 8-18 (1947).

n23 See *id.*

n24 463 U.S. 783 (1983).

n25 *Id.* at 809 (Brennan, J., dissenting).

n26 See *infra* notes 27-38 and accompanying text.

n27 474 U.S. 481 (1986).

n28 *Id.* at 489.

n29 *Id.* at 487.

n30 463 U.S. 388 (1983).

n31 See *id.* at 390-404.

n32 *Id.* at 394-95.

n33 *Id.* at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

n34 509 U.S. 1 (1993).

n35 *Id.* at 13-14.

n36 *Id.* at 10.

n37 *Id.* at 8-9.

n38 *Id.* at 13-14.

n39 403 U.S. 602, 612-13 (1971).

n40 *Id.* at 612.

n41 *Id.* (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

n42 *Id.* at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

n43 *See id.* at 606-07.

n44 ROSSUM & TARR, *supra* note 5, at 203.

n45 *See Michael McConnell & William B. Graham, The Constitutionality of H.B. 1640, The Pennsylvania School Choice Proposal*, at 3-13 (The Commonwealth Foundation 1994-95).

n46 *Id.* at 10.

n47 PA. CONST. art. III, § 15.

n48 397 A.2d 1154 (Pa. 1979).

n49 *See id.* at 1165 n.11.

n50 *Id.* at 1171 n.20.

n51 226 A.2d 53 (Pa. 1967).

n52 *Id.* at 64.

n53 126 A.2d 911 (Pa. 1956).

n54 *Id.* at 914.

n55 *See generally* H.R. 38, 179 Reg. Sess. (Pa. 1995), § 11(B), (E)(2)(II).

n56 *See id.* at (E)(1).

n57 See *id.* at § 11(B), (E)(2)(II), (E)(1).

n58 Section 29 of the Pennsylvania Constitution reads:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

*Id.*

n59 *Id.* The wording of this part of Section 29 differs slightly in style, though not in substance, from the original wording written during the 1873 Constitutional Convention as Article III, Section 18 which stated that "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association." PA. CONST. art III, § 18 (amended 1937). The stylistic changes were incorporated in 1937. The authors wish to thank the Honorable Robert E. Woodside, and the Honorable Robert J. Woodside for their assistance in researching the date of language modification.

The language permitting grants or loans for higher educational purposes was added on November 5, 1963, to accommodate the PHEAA grant and loan program. PA. CONST. art. III sec. 29 (amended 1963). Given the development of case law to that point, however, it is not entirely clear that such an amendment was necessary. Memorandum from the law offices of Ball, Skelly, Murren & Connell 6 (March 2, 1995) (on file with author). As William Ball and his colleagues at the Harrisburg law firm of Ball, Skelly, Murren and Connell argued in a March 1995 memorandum on the constitutionality of school choice in Pennsylvania:

if the 1963 amendment which permits scholarship grants and loans for higher educational purposes is interpreted to impliedly prohibit scholarship grants or loans for other educational purposes, then all of the other appropriations which are expressly permitted by Article III, Section 29 must be similarly read to impliedly prohibit appropriations for analogous purposes not specifically permitted.

*Id.* Ball speculated on the absurdity of such an interpretation, by noting "the authorization for payments to blind persons 21 years of age and older must be held to impliedly prohibit assistance to blind persons under the age of 21." *Id.* To avoid confusion, Article III, Section 18 of the 1873 Constitution will simply be referred as Article III, Section 29 of the present Constitution.

n60 Jones, *supra* note 7, at 1302.

n61 *See id.*

n62 See William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 275-76 (1997); This argument originates from one made by Representative Colleen A. Sheehan from the 149th Legislative District, Montgomery County. H.R. 179-53, Sess. of 1995, 1454-1456 (Pa. 1995).

n63 See generally, Jones, *supra* note 7, at 1302.

n64 See *id.* at 1303.

