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**LEAGUE OF WOMEN VOTERS V. STATE:
THE REJECTION OF PUBLIC AND PRIVATE
HYBRIDITY WITHIN WASHINGTON
STATE PUBLIC SCHOOLS**

LAURA HABEIN*

ABSTRACT

On September 4, 2015, in a 6-3 decision in League of Women Voters of Washington v. State, the Washington State Supreme Court became the first in the nation to deem charter schools funded by taxpayers unconstitutional. Charter schools in Washington are not governed by elected boards; thus, the Court found charter schools unaccountable to voters and not public enough to be deemed “common schools” under the state constitution. This recent decision splits with supreme courts in many other states who recently faced similar constitutional challenges. Thus, the question comes to mind: How public is public enough when determining the constitutionality of a charter school? This note argues that the Washington Supreme Court came to the wrong conclusion in League of Women by defining public too narrowly and in the end, failed to serve the true purpose of article IX, section 2 of the state constitution. On the spectrum between public and private, League of Women falls too far on the side of private because the Court places too much textual emphasis on the state constitution, relies too heavily on outdated precedent from over a century ago, and fails to draw the appropriate line between restricted and unrestricted funding.

I. INTRODUCTION

At the heart of a successful democratic, republican government lies accessible education for the people. Thus, each state has a public school system to provide its citizens with an education to foster productive, articulate, and creative participants in society and the economy. In particular, the Washington Constitution created a common school system that must be both “general” and “uniform” and partially funded through constitutionally protected funds. On September 4, 2015, Washington’s Supreme Court became the first in the country to find taxpayer-funded charter schools unconstitutional.¹ The court reasoned that because charter schools under Initiative 1240 (“Charter School

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1. League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

Act” or “Act”)² are run by appointed boards or nonprofit organizations, charter schools are not subject to voter control.³ This lack of voter control means that charter schools cannot qualify as “common schools” within the meaning of article IX, section 2 of the Washington Constitution.⁴ This recent decision makes Washington the first state to find charter schools essentially not public enough.

Thus, a question comes to mind: how public is public enough when determining the constitutionality of a charter school? This Note surveys a history of common schools in general and within the State of Washington, including the recent surge of charter schools within the United States, and the inherent legal issues arising from the hybridity of charter schools, which are grounded in private sector concepts but remain a public sector creature. It then looks to the Washington Supreme Court’s recent decision in *League of Women*. This Note argues that the court utilized a flawed application of dated case law. Further, this Note argues that the Act complies with the “uniform” and “general” education requirements and funding provisions of the Washington State Constitution. On the spectrum between public and private, *League of Women* falls too far on the side of private because the court rigidly adheres to outdated precedent from over a century ago and fails to draw the appropriate line between restricted and unrestricted funding. After discussing the flawed reasoning of *League of Women*, this Note turns to the necessary evolution of the Washington school system, which should include charter schools. Last, this Note discusses how *League of Women* might impact and spur future state constitutional challenges to charter schools.

II. EVOLUTION OF EDUCATION WITHIN THE STATES

Though citizens often take the concept of free public education for granted today, early American colonists would not have expected tax-supported schools.⁵ Education, however, was a priority. Free state school systems were proposed by political theorists, such as Thomas Jefferson and Benjamin Rush, but these early proposals for state-run edu-

2. Initiative Measure No. 1240 (2012) (codified at WASH. REV. CODE § 28A.710.040(3) (2012)), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015) (“Public charter schools must comply with all state statutes and rules made applicable to the charter school in the school’s charter contract and are subject to the specific state statutes and rules identified in subsection (2) of this section. Charter schools are not subject to and are exempt from all other state statutes and rules applicable to school districts and school district boards of directors, for the purpose of allowing flexibility to innovate in areas such as scheduling, personnel, funding, and educational programs in order to improve student outcomes and academic achievement. Charter schools are exempt from all school district policies except policies made applicable in the school’s charter contract.”).

3. *League of Women*, 355 P.3d at 1132.

4. *Id.*

5. L.K. Beale, *Charter Schools, Common Schools, and the Washington State Constitution*, 72 WASH. L. REV. 535, 537 (1997).

cation failed to gather enough support.⁶ Nevertheless, every state eventually established a form of state-run, tax-supported school system.

The definition and application of common schools has evolved over time. Originally, the term common school referred to a “vernacular school for ‘common folk’ as opposed to a Latin preparatory school for the upper classes.”⁷ After that, common schools were considered one-room schoolhouses where students were separated by level of learning rather than age.⁸ More recently, common schools refer to public schools open to all children within a locality.⁹ This shift towards mass education comes from the American philosophical perspectives and political objectives from over a century ago.¹⁰ Through mass education, America could define itself as a country, teach patriotism and moral values, and develop a skilled, productive, and innovative work force. Ideally, common schools should “serve individual interests founded in liberal philosophy as well as communitarian goals founded in both democratic and republican theory.”¹¹

Common schools represented a public good for all students within a locality. Thus, state constitutions codified the importance of an education for the survival of a democratic government. For example, the Washington Constitution states: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”¹² Additionally, many states provide positive rights to education that is “equal” or “sufficient” or “uniform.”¹³ Specifically, Washington must “provide for a general and uniform system of public schools.”¹⁴ However, these positive rights given to students are nearly impossible to define and apply. This creates conflict between the constitutional rights of state citizens to a common school education that is “sufficient” or “uniform” and the reality of state debt, limited resources, and racial and socioeconomic inequalities.

6. *Id.* (Jefferson and Rush proposed an education system “to prepare men to vote intelligently, to perpetuate a republican government, to produce disciplined citizens, and to unify a diverse population.”); *id.* at 537–38 (Rush sought to create a uniform system to “render the mass of people more homogeneous, and thereby fit them more easily for uniform and peaceable government.”).

7. *Id.* at 536.

8. *Id.*

9. *Id.*

10. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 169 (1996).

11. *Id.*

12. WASH. CONST. art. IX, § 1; *see also* IND. CONST. art. 8, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”); MONT. CONST. art. X, § 1; VA. CONST. art. VIII, § 1.

13. *See* ILL. CONST. art. X, § 1 (“The state shall provide for an *efficient* system of *high quality* public educational institutions and services.”) (emphasis added); ORE. CONST. art. VIII, § 3 (“establishment of a *uniform*, and *general* system of Common schools”) (emphasis added).

14. WASH. CONST. art. IX, § 2.

Legislatures and administrators struggle to uphold state constitutional educational rights partially because of how much schools have changed since state constitutions were enacted. As the country becomes more diverse—racially and economically—and more populated, applying vague standards of uniformity and equality becomes nearly impossible. For example, at statehood in 1889, Washington maintained three high schools with 320 students enrolled.¹⁵ Less than ten years later, the average daily public school attendance was 50,700, with forty-five students graduated from high school.¹⁶ However, Washington schools currently serve more than one million students in approximately 2,281 public schools.¹⁷ Thus, applying Washington's constitutional requirements of "general" and "uniform" schools is practically unworkable. Washington's public school system, like most other states, differs greatly from the one in existence at statehood. Therefore, just as the demographics of states and the nation have evolved over time, so must the methods of providing education through common schools.

In the past fifty years, efforts have been made to change the structure of public education in order to equalize opportunities.¹⁸ For example, school desegregation and school finance reform attempted to erase racial and financial boundaries between schools.¹⁹ Despite these alterations, the American school system still struggled, and from this struggle emerged the concept of school choice. Under public school choice, if a student goes to a Title I school that the state identified as needing improvement, corrective action, or restructuring, parents may choose to send the student to another public school that meets educational standards.²⁰ Under the Voluntary Public School Choice Program, parents, especially if their child attends a low-performing public school, have expanded education options.²¹ Additionally, the school district must cover the student's transportation costs.²² Some of the school choice options include magnet schools, private education, homeschooling, and charter schools.²³ School choice aims to allow parents to select a different school among a variety of non-tuition options for their child if they are unsatisfied with the performance of their child's public school.²⁴ School choice helps address and provide

15. Brief of Respondent at 5, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

16. *Id.*

17. *Id.*

18. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2050 (2002).

