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State Appropriations to Private Schools: Can the Legislature Contract Out of the Constitution? *State ex rel. Creighton University v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984)

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Note

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I. INTRODUCTION

Article VII, § 11 of the Nebraska Constitution contains what seems to be a rather clear and direct prohibition on state appropriations to nonpublic educational institutions. It mandates that "[n]otwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ."[1] What this provision actually prohibits, however, is far from clear. The Nebraska Supreme Court has recently taken a major step towards defining the boundaries of article VII, § 11 in *State ex rel. Creighton University v. Smith*.[2] In *Smith*, the court upheld a legislative scheme designed to provide state funds for research of cancer and smoking diseases in the State of Nebraska.[3] Creighton University, a nonpublic school, attempted to contract with

1. NEB. CONST. art. VII, § 11.
2. 217 Neb. 682, 353 N.W.2d 267 (1984).
3. *Id.* at 691, 353 N.W.2d at 272.

the state to conduct research pursuant to the Act, and was refused consideration based on the prohibition in article VII, § 11.[4] In permitting Creighton to receive these funds in spite of any incidental benefit, the Nebraska Supreme Court for the first time allowed state money to be distributed directly to a nonpublic school — a result that could have a lasting impact on legislative spending decisions in Nebraska.

The decision is, therefore, worthy of examination. In order to fully appreciate the magnitude of *Smith*, the United States Supreme Court's treatment of state aid to private schools and the Nebraska Supreme Court's previous treatment of article VII, § 11 will be reviewed in Part II of this Article. In light of this background, an attempt to rationalize the court's decision in *Smith* and point out its ramifications will be made in Part III. For now, however, the focus turns to the precedental framework in which *Smith* was handed down.

II. A HISTORICAL PERSPECTIVE

A. Basic Policy Considerations

This Article concerns itself with an issue peculiar to the Nebraska Constitution. However, a brief examination of essential policy behind the United States Supreme Court's treatment of the first amendment establishment clause is helpful in developing a proper perspective of the *Smith* decision.

The first major United States Supreme Court decision to address the problem of state aid to parochial education was *Everson v. Board of Education*.[5] In upholding a state transportation program benefiting parochial schools, the Court explained the circumstances and beliefs that led to the adoption of the establishment clause.[6] Excessive intermingling between church and state in England had compelled the founding fathers to be wary of any potential governmental intrusion on the free exercise of religious beliefs. They accepted implicitly the notion that the government should not interfere in a matter dependent wholly upon one's own conscience, and expressed this belief in the Constitution. This mythical "wall of separation" envisioned by the drafters has not, however, been an impenetrable one.[7] Despite the

4. *Id.* at 686, 353 N.W.2d at 270.
5. 330 U.S. 1 (1947).
6. *Id.* at 9-13.
7. *See* Comment, *P.E.A.R.L. v. Regan: Permitting Direct State Aid to Parochial Schools*, 47 BROOKLYN L. REV. 469, 485-86 (1981); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1466-69 (1981); Note, *Publicly Funded Transportation For Parochial School Students: New Issues*, 55 NEB. L. REV. 161 (1975) [hereinafter cited as Note, *New Issues*]. Erosion of the wall of separation between church and state has become an issue of general concern, in part, thanks to the efforts of

founder's reasoning, the Court has, in several instances, allowed private schools to benefit from various forms of governmental action.[8] Chief Justice Burger has observed that: "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute."[9]

Ultimately, the Court made an attempt to provide a formula for balancing the necessity of state intervention in the private school system with the prohibition of the establishment clause in *Lemon v. Kurtzman*.[10] The Court in *Lemon* recognized that complete and absolute separation between church and state is not only impossible, but undesirable,[11] and enunciated a tripartite test aimed at finding a compromise between these competing philosophies.[12] The result of this balancing process was that the character and purposes of the benefited institution, the nature of the state aid, and the resulting relationship between the sovereign and the religious authority have all become important considerations.[13]

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those such as Jerry Falwell and the Moral Majority. The injection of government into religion and vice-versa has accordingly become a hotly contested issue in the 1984 presidential campaign. *See generally Politics and the Pulpit*, NEWSWEEK, Sept. 17, 1984, at 24.

8. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding a New York statute appropriating public funds to nonpublic schools for performing various services mandated by the state, i.e., intelligence testing); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a state statute requiring public schools to loan textbooks to private parochial schools free of charge). *See generally supra* note 7 and sources therein.
9. Walz v. Tax Comm'r, 397 U.S. 664, 668 (1970).
10. 403 U.S. 602 (1971). *Lemon* involved two state statutes that provided aid to private schools in various forms, including teacher salary supplements, textbooks, and instructional materials.
11. "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Id.* at 614.
12. *Id.* The test mandates that: 1) the statute have a secular legislative purpose; 2) the statute's principal or primary effect to be one that neither advances nor inhibits religion; and 3) the statute not foster an excessive governmental entanglement with religion. *Id.* at 612-13. The tripartite test was taken from two earlier United States Supreme Court decisions, Board of Educ. v. Allen, 392 U.S. 236, 243 (1968), and Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970).
13. Complete treatment of the establishment clause is beyond the scope of this article. *See generally* Note, *Constitutionality of State Tax Deductions for Private School Tuition: A New Door in the Wall of Separation*, 63 NEB. L. REV. 572 (1984); Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 NEB. L. REV. 359 (1983); Note, *The Establishment Clause and its Application in the Public Schools*, 59 NEB. L. REV. 1143 (1980); Note, *New Issues*, *supra* note 8.

A good overview of state aid to private school decisions can be found in a more recent case, Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir.