n65 THE FEDERALIST No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

n66 The doctrine of constitutionalism is the logical outcome of the idea that because human beings are by nature equal and free, they possess an original right to establish, by social contract, the principles of law that are to be deemed fundamental and supreme. All other law is merely ordinary law created by governmental action and must accord with the fundamental voice of the people speaking in their sovereign capacity, *i.e.*, by the direct vote of the people or by delegates chosen by them to sit in convention expressly for the purpose of the ratification of constitutional law; subsequent alterations in the fundamental law must be made through the constitutionally prescribed amendment processes. See Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 PUGET SOUND L. REV. 351 (1987).

n67 THE FEDERALIST No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

n68 Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 910 (1998).

n69 See *id.*

n70 The procedure that established the 1873 Constitution of Pennsylvania consisted of (1) the authorization of and election of delegates to a Constitutional Convention by the people of Pennsylvania, 1 PA. CONG. DEB., 3 (1873) [entire work hereinafter DEBATES]; (2) the framing of the proposed amendments to the Constitution, 5 *id.* at 15; (3) the publication of the proposed amendments in at least two newspapers in every county where there were newspapers established, *Id.*; and (4) the ratification of the constitutional revisions at the special ratification election held December 16, 1873 by the qualified voters of the Commonwealth of Pennsylvania. Interview with Louis Waddell, Associate Historian, Pennsylvania Historical and Museum Commission, Bureau of Archives and History (Feb. 12, 1998). The procedure of ratification was a point of controversy for some who disagreed with the provision for election machinery and the manner of submitting the amendments for ratification via a special election. *Id.* Disputing the special election ordinance adopted by the Convention of 1873, some claimed that the amendments should be voted on separately rather than an up or down vote on the entire revised document. *Id.* Those persons claimed that the question of ratification should be decided at the general election, not an election specially called for the purpose. 6 DEBATES, *supra* at 162. Despite the heated controversy, the new 1873 Pennsylvania Constitution was ratified by a large majority of the people. Interview with Louis Waddell (Feb. 12, 1998). However, since the procedure did not include preliminary debates in the General Assembly or debates in ratifying conventions, the intent of the 1873 constitutional provisions cannot be further clarified by such additional discussion (as, for example, the proposals of the Federal Convention of 1787 were further debated and clarified by the state ratifying conventions). The Originalists look to the debates of the framers of the 1873 Constitution as the primary source for discovery of original intent when the text itself is not sufficiently plain or clear. See generally Boyce, *supra*, note 68.

A special note of gratitude is extended to Dr. Louis Waddell. Dr. Waddell's vast knowledge of Pennsylvania Constitutional history and equally vast kindness to others interested in the heritage of our Commonwealth has

been an inimitable source of learning and pleasure to us throughout the preparation of this study.

n71 *See PA. CONST. art III, § 29.*

n72 *See PA. CONST. art III, § 19.*

n73 *See id.*

n74 2 DEBATES *supra* note 70, at 662.

n75 *Id.*

n76 *Id.*

n77 *Id.* at 667.

n78 *Id.* at 669.

n79 PA. CONST. art. III, § 15.

n80 *See PA. CONST. art. III, § 29.*

n81 *Id.*

n82 *See 2 DEBATES, supra* note 70 at 699. In debating the purpose and scope of § 29, the delegates specifically commented on the propriety of the state appropriating money "in aid of one particular sectarian institution or corporation, to the exclusion of all others." *Id.* (statement of delegate Sharpe).

n83 PA. CONST. art. I, § 3.

n84 PA. CONST. art. III, § 29.

n85 *See, e.g., Collins v. Kephart*, 117 A. 440 (Pa. 1921); *Collins v. Martin*, 139 A. 122 (Pa. 1927). However, in *Schade v. Allegheny County Institution Dist.*, 126 A.2d 911 (Pa. 1956), the Pennsylvania Supreme Court departed from this strict reading of the Constitution and allowed the appropriation of public funds to a sectarian institution to accomplish a "governmental duty." *See id.* The court also argued that the distribution of such funds is permissible for business transactions and for the payment of legitimate debts. For a discussion of these rulings, *see Ball, supra* note 62, at 276.