19. *Id.*

20. *School Choices for Parents*, U.S. DEPT. OF ED., <http://www2.ed.gov/parents/schools/choice/definitions.html> (last modified Jan. 14, 2009).

21. *Id.*

22. *Id.*

23. *See id.*

24. Samantha L. Skabla, Note, *Charter Schools and Their Effect on Providing Equal Education Opportunities to Students in Philadelphia*, 3 RUTGERS J. L. & URB. POL'Y 471, 472 (2006).

a partial solution to the current inequalities within public school districts.

Charter schools represent one form of school choice. Charter schools can take many different forms, but typically, they are schools run by private organizations—such as teachers, parents, or private corporations—that receive public funding and are nonsectarian.²⁵ Additionally, state enabling statutes must authorize charter schools.²⁶ State statutes grant charter schools greater flexibility than traditional public schools in exchange for greater accountability.²⁷ In 1991, Minnesota passed the first charter school law.²⁸ As of March 2015, forty-three states and the District of Columbia have enacted charter school legislation.²⁹ Charter schools are growing quickly across the nation due to bipartisan support from governors, state legislators, and secretaries of education.³⁰

This vast support indicates a need and desire for evolution within the education sector and a shift from the concept of education, either in purely public or private spheres, to a hybrid form of education catered to the needs of the student. However, some critique charter schools as a “retreat for middle-class minority and white students, leaving the most at-risk students behind in under funded, inadequate public schools.”³¹ Opponents of charter schools believe charter schools, because private organizations run them, create “a market system” where “poor urban public schools” cannot compete.³² Many charter schools, however, run under a lottery system and thus provide lower-income students with opportunities previously available only to more affluent families. Charter schools, if run properly with the goals of school choice, allow students to freely choose their school, thus providing high-quality educational opportunities across various socioeconomic groups and residential areas.³³

25. *Id.* at 472–73.

26. *Id.*

27. *Id.* at 473.

28. *Id.*

29. *Choice & Charter Schools*, CTR. FOR ED. REFORM, <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Feb. 3, 2016) (listing that the states without charter school laws are Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia.).

30. Skabla, *supra* note 24, at 473; *see also Fast Facts: Charter Schools*, NAT. CTR. FOR ED. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited Feb. 4, 2016) (stating that from the 1999–2000 school year to the 2012–2013 school year, the percentage of public schools that were charter schools increased from 1.7 percent to 6.2 percent and that the total number of public charter schools increased from 1,500 to 6,100.).

31. Skabla, *supra* note 24, at 474.

32. *Id.*

33. *Id.*; *see* Ryan & Heise, *supra* note 18, at 2086 (discussing that school districts with higher property values and income brackets have the advantage of being able to spend more of their revenue on students because their students come to school with few of the problems that plague students living in poverty and that school choice would allow students to choose freely among schools, thus breaking down the current income and race segregation within education).

Charter schools represent one form of evolution within the educational sector. Charter schools create a hybrid within the common school system. No longer are there distinct lines between public common schools and private schools. Additionally, citizens' perspectives of public schools is shifting from strictly a public service to more of a public good. Public education has become more of a commodity within the public sector. Charter schools are "grounded in private-sector concepts such as competition-driven improvement But they remain very much a public-sector creature, with in-bred requirements of accountability and broad-based equity."³⁴ While it is too early to determine the true effects of charter schools and the charter laws differ from state to state, what is for certain is that the American system of public education is struggling. In many cases, it is failing its students and falling short of state constitutional requirements. Thus, charter schools may or may not be a lasting solution, but it is important to test out new educational strategies in order to discover the most effective system of public education.

III. LEAGUE OF WOMEN VOTERS OF WASHINGTON v. STATE

In November 2012, Washington state voters approved Initiative 1240, codified in the Charter School Act ("Act") which allows the establishment and operation of charter schools.³⁵ This narrowly passed Act came after a long, hard debate. Washington state voters denied charter school legislation three times prior to enacting the Act.³⁶ The 2012 initiative was supported by many philanthropic organizations, such as the Bill and Melinda Gates Foundation and the Bezos Family Foundation.³⁷ However, the Washington Education Association and various other groups vocalized their disapproval of the initiative.³⁸ The Act would create forty charter schools within five years, and its purpose was to give parents more options regarding the education of their children.³⁹ Additionally, the Act deemed charter schools public common schools open to all students without tuition.⁴⁰ The Act was challenged for being facially unconstitutional, and on September 4, 2015, the state of Washington became the first state to find charter schools unconstitu-

34. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 747 (Cal. Ct. App. 1999).

35. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1134 (Wash. 2015).

36. Emma Brown, *What makes a public school public? Washington state court finds charter schools unconstitutional*, WASH. POST (Sept. 9, 2015), https://www.washingtonpost.com/local/education/what-makes-a-public-school-public-washington-state-court-finds-charter-schools-unconstitutional/2015/09/08/706975c8-5632-11e5-8bb1-b488d231bba2_story.html.

37. *Id.*

38. *See id.*

39. *See* WASH. REV. CODE §§ 28A.710.005(1)(n)(i), (f) (2012), *invalidated* by *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015), *amended* in 2016.

40. *Id.*

tional.⁴¹ By the time the court filed the opinion, nine charter schools were operating; eight of them opened their doors in August 2015.⁴²

A. Summary of League of Women

In a 6–3 decision, the Washington Supreme Court struck down the Act as facially unconstitutional. Chief Justice Madsen wrote the majority opinion which relied on two main findings. First, the court found that charter schools are not common schools under article IX, section 2 of the Washington State Constitution.⁴³ Additionally, because charter schools are not deemed common schools by the court, the Act’s funding provisions, which shift the portion of common school funding for each student to the new charter schools, are void and not severable from the Act.⁴⁴

The majority’s analysis regarding whether charter schools are common schools turns on the language of article IX, section 2 of the state constitution and the court’s case law from 1909. Article IX, section 2 provides:

The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.⁴⁵

Article IX, section 2 was discussed in *School District No. 20 v. Bryan*.⁴⁶ The court declined to overturn *Bryan* because “intervenors offer[ed] no compelling reason to abandon [it].”⁴⁷ Additionally, the court declined to “‘recognize an evolving common school system’ and not [to] read *Bryan* as ‘a static statement of constitutional imperatives.’”⁴⁸ The court applied *Bryan*’s rule that, “[A] common school . . . is common to all children . . . free, and subject to, and under the control of, the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent.”⁴⁹ The court reasoned that charter schools are not subject to the voter control necessary under *Bryan* to qualify as common schools under article IX.⁵⁰

41. See *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

42. See Debbie Cafazzo & Melissa Santos, *State Supreme Court Says no—again—to Washington charter schools*, NEWS TRIB. (Nov. 19, 2015, 4:17pm), <http://www.thenewtribune.com/news/local/education/article45547353.html>.

43. See *League of Women*, 355 P.3d at 1131.

44. See *id.*

45. WASH. CONST. art. IX, § 2.

46. *School Dist. No. 20 v. Bryan*, 99 P. 28, 28–29 (Wash. 1909).

47. *League of Women*, 355 P.3d at 1131.

48. *Id.* at 1137.

49. *Bryan*, 99 P. 29–30.