These first amendment principles are analogous to the basic considerations behind the Nebraska Supreme Court's treatment of the Nebraska Constitution's article VII, § 11.[14] Though these considerations are relevant and will be discussed, it should be noted that analysis under the Nebraska Constitution involves an entirely different question. A statute that might be considered valid under the test enunciated in *Lemon* might not pass muster under a more stringent state constitutional provision, such as Nebraska's.[15] With this distinction in mind, an examination of Nebraska law will help to further set the stage for *Smith*.

B. Treatment of the Original Article VII, § 11

Prior to 1972, article VII, § 11 of the Nebraska Constitution prohibited the appropriation of public funds "*in aid of* any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof."[16] This language was the result of lengthy debate that occurred during the 1920 Nebraska Constitutional Convention.[17] Participants in those debates made it clear that the original purpose and design of the article was to prohibit completely the extension of aid from public funds to nonpublic schools.[18] The framers of the article anticipated that the state might attempt to provide aid to private schools indirectly, and in light of the same policy considerations basic to the United States Constitution,[19] explicitly sought to prohibit such action:

> I desire to have the Constitution prohibit any state aid under any guise to any educational institution other than the public school. It is not a difficult matter, if the Legislature sees fit to find an excuse in the interests of general welfare, to make donations under the guise of military training or normal training or what not, in a private institution. I have absolutely no hostility to

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1984), *cert. granted sub nom.* Aguilar v. United States, 105 S. Ct. 241 (1984). *Felton* involves New York City's use of federal funds to send public school teachers into religious schools to provide remedial instruction, clinical services, and guidance programs.

14. *See* 2 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION 2661 (1919-20) [hereinafter cited as 2 PROCEEDINGS].
15. *See* Gaffney v. State Dep't of Educ., 192 Neb. 358, 364, 220 N.W.2d 550, 554 (1974); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 911-12 (1976) (specifically listing Nebraska as a state whose constitutional provision is more strict than the first amendment establishment clause).
16. NEB. CONST. art. VII, § 11 (1920, amended 1972) (emphasis added).
17. *See* 2 PROCEEDINGS, *supra* note 14, at 2661 (discussion of proposition 325, the proposition which, after adoption, became art. VII, § 11 of the 1920 Nebraska Constitution).
18. *Id.* at 2680. *See* Gaffney v. State Dep't of Educ., 192 Neb. 358, 363, 220 N.W.2d 550, 553-54 (1974).
19. *See supra* notes 5-15 and accompanying text.

> those institutions, but it will invariably bring on the kind of war fare that this state should stay clear from, if you mingle the state and church even to that extent.[20]

Subsequent court interpretation of the pre-1972 provision bears out what was intended by the participants of the convention. Two significant decisions were made by the Nebraska Supreme Court interpreting the old language of article VII, § 11. The first, *State ex rel. Rogers v. Swanson*,[21] involved a state statute that provided for public grants to students in need of tuition aid to attend private colleges or universities.[22] The appellant, a student at a private college, had filed a petition for mandamus compelling the State Treasurer to sign a warrant issuing funds under the tuition grant program to the appellant.[23] The opinion was drafted well after article VII, § 11 had been amended, but since the statute was enacted prior to the amendment, the court concluded that the change in wording would have no effect on the question involved.[24] The court proceeded to decide the case on the basis of the pre-amendment wording.

After considering the purpose and history of article VII, § 11, the court held that the scheme of tuition reimbursement was unconstitutional as an allocation of public funds intended to benefit private universities.[25] The court's examination of the intent of the statute revealed that the purpose of the Act was to indirectly provide aid to private colleges. Comments made by senators during debate on the bill indicated concern for the continued solvency of private colleges in the State of Nebraska, and an intent to assure this solvency through the tuition grants.[26] The court held that the program was, therefore, an attempt by the legislature to circumvent an express provision of the constitution by doing indirectly what it could not do directly.[27] Several decisions from other jurisdictions were discussed that sup-

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20. 2 PROCEEDINGS, *supra* note 14, at 2661.
21. 192 Neb. 125, 219 N.W.2d 726 (1974).
22. *Id.* at 127, 219 N.W.2d at 728. The specific sections involved were NEB. REV. STAT. §§ 85-701 to 85-721 (Cumm. Supp. 1972).
23. State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 126-27, 219 N.W.2d 726, 728-29 (1974).
24. *Id.* at 128, 219 N.W.2d at 729. *See* Whetstone v. Slonaker, 110 Neb. 343, 346, 193 N.W. 749, 750 (1923) (statute that was unconstitutional at time of passage is not validated by a subsequent amendment to the constitution).
25. State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 128-29, 219 N.W.2d 726, 729-30 (1974).
26. *Id.* at 130, 219 N.W.2d at 730. Senator Carpenter was quoted as desiring to find " 'some legal way in order to have the state make a contribution, either in the bill or any other area, in order to use up the unused parts of these private schools.' " *Id.*
27. State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 136, 219 N.W.2d 716, 733 (1974). *See also* United Community Serv's. v. Omaha Nat'l Bank, 162 Neb. 786, 77 N.W.2d 576 (1956). Here, the court issued a declaratory judgement condemning the Omaha Public Power District's decision to make contributions to a "community chest"

ported the conclusion that indirect circumvention of a constitutional provision is equally as violative of the provision as direct circumvention.[28] The court concluded that the fact that the funds were given to the student and not to the college itself did not prevent the statute from being in violation of article VII, § 11 as an unconstitutional allocation of public funds in aid of private colleges.[29]