n86 *See generally 2 DEBATES, supra* note 70.

n87 *See PA. CONST.* art III, § 29.

n88 *See generally* 2 DEBATES, *supra* note 709.

n89 *See infra* notes 74-78 and accompanying text.

n90 2 DEBATES, *supra* note 70, at 666.

n91 *Id.* at 662-86.

n92 *Id.* at 666 (emphasis in the original) (quoting the Proposed Amendment to the Committee's Report (Dallas)).

n93 *Id.* (emphasis in the original).

n94 *Id.* at 686.

n95 *Id.*

n96 *Id.*

n97 *Id.*

n98 *Id.* at 685-86.

n99 *Id.* at 677.

n100 *See generally* 2 DEBATES, *supra* note 70.

n101 *Id.*

n102 *See infra* notes 103-14 and accompanying text.

n103 2 DEBATES, *supra* note 70, at 662.

n104 *Id.*

n105 *Id.*

n106 *Id.* at 666-67.

n107 See also 5 DEBATES, *supra* note 70, at 662-86.

n108 5 DEBATES, *supra* note 70, at 279.

n109 2 DEBATES, *supra* note 70, at 686.

n110 *Id.* at 677.

n111 *Id.*

n112 *Id.* at 677-78.

n113 5 DEBATES, *supra* note 70, at 279.

n114 6 DEBATES, *supra* note 70, at 684.

n115 PA. CONST. art III, § 29.

n116 See 2 DEBATES, *supra* note 70.

n117 2 DEBATES, *supra* note 70, at 693.

n118 *Id.* at 693-94.

n119 *Id.* at 638.

n120 *Id.* at 637.

n121 *Id.* at 638.

n122 5 DEBATES, *supra* note 70, at 280.

n123 Mahlon Howard Hellerich, The Pennsylvania Constitution of 1873 (1956) (unpublished Ph.D. dissertation, University of Pennsylvania (Philadelphia) at 170) (quoting FRANCIS JORDAN, STATISTICAL AND OTHER INFORMATION FOR THE CONSTITUTIONAL CONVENTION OF PENNSYLVANIA 30 (1872) (on file with the Pennsylvania State Library)).

n124 *Id.* at 505 (quoting JORDAN, *supra* note 123, at 31).

n125 *Id.* at 170.

n126 *Id.*

n127 PA. CONST. art. III, § 29.

n128 Hellerich, *supra* note 123, at 210.

n129 *Id.*

n130 *Id.*

n131 2 DEBATES, *supra* note 70, at 649.

n132 *Id.*

n133 *Id.* at 653.

n134 *Id.*

n135 *Id.*

n136 *Id.* at 653-54.

n137 *Id.* at 649.

n138 *Id.*

n139 5 DEBATES, *supra* note 70, at 278. Many other delegates, like Hanna, Ewing, and M'Clean concurred on this point. See, e.g., 2 DEBATES, *supra* note 70, at 641, 662, 666, and 679-80.

n140 2 DEBATES, *supra* note 70, at 693-94.

n141 *Id.* at 693.

n142 *Id.* at 694.

n143 *Id.* at 648 (emphasis added).

n144 *Id.*

n145 *Id.* at 675 (emphasis added).

n146 7 DEBATES, *supra* note 70, at 393 (emphasis added).

n147 *Id.* at 394 (emphasis added).

n148 *Id.*

n149 248 A. 2d 212 (Pa. 1968).

n150 *Id.* at 218.

n151 103 A.2d 769 (Pa. 1954).

n152 154 Op. Pa. Att'y Gen. 149 (1972).

n153 78-24 Op. Pa. Att'y Gen. 92-96 (1978).

n154 See also, Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35 (1932); Commonwealth v. Perkins, 342 Pa. 529 (1941).