50. See *League of Women*, 355 P.3d at 1137.

The majority argues that charter schools are devoid of local control in two significant ways. First, charter school authorizers may monitor the performance and legal compliance of charter schools,⁵¹ but cannot “unduly inhibit the autonomy granted to charter schools”⁵² and must develop and follow policies consistent with the National Association of Charter School Authorizers’ standards.⁵³ The majority deems this sharing of power and flexibility granted to charter schools to be too great, and thus deems charter schools “devoid of local control from their inception to their daily operation.”⁵⁴ Second, the court takes issue with the charter school board which operates charter schools.⁵⁵ The court reasons that because charter schools are run by an appointed board or nonprofit organization, charter schools are not accountable to local voters in the same or equivalent way as traditional public schools with elected school board members.⁵⁶

After finding that charter schools are not common schools under article IX, the court determined that the funding provisions of the Act that shifted existing school funding are unconstitutional. The Washington State Constitution directs the legislature to fund common schools and restricts the legislature’s ability to “divert funds committed to common schools for other purposes even if related to education.”⁵⁷ The court also rejected the State’s position that the Act may be funded because funding “follows the students” and the Act could be funded by the state general fund.⁵⁸ The court reasoned that funding does not follow the student if the student no longer attends a common school.⁵⁹ Additionally, when a child is no longer attending a common school, there is no entitlement to part of the state school fund.⁶⁰ Thus, the court found the Act’s funding provisions unconstitutional where it acquires money designated to common schools.

Lastly, the majority held that these unconstitutional provisions render the Act unconstitutional in its entirety.⁶¹ The court found that while the Act contains a severability clause, the invalid provisions of the Act are too intertwined with the remainder of the Act “and so fundamental to the Act’s efficacy” that the invalid portions are not severa-

51. WASH. REV. CODE § 28A.710.180(1) (2012), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015), *amended in* 2016.

52. *Id.* at § 28A.710.180(2).

53. *Id.* at § 28A.710.100(3).

54. *League of Women*, 355 P.3d at 1134.

55. WASH. REV. CODE § 28A.710.020(3) (2012), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015), *amended in* 2016.

56. *League of Women*, 355 P.3d at 1136.

57. *Id.* at 1140; *see generally* WASH. REV. CODE § 28A.710.220(2) (2012) (discussing the powers of the superintendent of public instruction to distribute state funding to charter schools), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015), *amended in* 2016; WASH. REV. CODE § 28A.150.380(1) (2012) (requiring the state legislature biennially to appropriate funds to the school districts), *invalidated by* League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015), *amended in* 2016.

58. *League of Women*, 355 P.3d at 1136.

59. *See id.*

60. *See id.* at 1140 (citing *State v. Preston*, 140 P. 350 (1914)).

61. *See id.* at 1141.

ble.⁶² Justice Fairhurst, however, dissented to the majority's holding of lack of severability. According to Fairhurst, the unconstitutional provisions are severable because Washington's constitution identifies only three funds restricted solely to common schools.⁶³ Fairhurst notes that the Act does not direct the legislature to expend any principal from the common school fund.⁶⁴ Additionally, the interest from the common school fund has not been diverted to support charter schools.⁶⁵ Fairhurst clarifies for the majority that the Act does not have to appropriate state tax for common schools because only twenty-eight percent of the general fund's revenue is from state tax for common schools.⁶⁶ Thus, charter schools, as a mere two percent of Washington's public schools, can certainly be funded through the remaining seventy-two percent.⁶⁷ Lastly, access to the restricted construction fund is not necessary, according to Fairhurst. The Act only provides that charter schools are "eligible for state matching funds for common school construction."⁶⁸ Funds for school construction come from the state building construction account and the common school construction account.⁶⁹ Therefore, the Act may be funded through the state building construction account or the unrestricted revenues in the general fund.⁷⁰ In the end, Fairhurst argues that the appellants failed to meet their burden under a facial challenge to show that the funding provisions were not severable.

B. *Flawed Application of Case Law in Analysis of League of Women*

In *League of Women*, the court must determine whether the Act is unconstitutional on its face because the plaintiffs' challenge is facial. Therefore, the Act must be found constitutional unless the court is certain that there is no set of facts or circumstances under which the statute can constitutionally be applied.⁷¹ This is a very high bar for the plaintiffs to reach, and they failed to do so.

The most pervasive flaw within the majority's reasoning is a limited view perspective on case law. The majority relies mainly on *Bryan*—a case from 1909—for its case law precedent. While *stare decisis* is an essential part of the nation's judicial system, it is only effective and help-

62. *Id.*

63. *See id.* at 1142 (Fairhurst, J., dissenting); *see generally* WASH. CONST. art. IX, §§ 2–3 (establishing that the three protected funds are the permanent common school fund, the state tax for common schools, and the common school construction fund).

64. *See League of Women*, 355 P.3d at 1142 (Fairhurst, J., dissenting).

65. *See id.*

66. *See id.* at 1143.

67. *See id.*

68. *Id.* at 1136 (citing WASH. REV. CODE § 28A.710.230(1) (2012), *invalidated by* *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015), *amended in* 2016).

69. *League of Women*, 355 P.3d at 1143 (Fairhurst, J., concurring in part and dissenting in part).

70. *Id.*

71. Brief of Respondent at 14, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

ful when all relevant case law is taken into account and put into context.

In 1909, the court was asked to determine whether Washington State's normal schools—public schools associated with teacher-training institutions—were able to receive common school funding as common schools.⁷² At the time, Washington statutes had long defined common schools as schools that were “maintained at public expense in each school district and under the control of boards of directors” and “open to the admission of all children . . . residing in that school district.”⁷³ The *Bryan* court held that a common school under the state constitution “is one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district.”⁷⁴ Further, the *Bryan* court noted that the “complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with the power to discharge them if they are incompetent.”⁷⁵

The court in *League of Women* reads the language of *Bryan* very strictly when it applies it to the Act. In doing so, the court's decision lands far on the public end of the spectrum when determining whether and how public charter schools must be under the state constitution to qualify as common schools. In the current state of education reform—where voters, parents, and legislatures are emphasizing school choice and embracing a more hybrid notion of public schooling—the court should have taken a more functional approach to applying *Bryan* to the Act. The court too quickly deems the fact that charter schools under the Act are run by appointed board members or nonprofit organizations as a fatal flaw, thus rendering charter schools outside the provisions of common schools under article IX of the Washington State Constitution.⁷⁶ At the heart of the *Bryan* dicta on voter control is the idea of accountability between the tax payers and the school officials. The charter school board's appointment process does not mean that charter schools are not accountable or under the control of local voters. In fact, in some ways charter schools are held more accountable to voters than traditional public schools are through elected school boards because charter schools must strictly follow their contract and have their students perform well on state tests in order for the charter to be renewed.

Another egregious mistake in the court's case law analysis is the fact that the court never mentions *McCleary v. State*.⁷⁷ In *McCleary*, respondents brought a declaratory action alleging that the state was violating article IX, section 1 by failing to amply fund the K–12 school

72. School Dist. No. 20 v. Bryan, 99 P. 28, 28–29 (Wash. 1909).

73. Brief of Respondent at 22, League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015) (No. 89714-0) (citing Laws of 1897, ch. CXVIII, § 64, p. 384).

74. School Dist. No. 20 v. Bryan, 99 P. 28, 30 (Wash. 1909).

75. *Id.*

76. League of Women Voters of Wash. v. State, 355 P.3d 1131, 1137 (Wash. 2015).

77. *McCleary v. State*, 269 P.3d 227 (Wash. 2012).

system.⁷⁸ The Washington Supreme Court found that the state was failing to adequately fund K–12 education.⁷⁹ When summarizing the central portions of the decision, the court held that article IX, section 1 “confers on children in Washington a positive constitutional right to an amply funded education.”⁸⁰ Further, it found that “[t]he program of basic education is not etched in constitutional stone,” and the legislature should review the education program “as the needs of students and the demands of society evolve.”⁸¹ These holdings, however, are never mentioned in *League of Women*. This is especially odd because it is a very recent case regarding article IX of the constitution. Further, it provides a helpful, modern framework for determining the legislature’s role and duties in providing for the education of Washington citizens.