The second decision, *Gaffney v. State Department of Education*,[30] interpreted article VII, § 11 in a similar fashion. *Gaffney* involved the constitutionality of the Nebraska Textbook Loan Act,[31] which was "intended to provide financial assistance to nonpublic elementary and secondary schools through the loan of secular textbooks by public school district boards of education."[32] The plaintiffs, parents of children enrolled in a private school, had requested a loan pursuant to the statute.[33] Upon the advice of the Attorney General, the school district took no action on the request, awaiting a determination of the law's constitutionality. The plaintiffs subsequently brought this action to have the law declared valid.[34]

Initially, the court noted that interpretation of the statute under

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operating within the boundaries of the territory served by the District. In discussing the applicability of article VII, § 11, the court said:

> If by giving to agencies of this character, even though the money given is designated to be used for activities non-sectarian in character, it makes available to such agency for religious or educational purposes money it has on hand to an extent not otherwise possible, thus indirectly doing what the Constitution prohibits, we think it would be bad. Any legislation passed dealing with the subject and delegating such authority to some agency must properly restrict that agency to the same extent as the Legislature itself is restricted in order to prevent such agency from doing what the Legislature itself could not do.

Id. at 804-05, 77 N.W.2d at 589.

28. State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 131-36, 219 N.W.2d 726, 731-33 (1974). One case, Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955), involved a constitutional provision prohibiting appropriations *to* a nonpublic school. The court interpreted the provision to mean appropriations *for the benefit of* a private institution. *Id.* at 426, 89 S.E.2d at 856. This may be compared with the Nebraska Supreme Court's interpretation of "appropriation to" private school, discussed *infra* notes 69-89 and accompanying text.

29. The court stated that the Act was a "patent attempt to sanction by indirection that which the Constitution forbids." State *ex rel.* Rogers v. Swanson, 192 Neb. 125, 136, 219 N.W.2d 726, 733 (1974).

Two other issues discussed in the case, but beyond the scope of this Article, involved NEB. CONST. art. III, § 18, prohibiting the granting of special or exclusive franchises by the state, and U.S. CONST. amend. I, respecting the establishment of religion. On both counts, the court held that the Act presented no violation of the constitutional mandate.

30. 192 Neb. 358, 220 N.W.2d 550 (1974).

31. NEB. REV. STAT. §§ 79-4,118, 79-4,118.01, 79-4,119, 79-4,1138 (Reissue 1971).

32. Gaffney v. State Dep't of Educ., 192 Neb. 358, 359-60, 220 N.W.2d 550, 552 (1974).

33. *Id.* at 360, 220 N.W.2d at 552.

34. *Id.*

the Nebraska Constitution involved a fundamentally different question than interpretation under the establishment clause of the first amendment to the United States Constitution.[35] The court reasoned that the language of the Nebraska Constitution that prohibits appropriations in aid of private schools does not permit an examination of the factors enunciated in *Lemon v. Kurtzman*.[36] Any determination as to the impact of the statute is not relevant under the Nebraska provision, since "the State of Nebraska attempted to avoid even opening the door to an involvement in the political, legislative, and judicial disputes involved in determining hairline and illusory distinctions of degree. The Constitution . . . says there shall be no aid at all."[37] The court made it clear that the Nebraska Constitution was to be interpreted according to its plain meaning. Article VII, § 11 "says what it means and means what it says."[38]

The court then held that the statutory scheme was unconstitutional. As in *Swanson*, the court rejected the contention that since the aid went to the students, and not to the school, no constitutional violation existed.[39] The court concluded that indirect circumvention of the provision could not be allowed, for to permit it "ignores substance for form, reality for rehetoric, and would lead to total circumvention of the principles of our Constitution . . . ."[40]

It is important to note that in determining the statute's constitutionality, the court looked more to the character of the aided activity than to the manner or form in which the aid was given.[41] The court did not allow the legislature to get around the provision by using the student as a mechanism to aid private schools. Clearly, the case involved an activity that was directly linked to the education of the students, and the court responded by prohibiting state money from supporting it, no matter what mechanism of implementation was employed.

Both *Gaffney* and *Swanson* involved legislation that the Nebraska Unicameral deemed important to the well-being of state citizens and clearly in furtherance of a public purpose. Both cases concerned appropriations made not to the school, but to students. Yet, both statutory schemes were found unconstitutional. The decisions thus demonstrate the restrictive nature of the pre-1972 constitutional pro-

35. *Id.* at 362, 220 N.W.2d at 553. *See supra* note 18 and accompanying text.
36. Gaffney v. State Dept. of Educ., 192 Neb. 362, 220 N.W.2d 550, 553 (1974). Those factors, discussed *supra* note 12 and accompanying text, are secular purpose, primary effect, and excessive entanglement.
37. Gaffney v. State Dep't of Educ., 192 Neb. 358, 364, 220 N.W.2d 550, 554 (1974). *See supra* notes 14-15 and accompanying text.
38. Gaffney v. State Dept. of Educ., 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974).
39. *Id.* at 367, 220 N.W.2d at 556.
40. *Id.*
41. *Id.* at 369, 220 N.W.2d at 557.

vision. The court displayed a marked intolerance of the usage of public funds in the private school system in any manner, and seemed steadfast in maintaining the complete separation of church and state conceived by the drafters of the provision.[42]

Both cases, however, included dissenting opinions by Judge Clinton that evidenced remarkable foresight of the changes that were about to take place. In *Gaffney*, Judge Clinton quoted from a New Hampshire Supreme Court opinion that commented that "since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination."[43] This focus on public purpose and incidental benefits was about to become the key to a dramatic shift in the Nebraska Supreme Court's treatment of article VII, § 11.

C. Treatment of the Modern Article VII, § 11

In 1972, upon the initiative of the Unicameral, the people of Nebraska amended article VII, § 11 of the Nebraska Constitution to read: "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 . . . ."[44] The key change from the old provision is the use of the word "to" in place of the phrase "in aid of." This seemingly minor change brought about a major shift in decisions interpreting the article.