Therefore, by emphasizing *Bryan* without adequately describing why precedent from 1909 should be applicable, the court fails to properly articulate the case law regarding common schools in general. Further, the court’s application of case law is suspect because it never mentions applicable, recent case law in *McCleary*. This narrow, strict application of *Bryan* without mentioning *McCleary*, despite both parties mentioning *McCleary* frequently throughout their briefs, is part of the reason why the court is able to go against the current evolution of education, specifically charter schools. The court’s application of case law allows the court to remain in 1909 rather than applying all relevant case law to the current hybrid education system of 2015. Had there been more of a balance between the application of the two cases and a more articulate reasoning and application of both of them, *League of Women* could have come out differently. At the very least, the application of *League of Women* to future education cases would have been more helpful because it would have provided a clear, appropriate decision that applied all applicable case law.

C. *The Act Complies with Washington’s “Uniform” and “General” Common School System*

The Washington State Constitution requires that the legislature “provide for a general and uniform system of public schools.”⁸² Positive rights, like this, are common in state constitutions,⁸³ but defining and applying these positive rights is nearly impossible. Yet, this is something that legislatures and courts must do. Thus, when defining and applying these ambiguous positive rights, legislatures and courts must interpret

78. *Id.* at 244.

79. *Id.* at 258.

80. *Id.* at 231.

81. *Id.*

82. WASH. CONST. art. IX, § 2.

83. See COLO. CONST. art. IX, § 2 (“The general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”); MONT. CONST., art. II, § 4 (providing a positive right to “individual dignity”); see generally Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002).

these amorphous rights in the current context. It is flawed reasoning to place a static interpretation of positive rights when these rights purposely lend themselves to evolving with society.

State constitutions vary from the Federal Constitution because many state constitutions contain positive rights mandating public policy in areas like education. For example, eighteen state constitutions mandate that the government assist the poor, and “all fifty state constitutions contain at least the positive right to education.”⁸⁴ Courts, however, differ in how to interpret these amorphous positive rights. Some courts follow the “federal negative-rights model” which effectively ignores the positive rights guaranteed in the state’s constitution.⁸⁵ Other states give positive rights “varying degrees of force.”⁸⁶ Some courts rely on the separation of powers rationale and give complete deference to state legislatures to determine how to enact positive rights within their state’s constitution.⁸⁷ On the other hand, other state courts, like Montana’s, apply a deferential approach but allow the possibility of a case to enforce positive rights.⁸⁸ Thus, courts are unsure of how to interpret positive rights in state constitutions, and this leads to many discrepancies from state to state.

The Washington Supreme Court, however, recently interpreted the positive right of education in the constitution’s article IX, section 1 in *McCleary*.⁸⁹ When interpreting negative rights, such as the right to equal protection of the laws,⁹⁰ the role of the court “is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries.”⁹¹ When interpreting positive rights, however, this approach is flawed. The court in *McCleary* notes that when analyzing positive constitutional rights, the court “is concerned not with whether the State has done too much, but with whether the State has done enough.”⁹² In the end, the test provided by *McCleary* is to determine “whether the state action achieves or is reasonably likely to achieve ‘the constitutionally prescribed end.’”⁹³ Thus, when determining whether the Act is constitutional, the court must determine whether the Act achieves or is reasonably likely to achieve the constitutionally prescribed general and uniform system of public schools.

84. Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 774 (2001).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012) (characterizing article IX, section 1 as a “‘true right,’ created by a ‘positive constitutional grant’”).

90. *See, e.g.*, WASH. CONST. art. 1, §12 (“No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”).

91. *McCleary*, 269 P.3d at 248; *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

92. *McCleary*, 269 P.3d at 248.

93. *Id.* (citing Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. at 1137 (1999)).

Neither party raises the issue of positive rights in their briefs. Therefore, it is understandable why the court does not address this issue. Had the State, however, brought up positive rights under *McCleary*, it could have had an interesting argument. It could have argued that Washington citizens have a positive right to an education. Recent standardized test scores and disparities based on race and socio-economic status, however, show that many Washington students are not receiving a proper education through the public schools. Therefore, the legislature attempted to address this issue through school choice, and more specifically, establishment of charter schools. The question for the court would then become whether the Act “achieves or is reasonably likely to achieve” the constitutionally prescribed end of a “general and uniform system of public schools.” In this case, there are valid arguments on both sides, and reasonable courts could differ on deciding this issue. The state would have a strong argument, however, that in order for public schools to provide an education to all students “without distinction or preference on account of race, color, caste, or sex,”⁹⁴ the legislature must try to alleviate the achievement gap through charter schools. This argument, however, was not brought to the court so it was not addressed.

For the appellants and the court in *League of Women*, however, this case does not turn on positive rights analysis. Instead, “this case turns on the language of article IX, section 2 of [Washington’s] state constitution and this court’s case law addressing that provision.”⁹⁵ For the court, “because charter schools under [the Act] are run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as ‘common schools’ within the meaning of article IX.”⁹⁶ The court and appellants rely heavily on the precedent of *Bryan* from 1909, which, as mentioned previously, confines common schools to those that are “common to all children . . . free . . . and subject to, and under the control of, the qualified voters of the school district.”⁹⁷ The *League of Women* court follows the *Bryan* court’s emphasis on the importance of complete control and argues that complete control “carries with it the right of the voters, through their chosen agents, to select qualified teachers, with power to discharge them if they are incompetent.”⁹⁸

The court’s analysis and reasoning in *League of Women* is flawed in its conclusion that charter schools are not common schools. First, the court only provides a one-sentence conclusion for its reasoning stating that because charter schools are not run by voter-elected school boards, charter schools are not common schools.⁹⁹ This one sentence fails to show any reasoning besides complying strictly with the *Bryan* precedent

94. WASH. CONST. article IX, §1.

95. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1135 (Wash. 2015).

96. *Id.* at 1137.

97. *School Dist. No. 20 v. Bryan*, 99 P. 28, 30 (Wash. 1909).

98. *Id.*

99. *League of Women*, 355 P.3d at 1137 (“Here, because charter schools under I-1240 are run by an appointed board or nonprofit organization and thus are not subject to local

from 1909. If the court is going to rely on precedent from 1909 to find the Act unconstitutional, it must explain its reasoning for relying on this precedent beyond one conclusory sentence. The finding of the Act as unconstitutional will affect the education of students across the state for decades to come, and the citizens of Washington deserve more than the limited, conclusory reasoning provided by the court.

Moreover, the court's limited reasoning allows the appellant's argument to slip through without the court specifically denoting how the appellant met its burden of proof. The Act was enacted through an initiative process, and "in approving initiative measures, the people exercise the same power of sovereignty as the Legislature when it enacts a statute."¹⁰⁰ Therefore, "a statute enacted through the initiative process is, as are other statutes, presumed to be constitutional."¹⁰¹ Thus, the challenging party "bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt."¹⁰² In this case, the appellant carries the heavy burden of proving that enacting the provisions of the Act cannot be done in a constitutional way under any circumstances. The court obviously believed that the appellants met this heavy burden, but the court failed to explain its reasoning. They failed to explain why the Act is unconstitutional beyond a reasonable doubt. Given the drastic implications of this case on the daily lives of Washington citizens, the court should have explained its reasoning thoroughly, and by not doing so, the court has left legislators and citizens confused.

Additionally, the court's reasoning and application of case law fails to truly examine how much control voters actually have regarding traditional common schools compared to charter schools under the Act. *Bryan* argues that complete control is "a most important feature," but the education system was significantly different in 1909.¹⁰³ Voter control was easier to obtain because there were fewer students and schools. Additionally, if voter control was effective today, Washington schools would likely be performing better than they currently are. *Bryan* specifically notes that voter control allows for voters to select qualified teachers and discharge them if they are incompetent.¹⁰⁴ However, if this control were actual rather than theoretical, Washington schools would not be failing their students. The Act provides for the ultimate voter control because voters have chosen to create charter schools to improve Washington's failing educational system. Additionally, while the school board members of charter schools are not elected by voters, charter schools provide voters with control over the schooling of their children through school choice. Moreover, voters have control regarding the effectiveness of teachers because if the charter school does not perform

voter control, they cannot qualify as 'common schools' within the meaning of article IX.").

100. *Fed'n of Employees v. State*, 901 P.2d 1028, 1034 (Wash. 1995) (citing *In re Estate of Thompson*, 692 P.2d 807, 808 (Wash. 1984)).

101. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 780 (Wash. 2000).

102. *Id.*

103. *School Dist. No. 20 v. Bryan*, 99 P. 28, 30 (Wash. 1909).

104. *Id.*

well, its contract will not be renewed. Thus, effective voter control is not only obtained through elected representation on a school board, but is also obtained through school choice and accountability standards.

Additionally, appellants argue that the Act unconstitutionally exempts charter schools from the vast majority of the Common School Provisions, including laws regulating scheduling, personnel, funding, and educational programs.¹⁰⁵ The appellants focus on the fact that charter schools under the Act are not required to offer some of the requirements under the basic education program described in the Basic Education Act.¹⁰⁶ This argument, however, is flawed. When stating the basic education goals of school districts, the legislature specifically notes that “the state of Washington intends to provide for a public school system that is able to evolve and adapt in order to better focus on strengthening the educational achievement of all students.”¹⁰⁷ Thus, the legislature intended for these guidelines and goals to evolve in order to properly serve all students.

Charter schools represent a necessary evolution for the Washington public school system because the Washington public school system is failing its students.¹⁰⁸ For example, during the 2014–2015 academic school year, 26.3% of juniors met the minimum standard for English Language Arts under the Smarter Balanced Assessment and only 13.7% of juniors met the minimum standard for math under the Smarter Balanced Assessment.¹⁰⁹ These results are unacceptable and pose major concerns for the success of our society in the future. Therefore, it is understandable why the voters of Washington passed the Act by initiative in order to attempt to provide better opportunities for students through charter schools. Clearly, the current goals and procedures of the public school system are ineffective, and therefore, it is essential for the state to evolve and test new strategies in order to provide students with their constitutionally protected right to education. Charter schools are one example of this necessary evolution because they innately have a hybrid character that mixes the public availability of school for all students with private, consumer-driven results. The court in *League of Women* failed to even address the issue of educational differences between traditional public schools and charter schools under the Act. Again, the court failed to effectuate its duty by ignoring a central issue to the argument.

105. Brief of Respondent at 31, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

106. *Id.*; see RCW 28A.150.220.

107. RCW 28A.150.210.

108. See *Washington State Report Card*, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, <http://reportcard.ospi.k12.wa.us/summary.aspx?groupLevel=District&schoolId=1&reportLevel=State&year=2014-15> (last visited Mar. 7, 2016) (providing the percentage of students who met the standards set for English Language Arts, Math, Science, and EOC Biology).

109. *Id.*

D. Increased Accountability to Tax Payers

The main job of schools is to provide a quality education to students. This education in common schools must be “general” and “uniform” under the Washington State Constitution.¹¹⁰ Under *Bryan*, the voters of Washington are holding the common schools accountable for this job. However, Washington’s public common schools are struggling academically. For example, 26.3% of juniors in high school for the 2014–2015 school year met the standards set for English Language Arts and 13.7% of juniors met the standards set in Math for the 2014–2015 school year.¹¹¹ These scores indicate that merely having elected school board officials is not enough to allow voters to hold common schools accountable.

Charter schools, however, are subject to rigorous accountability requirements. Charter schools must meet the same academic requirements as traditional public schools because charter schools must meet the Essential Academic Learning Requirements (EALRs).¹¹² EALRs state what every child should know at each grade level, and they are comprehensive. For example, the science EALRs are described in more than 92 pages and provide generous detail.¹¹³ Public charter schools must provide instruction in the various EALRs subjects at each grade level.¹¹⁴ However, what differentiates public charter schools from traditional public schools regarding application of EALRs is that unlike traditional public schools, charter schools can be closed for failing to meet performance expectations.¹¹⁵ Additionally, charter school authorizers may require a “corrective action plan” at any time while the charter is operating, and charter schools must score above the “bottom quartile of public schools to be eligible to renew their contract, absent extraordinary circumstances.”¹¹⁶ Yet, under *Bryan*, the more accountable form of schooling is the current traditional public school system, in

110. WASH. CONST. art. IX, §2.

111. *Washington State Report Card*, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, <http://reportcard.ospi.k12.wa.us/summary.aspx?groupLevel=District&schoolId=1&reportLevel=State&year=2014-15> (last visited Mar. 7, 2016).

112. See RCW 28A.710.040(2) (b) (stating that all charter schools must provide basic education, as provided in RCW 28A.150.210, including instruction in the essential academic learning requirements and participate in the statewide student assessment system as developed under RCW 28A.655.070); RCW 28A.150.210 (setting the goals of each district to provide opportunities for every student to: (1) read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences; (2) know and apply core concepts and principles of math, social, physical and life sciences, civics and history, arts, and health and fitness; (3) think analytically, logically, and creatively; and (4) understand the importance of work and finance and how performance, effort and decisions directly affect future career and educational opportunities).

113. Brief of Respondent at 9, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

114. RCW 28A.710.040(2) (b).

115. RCW 28A.710.200.

116. Brief of Respondent at 12, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0); see RCW 28A.710.180(4).

which schools are required to implement a “corrective action plan” only when they fall into the bottom five percent of public schools.¹¹⁷

Additionally, before charter schools may be authorized, they must go through a rigorous application process to show their credibility. Along with the Commission’s extensive regulations and approval criteria, each applicant must submit a host of other plans, such as a planned curriculum and evidence the curriculum is based on proven methods, a description of teaching methods and instructional strategies, and a plan for serving various types of students.¹¹⁸ The Act’s extensive and thorough application process as well as monitoring measures help ensure that charter schools are providing the quality education that is the right of every Washington student. The court, however, never acknowledges these forms of accountability. Instead, the court focuses all of its time on the minor fact that the charter school board members are appointed rather than elected.

Additionally, the court was concerned about the voters’ ability to hold charter schools accountable without a voice on the charter school board. However, the charter school board is an agency of the state in many ways. The Washington state legislature has specifically noted that “[t]he people of this state do not yield their sovereignty to the agencies which serve them The people insist on remaining informed so that they may retain control over the instruments they have created.”¹¹⁹ Thus, charter schools are a creature of the state as they are allowed by the state. Therefore, the state, through voter-elected officials, will help hold charter schools accountable. The court fails to acknowledge this argument.

Moreover, the court’s application of *Bryan* is static, and the court ignores the fact that voter control can be obtained through more ways than elected school boards. Charter schools are created through a charter, and under the Act, in evaluating applicants, the Commission and school district authorizers must hold a public forum.¹²⁰ Once approved, charter schools enter into a contract with the authorizer.¹²¹ The contract ensures that academic performance will be monitored and puts compliance measures in place “for student achievement, comparative performance, student progress, post-secondary readiness, state and federal accountability, mission-specific accountability, financial compliance, and organizational performance.”¹²² This contract arguably provides more accountability to taxpayers than the election of a school board member.

117. RCW 28A.657.020.

118. Brief of Respondent at 10–11, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0) (listing nineteen requirements charter school applicants must describe regarding their approach to teaching, curriculum, community, and discipline).