Lenstrom v. Thone,[45] decided by the Nebraska Supreme Court in 1981, marks the point at which the effect of the change in wording

42. Another Nebraska Supreme Court decision worthy of mention is State *ex rel.* School Dist. of Hartington v. Nebraska State Bd. of Educ., 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S. 921 (1972). Though neither *Swanson* nor *Gaffney* mentioned the case, they seemed to have overruled it by implication. *See* Note, *New Issues*, *supra* note 7 at 191. In *Hartington*, the court approved the leasing of classroom space from a Catholic school by a public school district. The arrangement was prompted by the public district's lack of space to provide remedial reading and math instruction. Though basing its decision in part on article VII, § 11, the court's only discussion involved the portion of § 11 that mandates that no religious test be required of a student for admission to public school. Even so, the *Hartington* decision seems to be in direct conflict with the analysis in *Swanson* and *Gaffney*. Clearly, the income generated by the leasing of classroom space would be considered an expenditure in aid of a private school under the holdings in both cases. In upholding the use of funds for a needed program, *Hartington* seems more representative of public purpose focus found in Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981), and its progeny. *See generally*, Note, *New Issues*, *supra* note 7, at 190-92.

43. Gaffney v. State Dep't of Educ., 192 Neb. 358, 377, 220 N.W.2d 550, 561 (1974) (quoting Opinion of the Justices, 109 N.H. 578, 581, 258 A.2d 343, 346 (1969)).

44. NEB. CONST. art. VII, § 11 (emphasis added).

45. 209 Neb. 783, 311 N.W.2d 884 (1981).

became evident. *Lenstrom* was an action for a declaratory judgment[46] to determine the constitutionality of the Nebraska Scholarship Award Program.[47] The program, like the one in *Swanson*, involved grants to students attending both public and private colleges in Nebraska to defray educational expenses.[48] The plaintiffs were students who were eligible to receive the grants.[49]

The defendants argued that the program was unconstitutional because it attempted to appropriate public funds in support of private educational institutions in violation of article VII, § 11.[50] They cited both *Gaffney* and *Swanson* as controlling, in that state funds would reach private institutions through their students, indirectly circumventing the constitution.[51] The defendants further claimed that the 1972 amendment to article VII, § 11 did not change the meaning or substance of the provision,[52] and urged that the provision still prohibited direct or indirect use of public funds in support of private institutions.

The court, however, found that the change in wording significantly altered the meaning and practical effect of the provision. The court stated that the language should be construed literally, and, quoting from *Gaffney*,[53] noted that the article " 'says what it means and means what it says' . . . . The effect of the literal language of the amendment is to prohibit appropriations made *to* a nonpublic school."[54] Since the appropriation was not made to the school, but to the student, the court held that article VII, § 11 was not violated by the statute.

Further, the court noted that since a state constitution is not a grant but rather a restriction on legislative power, the legislature may enact any law for the accomplishment of a public purpose that does not expressly violate a provision of the constitution.[55] It is irrelevant that "incidental benefits may accrue to others" as a result of such leg-

46. *Id.* at 784, 311 N.W.2d at 885. The defendants had filed a demurrer, claiming the Act on its face violated article VII, § 11, which was sustained by the district court. *Id.* at 785, 311 N.W.2d at 886.

47. NEB. REV. STAT. §§ 85-980 through 85-9, 102 (1981).

48. Lenstrom v. Thone, 209 Neb. 783, 784, 311 N.W.2d 884, 886 (1981).

49. *Id.* at 785, 311 N.W.2d at 886.

50. *Id.*

51. *Id.* at 785-86, 311 N.W.2d at 886.

52. *Id.* at 786, 311 N.W.2d at 886-87. The defendants relied on a statement appearing in NEB. LEGISLATIVE COUNCIL, A SUMMARY OF CONSTITUTIONAL AMENDMENTS PROPOSED BY THE NEBRASKA LEGISLATURE, Mar. 1972, which stated that though the provision was to be reworded somewhat, its meaning would remain the same. *See* Lenstrom v. Thone, 209 Neb. 783, 787-88, 311 N.W.2d 884, 887 (1981).

53. Lenstrom v. Thone, 209 Neb. 783, 788, 311 N.W.2d 884, 888 (1981) (quoting Gaffney v. State Dep't of Educ., 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974)).

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

55. *Id.* at 789, 311 N.W.2d at 888.

islation.[56] Accordingly, the court concluded that since the scholarship award program was enacted in furtherance of a public purpose,[57] the statute was permissible and should be upheld.[58]

The interpretation of article VII, § 11 offered in *Lenstrom* was followed in *State ex rel. Bouc v. School District of the City of Lincoln*.[59] *Bouc* involved an action for a writ of mandamus to compel the defendants to honor the plaintiff's request for bus transportation to a private parochial school.[60] The request was made pursuant to a statute that provided that a public school district must offer transportation services to children attending nonpublic schools who would be able to utilize the present bus routes.[61]

In affirming the district court's order to grant the writ, the court relied heavily on its decision in *Lenstrom*. The court noted that article VII, § 11 only prohibits appropriations made *to* a private school, in spite of any incidental benefit that may result from an appropriation made differently.[62] The court held that the transportation program could not be considered an appropriation "to" a nonpublic school:

> Instead, it involves the direct providing of transportation services to those students who attend a nonprofit private institution and who reside in a public school district that has elected to provide transportation for its public school students. In this respect, any benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed to be an "appropriation . . . to" that institution.[63]

Following the holding in *Lenstrom*, the court concluded that such an incidental benefit is not enough to render the program violative of article VII, § 11.[64]