119. RCW 42.30.010.

120. RCW 28A.710.140.

121. RCW 28A.710.160.

122. Brief of Respondent at 11, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

Additionally, the court fails to note, when evaluating whether charter schools provide enough voter control to be public enough to be common schools, that the Act values and emphasizes transparency. While charter schools are run by appointed charter school boards, these boards are not making decisions and taking action in the shadows, behind closed doors. Instead, “charter school authorizers and public charter schools are subject to the Public Records Act and the Open Public Meetings Act.”¹²³ Moreover, an annual report comparing the performance of public charter schools and similarly situated traditional public schools must be produced by the State Board of Education for the governor, legislature, and public at large.¹²⁴ Thus, the Act provides ample transparency and continuous evaluation and evolution. This transparency and evaluation is essential for the success of any form of schooling, and it provides voters with the opportunity to remain informed on how their tax dollars are being spent and the fruits of that expense. The court failed to take into consideration transparency and annual public evaluation as a form of accountability and voter control. Thus, the court ended with an opinion suited for the common schools in operation in 1909 rather than the current hybrid education system in 2015.

E. *Constitutionality of Funding Provisions within the Act*

The lower King County Superior Court held that “charter schools are not ‘common schools’ under article IX of Washington’s Constitution and, therefore, the common school construction fund could not be appropriated to charter schools.”¹²⁵ The lower court held, however, that “the provisions permitting such appropriations were severable” and held the Act otherwise constitutional.¹²⁶ The Washington Supreme Court, nevertheless, found that the Act’s funding provisions, which attempt to access funds allocated to common schools, violate article IX of the constitution.¹²⁷ Further, the court found that “because the provisions designating and funding charter schools as common schools are integral to the Act, such void provisions are not severable, and that determination is dispositive of the present case.”¹²⁸

As previously mentioned, the court neglected its duty by relying on select precedent from 1909 without taking the time to explain its reasoning when finding that charter schools are not common schools.

123. *Id.* at 12; *see* RCW 28A.710.040(2)(h).

124. Brief of Respondent at 12, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0); *see* RCW 28A.710 (defining similarly situated schools as schools that have “academically, ethnically, and economically comparable groups of students.” Additionally, the report must include an assessment of the “success, challenges, and areas for improvement in meeting the purposes of this chapter, including the board’s assessment of the sufficiency of funding for charter schools, the efficacy of the formula for authorizer funding, and any suggested changes in state law or policy necessary to strengthen the state’s charter schools.”).

125. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1135 (Wash. 2015).

126. *Id.* at 1135.

127. *Id.* at 1133.

128. *Id.* at 1133–34.

Had the court reviewed the issue under the appropriate light of *McCleary* and put *Bryan's* dicta regarding voter control in perspective, the court would likely have found that charter schools are common schools. Had that happened, the funding provisions would not have been at issue. This, however, did not happen. Yet, even under this holding, the funding provisions that provide charter schools with funding from accounts restricted to common schools can easily be severed from the Act. This argument was supported in *League of Women* by Justice Fairhurst and the lower court.

A legislative act cannot be found to be “unconstitutional in its entirety unless invalid provisions are unseverable” and “it cannot reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.”¹²⁹ Here, the Act contained a severability clause which provides assurance that the voters, through the initiative, would have enacted the Act without invalid provisions. The court held that the “invalid provisions are so intertwined with the remainder of the Act and so fundamental to the Act’s efficacy that . . . the invalid portions are not severable.”¹³⁰

The Washington Constitution only requires that three restricted funds go to common schools: the permanent common school fund; the state tax for common schools; and the common school construction fund.¹³¹ The court is mistaken in its reasoning that the invalid provisions are too intertwined with the Act to be severable. The Act does not take resources from any of the three constitutionally restricted funds, and the charter schools can easily be funded through the general fund and state building construction account.

First, the Act does not have to take resources from the restricted funds. For example, the permanent common school fund is made of the principal of the fund and the interest that accrues. The principal of the fund must remain intact.¹³² Appellants do not argue that the Act improperly appropriates the principal of the fund so the principal is a non-issue. Additionally, the Act does not divert any of the interest from the common school fund. When the legislature froze the principal of the fund, it directed the accruing interest from the fund to go to the common school construction fund.¹³³ Therefore, the interest from the common school fund cannot be utilized by *any* public school, traditional or charter, for any type of operation costs. Thus, it is clear that

129. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 791 (Wash. 2000).

130. *League of Women*, 355 P.3d at 1141.

131. See WASH. CONST. art. IX, §§ 2–3 (Section 2 requires that “the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.” Section 3 establishes “the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools.”).

132. *League of Women*, 355 P.3d at 1142; see also RCW 28A.515.300(1) (“The principal of the common school fund as the same existed on June 30, 1965, shall remain permanent and irreducible.”).

133. *League of Women*, 355 P.3d at 1142.

the Act does not utilize any funds from the permanent common school fund.

Additionally, the state tax for common schools is restricted to the support of common schools.¹³⁴ This revenue from state taxes for common schools is held in the general fund, “from which [Washington’s] public education system receives support.”¹³⁵ This state tax for common schools only constitutes a fraction of the total appropriations for public schools in Washington.¹³⁶ In fact, “only 28 percent of the revenue appropriated for public education from the general fund is restricted,”¹³⁷ and the legislature uses much more money than merely what is collected from the state tax to properly fund the public school system.¹³⁸ Additionally, the Act only allows for the creation of a maximum of forty charter schools over a five-year period, and now more than eight schools may be established in any year within the five-year period.¹³⁹ Charter schools under the Act make up only two percent of Washington’s public schools,¹⁴⁰ and therefore, charter schools can easily be funded through the remaining seventy-two percent of the general fund that is not restricted to common schools.

Therefore, the majority’s argument that the funding provisions of the Act are unseverable is simply not true. By deeming the provisions unseverable, the court is essentially contending that the mere holding of tax dollars for common schools contaminates the entire general school fund from being used for anything besides common schools. If this were true, then the legislature’s approach to school funding has been unconstitutional for decades because the general school fund allocates resources beyond K-12 public schools to human services, higher education, general government, natural resources, and other things such as debt service, pensions, other education, transportation, and special appropriations.¹⁴¹

Additionally, the Act does not require access to the common school construction fund. The Act states that “[c]harter schools are eligible for state funding for school construction.”¹⁴² The court found this requirement by the Act unseverable, but once again, the court’s superficial interpretation created a flawed analysis. The legislature

134. RCW 84.52.065 (“[I]n each year the state shall levy for collection in the following year for the support of common schools of the state a tax.”).

135. *League of Women*, 355 P.3d at 1143; see RCW 84.52.067 (“All property taxes levied by the state for the support of common schools shall be paid into the general fund of the state treasury as provided in RCW 84.56.280.”).

136. See *League of Women*, 355 P.3d at 1143.

137. *Id.*

138. Brief of Respondent at 30, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0) (“The revenue from ‘the state tax for common schools’ made up only about 29 percent of the legislature’s appropriation to the Superintendent for allocation to Washington’s public schools in 2012.”).

139. WASH. REV. CODE § 28A.710.150 (2016).

140. *League of Women*, 355 P.3d at 1143.

141. SENATE WAYS AND MEANS COMM., A CITIZEN’S GUIDE TO WASHINGTON STATE K-12 FINANCE, S. 63, Reg. Sess., at 15 (2014), <http://leg.wa.gov/Senate/Committees/WM/Documents/2014%20K12%20Citizens%20Guide.pdf>.

142. WASH. REV. CODE § 28A.710.230(1) (2016).

does not rely solely on the common school construction fund to fund school construction. In fact, the legislature uses resources from both the common school construction fund and the state building construction account to fund school construction.¹⁴³ Thus, the legislature may constitutionally fund the construction for charter schools under the Act through the state building construction account or even the general fund.

Therefore, the Act does not require funding from constitutionally restricted funds. The Act provides that “[c]ategorical funding must be allocated to a charter school based on the same funding criteria used for non-charter public schools. . . .”¹⁴⁴ This provision does not expressly require funding from constitutionally restricted funds. Instead, it merely asks that the legislature do what it always has done when determining basic education appropriations. Each year, the legislature must adjust basic education appropriations between basic education programs. It must move appropriations around in order to best adapt to changes in school district demographics, changes in population, and changes in academic programs. The Act only requires that, once again, the legislature must adapt where it allocates resources and allow the money to follow the student. Thus, by finding the funding provisions unseverable, the court is essentially finding that other programs, such as Running Start,¹⁴⁵ where allocations are made based on student enrollment in programs, do not meet constitutional muster. This line of reasoning is simply illogical, and thus, the court erred in finding the funding provisions of the Act severable.