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56. *Id.* at 790, 311 N.W.2d at 888.
57. *Id.* at 791, 311 N.W.2d at 889. The court made it clear that rarely will a legislative determination of public purpose be questioned by the court. For the court to declare a statute invalid because its object is not a public purpose, "the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind." *Id.* at 789-90, 311 N.W.2d at 888.
58. *Id.* at 791, 311 N.W.2d at 889. A second issue, considered and quickly dismissed by the court, was the contention that the Act violated NEB. CONST. art. XIII, § 3, prohibiting the state from giving credit to an individual, association, or corporation.
59. 211 Neb. 731, 320 N.W.2d 472 (1982).
60. The plaintiff's son would directly benefit from the bus transportation.
61. *See* NEB. REV. STAT. § 79-487 (1976). Since the plaintiff's son could have boarded the bus near his home, and exited near his school without the bus having to change its normal route, he qualified for the program.
62. State *ex rel.* Bouc v. School Dist. of the City of Lincoln, 211 Neb. 731, 737, 320 N.W.2d 472, 476 (1982).
63. *Id.* Other issues discussed in the case involved the same collateral issues discussed in *Swanson* and *Gaffney*. *See supra* notes 29 & 58 and accompanying text.
64. *See generally*, Note, *New Issues*, *supra* note 7, at 191-93. The author, in analyzing the Legislative Bill that gave rise to the transportation program adjudicated in *Bouc*, predicted that the program would be found unconstitutional in light of the *Swanson* and *Gaffney* decisions. *See supra* notes 29 & 59 and accompanying text.

This decision, together with *Lenstrom*, demonstrates the significant change that occurred with the adoption of the 1972 amendment to article VII, § 11. It seems clear that the programs upheld in *Lenstrom* and *Bouc* would have been struck down had the court chosen to follow the reasoning employed in their earlier decisions. *Lenstrom* and *Bouc* therefore represent an expansion of permissible methods by which the state may channel funds for the benefit of a private educational institution. This expansion, so much in contrast with earlier court interpretation, was to be followed and broadened in *State ex rel. Creighton University v. Smith.*

III. *STATE EX REL. CREIGHTON UNIVERSITY V. SMITH*

A. The Decision

In *State ex rel. Creighton University v. Smith*,[65] the Nebraska Supreme Court upheld a decision by the District Court for Lancaster County granting a writ of mandamus, sought by Creighton University, to compel the Director of Health of the State of Nebraska (hereinafter the Director), to receive and consider Creighton's contract proposal for state funds for research of cancer and smoking diseases.[66]

In response to the ever-growing need for research and study of cancer and smoking related illness and death,[67] the Nebraska Legislature, during its 1981 session, enacted Legislative Bill 506 (hereinafter the Act).[68] Section 2 of the Act appropriates a fund to the Department of

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She understandably failed to foresee the shift in analysis that was to occur under the amended article VII, § 11.

65. 217 Neb. 682, 353 N.W.2d 267 (1984).

66. NEB. REV. STAT. § 81-637 (1981) defines cancer and smoking diseases as follows: "1) Cancer shall mean all malignant neoplasm regardless of the tissue of origin, including malignant lymphoma and leukemia; 2) Smoking diseases shall mean diseases whose causes are linked to smoking, including, but not limited to, cardiovascular, pulmonary, and gastrointestinal diseases . . . ."

67. During floor debate on the statute adjudicated in *Smith*, Senator Cullan, the bill's sponsor, stated:

> I think there is a tremendous need in the State of Nebraska for us to do something about cancer and about research and also about smoking related diseases . . . . The direct and indirect costs of smoking as far as diseases were concerned . . . nationwide is $27 billion . . . . When you extrapolate that to the State of Nebraska, smoking costs us as far as additional health care costs approximately $3 billion . . . . There were 3,000 cancer related deaths in the State of Nebraska in 1980 and approximately 5,500 people will develop cancer this year in the State. The direct cost for cancer in Nebraska for 1981 will be approximately $75 million and the indirect cost for cancer will be in excess of $140 million for 1981.

Floor Debate, 87th Leg., 1st Sess., 3620 (Apr. 16, 1981) (statement of Sen. Cullan).

68. An act relating to the Department of Health; to provide for a program of smoking disease and cancer research as prescribed; to provide for appropriations and the use thereof; to increase the cigarette tax; to amend section 77-2616, Reissue Revised Statutes of Nebraska, 1943, and section 77-2602, Revised Statutes Supple-

Health to be used for cancer and smoking disease research.[69] The Director is given the responsibility of distributing the funds by making grants and entering into contracts,[70] and is given specific criteria that must be considered in making these awards.[71] The statute further provides that the University of Nebraska, and "other postsecondary institutions having a college of medicine located in the State of Nebraska"[72] may receive such contracts.[73] Finally, the Director is instructed to promulgate regulations for administration of the program,[74] which must be submitted to the Attorney General for approval.

After passage of the Act,[75] the Director submitted a set of proposed

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ment, 1980; to provide severability; and to repeal the original sections. Now codified as NEB. REV. STAT. §§ 81-637 to 81-640 (1981).

69. NEB. REV. STAT. § 81-638 (1981). The statute provides:

> The legislature shall appropriate each year from the General Fund to the Department of Health an amount not more than the estimated revenue derived from one cent of the cigarette tax imposed by section 77-2616, less any amount appropriated from the General Fund specifically to the University of Nebraska Eppley Institute for Research in Cancer and Allied Diseases. The Director shall, after deducting expenses incurred in the administration of such funds, distribute such funds exclusively for grants and contracts for research of cancer and smoking diseases. The University of Nebraska may receive such grants and contracts and other postsecondary institutions having colleges of medicine located in the State of Nebraska may receive such contracts.

70. *See id.* at § 81-638.

71. The director when making grants and contracts pursuant to sections 81-637 to 81-640 shall consider:

> (1) The relevancy of the applicant's proposal to the furthering of research of cancer and smoking diseases;
> (2) The feasibility of the applicant's proposal;
> (3) The availability of other sources of funding for the applicant's proposal;
> (4) The facilities, personnel, and expertise available to the applicant for use in the proposal; and
> (5) Evidence of the quality of the applicant's prior or existing programs for research of cancer and smoking diseases or the applicant's potential for developing new programs for such research.

Id. at § 81-639.

72. *Id.* at § 81-638.

73. Creighton University is the only postsecondary institution other than the University of Nebraska to have a college of medicine located in the state.

74. The director shall adopt and promulgate rules and regulations pursuant to Chapter 84, article 9 to:

> (1) Establish an application process for grants and contracts;
> (2) Establish criteria for programs in order to receive funding;
> (3) Establish criteria as to the rates and amount of funding; and
> (4) Establish other procedures as he or she may deem necessary for the proper administration of sections 81-637 to 81-640.

Id. at § 81-640.

75. *See id.* at § 84-905.01, which provides that all rules adopted by state agencies be submitted to the Attorney General for consideration as to the statutory authority for and constitutionality of each rule.

rules and regulations to the Attorney General, which would have allowed all institutions of higher learning having a college of medicine in Nebraska, including nonpublic institutions, to be considered for cancer research contracts.[76] In a written opinion,[77] the Attorney General disapproved of the rules insofar as they permitted nonpublic schools to be considered for cancer research contracts. The Attorney General concluded that such an activity would be in violation of article VII, § 11 of the Nebraska Constitution,[78] and he declared the proposed rules unconstitutional.[79]

In response to this opinion, the Director submitted a second set of proposed rules and regulations that restricted the award of contracts under the Act to public institutions.[80] The Attorney General, however, again rejected these rules on the ground that they failed to prohibit nonpublic schools from receiving subcontracts for cancer research.[81] The Attorney General required that the rules mandate that the applicant be the University of Nebraska or any other *public* postsecondary institution with a medical school in Nebraska.[82] The Director made the recommended changes and promulgated final rules and regulations that were approved by the Attorney General.[83]

On September 28, 1982, Creighton submitted a proposal for a contract pursuant to the Act.[84] The Director refused to accept the application because of the opinions of the Attorney General and the rules and regulations adopted pursuant to those opinions.[85]

Creighton then brought an action for a writ of mandamus compelling the Director to promulgate, and the Attorney General to approve, rules and regulations permitting Creighton to be considered for research contracts. Despite the Attorney General's opposition on the grounds of article VII, § 11, the District Court issued a writ that would

76. The Act was approved by the legislature on May 22, 1981 by a vote of 40 in favor, 5 opposed, 1 present and not voting, and 3 excused and not voting. 2 NEB. LEGIS. J. 2214 (1981). Gov. Charles Thone signed the bill on May 28, 1981. *Id.* at 2284.

77. *See* State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 684-85, 353 N.W.2d 267, 269 (1984).

78. Letter from Paul L. Douglas and Marilyn B. Hutchinson to Henry D. Smith (Dec. 4, 1981) [hereinafter cited as Douglas Letter].

79. *See infra* note 81.

80. The Attorney General told the Department of Health that "you will also need to ask whether the postsecondary institution having a college of medicine located in Nebraska is public or nonpublic. This is because [of] article VII, § 11 of the Nebraska Constitution . . . ." Douglas Letter, *supra* note 78.

81. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 685, 353 N.W.2d 267, 270 (1984).

82. *Id. See also* Brief of Appellee at 5, State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984) [hereinafter cited as Brief of Appellee].

83. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 685, 353 N.W.2d 267, 270 (1984).

84. *Id.* at 686, 353 N.W.2d at 270.

85. *Id.* The contract proposal was entitled "Breast Cancer Genetics in Nebraska."

have allowed Creighton to receive a contract.[86]

On appeal, the Nebraska Supreme Court considered whether article VII, § 11 of the Nebraska Constitution prohibits the state from contracting with a private university for cancer research to be conducted in the university's college of medicine.[87] The court held that it does not, stating that the legislature may constitutionally contract with a private institution when the enabling statute fulfills a governmental duty or furthers a public purpose.[88]

B. Analysis and Implications

The *Smith* decision is significant in terms of the court's treatment of article VII, § 11 because of the factual situation presented to the court. Unlike any of the decisions discussed previously, the cancer research legislation in *Smith* appropriates funds for the direct use of the school itself, not for the use of parents or students. *Smith* marked the first instance where the court was forced to deal with legislation that clashed directly with the terms of the new constitutional provision, and its decision represents a significant step towards leniency in court supervision over state spending that benefits a private educational institution.