F. *Essential Evolution of the Washington School System*

The system of education has evolved greatly over time, and Washington’s public school system is no exception. Washington’s public school system has evolved in order to meet the needs of a changing society in the 125 years since the Washington Constitution was adopted. For example, Washington’s public schools have advanced from one-room school houses serving students for about three months per year, “to graded schools gradually serving students for longer periods, to a system that serves students nine months of the year or more and includes high schools and kindergarten.”¹⁴⁶ Additionally, just as the formatting of schooling has evolved over the years, so have the demographics of Washington. In 1889, at statehood, Washington had three high schools with a total of 320 students enrolled.¹⁴⁷ In contrast,

143. *See League of Women*, 355 P.3d at 1143.

144. WASH. REV. CODE § 28A.710.220(2) (2012), *amended* in 2016.

145. Running Start is a program run by the state of Washington that provides for students in high school to attend certain institutions to simultaneously earn a high school degree and college/university credit. *See generally Secondary Education: Running Start*, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, <http://www.k12.wa.us/Secondary-Education/CareerCollegeReadiness/RunningStart.aspx> (last visited Mar. 4, 2016).

146. Brief of Respondent at 4, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

147. *See id.* at 5.

the Washington public school system now serves “more than one million students, in about 2,281 public schools statewide.”¹⁴⁸ Thus, it is illogical to view Washington’s school system as stagnate. Moreover, it is misguided to believe that the legislature or past precedent ever intended the Washington school system, as set up by the constitution, to be static because a system of education must evolve with the society it sets to prepare students to participate in the future.

The legislature purposely embodied and made clear their intention for the Washington school district to evolve. When listing the goals of school districts, the legislature purposely notes that:

*A basic education is an evolving program of instruction that is intended to provide students with the opportunity to become responsible and respectful global citizens, to contribute to their economic well-being and that of their families and communities, to explore and understand different perspectives, and to enjoy productive and satisfying lives. Additionally, the state of Washington intends to provide for a public school system that is able to evolve and adapt in order to better focus on strengthening the educational achievement of all students, which includes high expectations for all students and gives all students the opportunity to achieve personal and academic success.*¹⁴⁹

School choice, and charter schools in particular, represent the current evolution of the education system. The legislature made room for this type of evolution, and thus, the legislature should have been given more deference by the *League of Women* court.

Moreover, charter schools are not the first attempt at evolving the Washington public school system with innovative programs.¹⁵⁰ The state currently runs a program called Running Start, which allows juniors and seniors in high school to enroll in college courses for both high school and college credit.¹⁵¹ Similar to what the charter schools are asking for, the higher education institutions involved in Running Start receive “state basic education funding, calculated based on the

148. *Id.*

149. WASH. REV. CODE § 28A.150.210 (2011) (emphasis added) (listing the goals for each school district when providing for a basic education).

150. Brief of Respondent at 6, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0) (“Funding appropriated for basic education similarly supports a wide variety of other programs operated by non-district entities, including: (1) University of Washington programs for selected academically gifted students, (2) Washington Youth Academy, a residential school for at-risk youth run by the National Guard, (3) work-based learning, (4) online courses and other alternative learning experiences, (5) contracted special education and other services provided by educational service districts or non-sectarian private entities, (6) schools for juvenile offenders housed in adult corrections facilities that can be operated by educational service districts, higher education institutions, or private entities, and (7) tribal schools operated by tribes under compacts.”).

151. See MIKE HUBERT ET AL., *LEARNING BY CHOICE: STUDENT ENROLLMENT OPTIONS IN WASHINGTON STATE*, WASHINGTON SUPERINTENDENT OF PUBLIC INSTRUCTION (2014), <http://www.k12.wa.us/GeneralInfo/pubdocs/LearningByChoice2014.pdf>.

number of public school students participating.”¹⁵² The school districts do not control the colleges involved in the program, nor do they control the colleges’ professors. Thus, the Washington school system has evolved over time in order to better prepare its students for college through the Running Start program. Colleges and technical schools within this program receive funding per student involved without the voter control deemed essential through *Bryan*.

In addition to Running Start, Washington school districts also operate “innovative schools, which can select top performing students.”¹⁵³ Additionally, these innovative schools have private boards of directors, and their curriculum differs from traditional public schools.¹⁵⁴ For example, Raisbeck Aviation High School is “an innovative math-and science-focused college-preparatory high school,” which serves students from twenty-seven school districts in the Puget Sound region.¹⁵⁵ Innovative schools, like Raisbeck Aviation, have a common set of characteristics including but not limited to: a “bold, creative[,] and innovative educational ideas; high standards for students and staff; high level of parent and community involvement; high level of educational experimentation; . . . [and] use of multiple approaches to address different learning styles.”¹⁵⁶ Under the Act, charter schools are similar to innovative schools. The main difference is that charter schools help cater to low-income, at-risk students. Thus, charter schools under the Act are simply another version of innovative schools seeking to join a long list of constitutional programs, all part of Washington’s public education system.

Running Start and the many other forms of basic education programs funded by the state, without being operated by district entities, highlight the necessary evolution and direction needed for Washington Public Schools, and they highlight the outdated structure within *Bryan*. Thus, the court erred in relying so heavily on the *Bryan* precedent from 1909 that it failed to understand the ever-evolving nature of education. Moreover, the court was so blinded by *Bryan* that it failed to realize that evolution within the education system is necessary in order to uphold the students’ positive right to education.

Had the court applied the more recent case of *McCleary*, the holding would likely have been different. As *McCleary* states, “the program of basic education is not etched in constitutional stone.”¹⁵⁷ Additionally, *McCleary* provides recent precedent of the court providing the greatest possible latitude to the legislature to implement a constitu-

152. Brief of Respondent at 6, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

153. *Id.* at 7; see WASH. REV. CODE § 28A.300.550 (outlining the criteria, identification, and publicity requirements for Washington innovation, or charter, schools).

154. See Brief of Respondent at 7, *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015) (No. 89714-0).

155. Raisbeck Aviation High School, *School Information*, HIGHLINE PUBLIC SCHOOLS (2016), <http://www.highlineschools.org/Page/9887> (visited last Mar. 5, 2016).

156. *Innovative Schools*, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, <http://www.k12.wa.us/EducationAwards/Innovative/> (last visited Mar. 5, 2016).

157. *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012).

tional mandate such as the education clause.¹⁵⁸ Further, the *McCleary* court, which decided the case a mere three years prior to *League of Women*, recognized that the education system must adapt and evolve as society changes. *McCleary* specifically states that “the legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve. From time to time, the legislature will need to evaluate whether new offerings must be included in the basic education program.”¹⁵⁹

Thus, just a mere three years before *League of Women*, the Washington Supreme Court held the legislature accountable to amply fund state public schools. It emphasized the need for the legislature to change its procedures as “the needs of students and the demands of society evolve” and to determine whether “new offerings must be included in the basic education program.”¹⁶⁰ Yet, three years later, this same court decides to rely on precedent from 1909 rather than defer to the legislature. Further, the court denied the legislature the ability to do what the court had previously encouraged—create new offerings for students. The court never mentions *McCleary*, and thus, the court fails to analyze the legal issue at hand in the proper context. By ignoring recent *McCleary* precedent in favor of *Bryan*, which was decided over a decade ago, the court fails to see that charter schools represent an encouraged, necessary, and constitutional evolution within the education program that falls in line with many other state funded programs within the public school system. Therefore, the court comes to the incorrect legal conclusion that charter schools are unconstitutional.