At the outset of the opinion, Judge Shanahan took some time to review the basic function of a state constitution.[89] He concluded that the legislature has vast authority, limited only by the state and federal constitutions, and that this authority extends to and includes the power of the state to enter into contracts.[90] The state legislature may enter into contracts and enact laws in furtherance of any public purpose, as long as there is no constitutional provision to the contrary.[91] The court then cited *Bouc* for the proposition that incidental benefits to a nonpublic school from a public program do not render the program unconstitutional.[92]

With these principles in mind, the court characterized the cancer research program not as one that appropriates state funds to nonpublic schools, but as one that executes the state's broad power to contract for services in furtherance of a public purpose.[93] As such, incidental benefits that might accrue to a private school as a result of the pro-

86. *Id.*
87. *Id.* at 687, 353 N.W.2d at 270.
88. *Id.* at 687, 353 N.W.2d at 271.
89. *Id.* at 670, 353 N.W.2d at 272.
90. *Id.* at 687, 353 N.W.2d at 271.
91. *Id.* at 688, 353 N.W.2d at 271.
92. *Id.* at 688-89, 353 N.W.2d at 271.
93. *Id.* at 689, 353 N.W.2d at 271-72 (citing State *ex rel.* Bouc v. School Dist., 211 Neb. 731, 737, 320 N.W.2d 472, 476 (1982)).

gram do not render it unconstitutional.[94] In addition, the court summarily rejected the appellant's contention that the program indirectly circumvents the constitution. In spite of the court's use of this analysis in the pre-amendment opinions, the court here considered the argument an "overworked expression," and stated that "if subjected to the test of ultimate application, the argument would necessitate that a fire in a nonpublic school be extinguished by a nonpublic bucket brigade, not by a publicly funded fire department."[95] The court concluded by stating that since the Act does not set aside state money for Creighton's special use, and does not vest in Creighton any right to receive state funds, it does not violate article VII, § 11 of the Nebraska Constitution.[96]

Several factors contributed to this decision. Initially, it was clear from the moment of the Act's proposal that the purpose of the legislature was to include Creighton as a recipient of cancer research funds. This is evidenced by the wording of the legislation itself, which states that "[t]he University of Nebraska may receive such grants and contracts *and other postsecondary institutions having a college of medicine located in the State of Nebraska may receive such contracts.*"[97] Creighton was then, and is now, the only institution in the state, other than the University of Nebraska, to have a medical school located in the state.[98] Moreoever, comments made by state senators during floor debate on the bill reveal that the senators understood and desired that Creighton be eligible for research contracts.[99] Legislators also appreciated the fact that allowing the state to contract with Creighton presented a potential conflict with article VII, § 11.[100] The sponsor of the bill, Senator Cullan, in response to this threat, made it clear that the bill was not directly intended to benefit any private institution, but to provide the state with needed service.[101] Fortunately

94. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 689, 353 N.W.2d 267, 272 (1984).

95. *Id.* at 690, 353 N.W.2d at 272.

96. *Id.*

97. *Id.* at 690-91, 353 N.W.2d at 272. This wording could be the saving grace of the decision. The court seems to be saying that even an indirect expenditure might be found unconstitutional if it operates to vest a right to funds in the private institution. Future litigation on article VII, § 11 might focus on this language.

98. NEB. REV. STAT. § 81-638 (1981) (emphasis added).

99. *See* Brief of Appellee, *supra* note 82, at 7.

100. Senator Warner stated: "[G]rants would be made to institutions of postsecondary education which have a college of medicine within the university and, essentially, as a practical matter that would within the state include only Creighton University and the University of Nebraska . . . ." Floor Debate, 87th Leg., 1st Sess., 3623 (Apr. 16, 1981) [hereinafter cited as Floor Debate]. Later, he stated again that the Act included "private institutions having a medical school, which obviously is Creighton . . . ." *Id.* at 4739 (May 7, 1981).

101. The Unicameral was presented with an Attorney General opinion that stated that

for the program, the Nebraska Supreme Court chose to view its purpose in the same manner.

A second factor contributing to the decision was the perceived nature of the use of the state money. Unlike most public spending that involves a conflict with state aid to nonpublic school provisions, the cancer research program did not involve spending in an area of direct educational concern. The cases discussed in this Article evidence that most litigation involving similar constitutional provisions deals with things that are basic to the instructional function of the school involved, e.g., textbooks, tuition, facilities, and busing.[102] The *Smith* decision, on the other hand, dealt with a different sector of Creighton's operation: research. When the court spoke of Creighton deriving only incidental benefit from a potential contract, it was speaking in terms of the University's instructional function.[103] The legislature viewed the impact of the program in the same way. Senator Cullan stated that "these contracts do not aid the schools in the traditional sense that aid to schools is generally considered, i.e., questions of textbooks or tuition . . . . [T]he distinction is significant."[104] This narrow, instructionally oriented focus allowed the court to view Creighton's potential benefit as only incidental, and not therefore unconstitutional.

The problem with this focus is that a modern university is not oriented solely toward instruction. A university has a responsibility not only to teach, but to serve the community and to conduct research. A research grant from the state, therefore, directly and substantially advances the mission of a university, even though its effect on the university's instructional function might be only incidental. The money that Creighton would have otherwise spent on research would be displaced by funds given them by the state.[105] Viewed from this broad, pragmatic perspective, rather than from a narrow, instructional per-

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the Act would be an unconstitutional violation of NEB. CONST. art. VII, § 11. *Floor Debate, supra* note 100, at 5600 (May 22, 1981).

102. "The point I would like to make clearly for the record is that the State of Nebraska, if we do contract with a private institution, is purchasing services, services for the people of the State of Nebraska in the public interest, not trying to assist any private institution." *Floor Debate, supra* note 100, at 5604 (May 22, 1981).

103. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 690, 353 N.W.2d 267, 272 (1984).

104. *Floor Debate, supra* note 100, at 5603 (May 22, 1981) (Senator Cullan, quoting Gina Dunning, Counsel for the Public Health and Welfare Comm.).

105. Assume, for example, that Creighton employed three professors who were involved in medical research. If professor A was paid $26,000 per year and spent 20% of his time doing research, professor B was paid $30,000 per year and spent 50% of his time doing research, and professor C was paid $28,000 per year and spent 50% of his time doing research, a state research grant would displace $34,200 in salary for Creighton to spend elsewhere ($5,200 for professor A, $15,000 for professor B, and $14,000 for professor C). These funds, originally committed to the research function of the University, could be transferred to the instructional sector of the University's operation, thereby benefiting Creighton in the

spective as the court did, the benefit Creighton would receive from a cancer research grant could hardly be viewed as incidental.

Not only was the research program substantively favorable when compared to traditonal forms of aid to schools, it was favorable in terms of its method of implementation. Although distributing funds to the school itself, the statute provided that the money first be appropriated to the Department of Health.[106] The Appellees relied heavily on this fact in arguing that the state was not appropriating money *to the school* in violation of article VII, § 11.[107] Their position was that the appropriation was to the Department of Health, which contracted for a service. The Act simply provided a mechanism whereby previously appropriated funds could be distributed. Literally, therefore, the constitution was not violated. If the state would have bypassed the Department of Health and given the money directly to the school, the court might not have found the "public purpose" rationale so attractive. However, the manner in which the money was distributed allowed the court to overlook the fact that the school itself received the funds.

This method of administration cannot be discussed without a word of caution. A major argument in the Appellant's brief,[108] treated lightly by the court,[109] was that the statute was an attempt to do indirectly what the Nebraska Constitution directly prohibits. The Appellants, relying on *Swanson* and *Gaffney*, argued that simply channeling the state funds through the Department of Health does not prevent the appropriation from being in violation of a clear constitutional provision. They contended that since the money would still go to the institution, the evil that article VII, § 11 is supposedly designed to alleviate would still be present.

This analysis seems to have more credibility in *Smith* than in either *Swanson* or *Gaffney*, where it was the basis for the decision, since here the funds actually go to the school and not to the student or parents. The court, however, dismissed this indirect circumvention argument by relying on the plain words of the constitution. By implementing the cancer research program through the Department of Health, the legislature avoided conflict with constitutional wording prohibiting appropriations *to* a private school.

This contractual method of distributing state funds is a common

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manner that the Nebraska Supreme Court, as evidenced in *Smith*, desires to avoid.

106. *See* NEB. REV. STAT. § 81-638 (1981).

107. Brief of Appellee, *supra* note 82, at 9-10.

108. Brief of Appellant at 37-38, State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984).

109. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 690, 353 N.W.2d 267, 272 (1984).

mechanism of legislative administration. An example is found in Nebraska's utilization of out-state facilites to educate students in veterinary medicine.[110] The legislature appropriates funds to the Board of Regents, which enters into contractual arrangements with various universities. These schools then reserve a certain number of spaces in their programs for students from Nebraska. Like the program in *Smith*, a contractual means of implementation is the most efficient manner of futhering a very valid public purpose.[111] Yet, unlike the expenditures for veterinary training, the expenditures for cancer research conflict with the policy of an established constitutional provision. This presents an opportunity for criticism of the *Smith* decision. When such a constitutional conflict arises, the court should not allow a legislative program's means of implementation to justify an otherwise unconstitutional expenditure.

For example, the legislature could earmark state funds for teacher salaries at private schools, appropriate the money to the State Board of Education, then distribute it to private schools in contract form. Or, the legislature could earmark state funds for the purchase of Bibles, appropriate the money to a state agency, then distribute the Bibles to students through contracts between the agency and individual schools. As absurd as these hypotheticals might seem, the analysis in *Smith* would arguably permit the state to spend money for these, or for virtually any other purpose, as long as the money was appropriated to a state agency first and then distributed by contract.

Smith should not be interpreted to allow mechanism to overcome substance. A clear violation of the policy of article VII, § 11 should not be approved simply because the method of distribution has been held constitutionally valid in *Smith*. Because any expenditure can be put into contractual form, the form of the expenditure should not be the threshold consideration in determination of the expenditure's constitutionality. *Smith* presents no real problem in terms of its result because of the clearly beneficial nature of the appropriation. However, as the purpose of the expenditure led the court to approve of it in *Smith*, so the purpose of an expenditure should lead the court to dis-

110. The relevant statute provides as follows:

> Until such time as the Legislature may provide suitable structures and educational facilities for a School of Veterinary Medicine and Surgery, the Board of Regents is authorized to enter into agreements with suitable schools or colleges of veterinary medicine and surgery in other states, *and to make expenditures pursuant thereto, for the purpose of utilizing the educational facilities of such schools and colleges for teaching students in the Nebraska School of Veterinary Medicine and Surgery in such required courses as are not offered at the University of Nebraska by reason of a lack of suitable facilities.*

NEB. REV. STAT. § 85-180 (1981) (emphasis added).

111. State *ex rel.* Creighton Univ. v. Smith, 217 Neb. 682, 690-91, 353 N.W.2d 267, 272 (1984). *See also supra* note 69 and accompanying text.

approve of a more blatant violation of constitutional policy in the future.

IV. CONCLUSION

The Nebraska Supreme Court's task of identifying the type of state spending that lies within the confines of article VII, § 11 is far from complete. *Smith* represents a significant expansion of those boundaries in permitting state funds to be distributed to a nonpublic school. This outcome seems quite reasonable in light of the nature of the expenditure. However, the court may have made a mistake in failing to limit its decision to the facts before it. In approving of the contractual method of the cancer research expenditure as well as of its substance, the court may have opened the door for the legislature to, quite literally, contract out of the constitution. If read to its extreme, *Smith* would allow the legislature to disguise unconstitutional expenditures to private schools by making contracts with the schools rather than simply appropriating the money to them. The impact of this decision will be tested when the court is confronted with a factual situation in which an appropriation without compelling public justification is made that provides substantial benefits to the school involved. When such a situation arises, the court should be wary of allowing the state to contract with a private school when the public purpose is not so clear, and the incidental benefits accruing to the school are not so incidental.

Steven D. Davidson, '86