G. League of Women and Future State Constitutional Challenges

Many states have addressed various state constitutional challenges to charter school statutes. A common constitutional challenge to charter schools, and school choice in general, is a uniformity challenge.¹⁶¹ Most state constitutions contain a uniformity provision of some sort requiring a uniform public education.¹⁶² While the provisions range from open-ended requirements to quite specific guarantees, most uniformity provisions accompany the establishment of state public education systems with various adjectives to describe such systems, and in many cases, one of those adjectives is “uniform.”¹⁶³

158. See *id.* at 248.

159. *Id.* at 251 (emphasis added).

160. *Id.*

161. See *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

162. See INSTITUTE FOR JUSTICE, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 5–6, https://ij.org/images/pdf_folder/school_choice/50staterereport/introduction.pdf.

163. See, e.g., FLA. CONST. art. IX, § 1 (“It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a *uniform, efficient, safe, secure, and high quality* system of free public schools. . . .”) (emphasis added); COLO. CONST. art. IX, § 2 (“[To] provide for the establishment and maintenance of a *thorough and uniform* system of free public schools. . . .”) (emphasis added).

One kind of uniformity challenge to the constitutionality of charter schools involves claims alleging that charter schools undermine the uniformity of the public school system because charter schools are freed from many of the curricular and administrative restrictions linked with traditional public schools. For example, in *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education*, plaintiffs argued that charter schools—or “community schools” as they are referred to in Ohio—prevent the state from providing the constitutionally mandated “thorough and efficient” system of public schools by diverting funding away from traditional public schools to “community schools.”¹⁶⁴ The Ohio Supreme Court rejected this argument and reasoned that charter schools were a constitutionally valid form of educational reform and that the Ohio constitution does not prohibit the reduction in state funding of traditional public schools when students leave the traditional public school system for other options.¹⁶⁵ The dissenting justices, however, proposed an argument that aligned with the majority’s argument in *League of Women*. The justices reasoned that charter schools undermine the public education system and could not be common schools entitled to public funds because they were essentially privately operated and not under the control of a local school board.¹⁶⁶ *State ex rel. Ohio Congress of Parents and Teachers* was decided in 2006, but *League of Women* shows a potential shift in state court analysis. It is likely that *League of Women* will spur rejuvenated uniformity challenges across the country in the hope that more courts will fall in line with the dissent of *State ex rel. Ohio Congress of Parents and Teachers* and *League of Women*.

Other plaintiffs frame a uniformity challenge in a slightly different light by alleging that charter school laws violate state uniformity clauses by removing control centralized in local school boards and placing that control in private, individualized charter school boards. For example, in *Gwinnett County School District v. Cox*, the Georgia Supreme Court invalidated the charter school statute after finding the statute to be inconsistent with the state’s constitutional provision vesting control of public schools in local school boards.¹⁶⁷ After this case, however, the Georgia Constitution was amended to allow for the authorization of charter schools by groups other than local school boards.¹⁶⁸ Given the resolve of the Washington Supreme Court,¹⁶⁹ a constitutional amendment would likely be required to allow for charter schools in the State of Washington.

Other courts, however, have rejected uniformity challenges to charter schools. These courts have relied on the reasoning that the

164. See *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 (Ohio 2006).

165. *Id.* at 1160–64.

166. *Id.* at 1167–70.

167. *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773 (Ga. 2011).

168. See Motoko Rich, *Charter Schools Win Support in Georgia Vote*, N.Y. Times, Nov. 8, 2012, at P15.

169. See *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015), *motion for reconsideration denied*, *League of Women Voters*, 355 P.3d at 1131.

state legislatures have the power to restructure the public education system to meet the needs of the state.¹⁷⁰ The courts' reasoning of honoring the wide latitude given to legislatures to create and modify a state's education system as needed resembles the reasoning in *McCleary*. In *McCleary*, the court held that "the program of basic education is not etched in constitutional stone," and "[t]he legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve."¹⁷¹ The court, however, failed to apply this same deference to the legislature in *League of Women*. Thus, *League of Women* represents a potential narrowing of the wide latitude provided to legislatures when running a state's educational system. This potential shift in jurisprudence is concerning and poses a serious separation of powers issue because the court begins to infringe on the duties of the state legislature. The Washington Supreme Court in *McCleary* instructed the legislature to evolve and find a way to provide an amply funded, quality education for the citizens of Washington, but in *League of Women*, the court ignores *McCleary* and essentially tells the legislature: You can evolve, but not *that much*. The court imposes itself in an area where the legislature should have deference. Thus, *League of Women* poses an opportunity for further challenges to legislature deference regarding the structuring and execution of a state's education system.

League of Women could be pointed to as a precedent on which to challenge charter schools in general across the country. For example, the case could be used as precedent to challenge charter schools in Minnesota, the first state to enact charter schools.¹⁷² However, applying *League of Women* to a challenge to Minnesota charter schools would prove difficult because Minnesota's constitution does not have a "common school" provision or an exclusive funding requirement.¹⁷³ This exemplifies the difficulty in applying precedent from one state to educational law in another state. Each state constitution has similarities such as educational provisions in general. Many states also provide for positive rights to an education that is "equal" or "uniform" or "general." These similarities, however, do not alleviate the fact that most states have slightly different language and provisions within the education sections of their constitutions. Therefore, it is unlikely to have a one to one comparison between state constitutions and case law. While *League of Women* represents a potential shift in thinking about the constitutionality of charter schools, which will likely spur constitutional challenges in many other states, the court's reasoning and analysis of Washington's

170. See *State ex rel. Ohio Cong. of Parents and Teachers*, 857 N.E.2d. at 1148; Wilson v. State Bd. Of Ed., 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999).

171. *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012).

172. See Marshall H. Tanick, *Are charter schools unconstitutional?*, STAR TRIB. (Sept. 30, 2015, 6:25 PM), <http://www.startribune.com/k-12-education-are-charter-schools-unconstitutional/330178111/>.

173. See Steve Kelley, *Counterpoint: No, charters are NOT unconstitutional*, STAR TRIB. (Oct. 6, 2015, 6:17 PM), <http://www.startribune.com/counterpoint-no-charters-are-not-unconstitutional/330979001/>.

unique funding provisions and “common school” provision make the case difficult to accurately apply to challenges in other states.

IV. CONCLUSION

It is not the Washington Supreme Court’s job to determine policy. However, the court must utilize the proper standard of review, case law, and reasoning when determining cases. In *League of Women*, the court failed to do so. The court failed to hold the appellants to the proper standard of review which begins by viewing initiatives as constitutional and places a high burden on the appellants to prove otherwise beyond a reasonable doubt. The court’s one-line of reasoning stating that charter schools are unconstitutional based on century-old precedent is not enough. Further, the court failed to review all relevant case law. The court never references *McCleary*, which was decided a mere three years before *League of Women*. The fact that the court never references *McCleary* when it is highlighted frequently in both parties’ briefs and is relevant case law, shows that the court had its 1909 blinders on when analyzing this case. Therefore, the court neglected to recognize the true accountability demanded of charter schools which helps provide much needed control to the voters and parents. Moreover, even if the court determined that charter schools are not common schools, the Act still should have been constitutional. The majority failed to take a logical approach to the funding provisions when determining their severability. The Act should have been constitutional because charter schools can be funded without access to the three constitutionally restricted funds.

The court should not get in the way of the legislature providing for the public education of citizens. The court should have given the legislature deference to help the public school system evolve in order to better suit the needs of the students and society. Forty-three states and the District of Columbia have found charter schools public enough to be constitutionally part of the public school system. Many other states have embraced the direction of education reform. They have accepted that in order for schools to properly serve the current society, there cannot be strict lines between private and public. The public’s conception of public schooling has shifted from a strictly public service to more of a public good which may be improved through private-sector concepts. In *League of Women*, however, the court fails to acknowledge these changing ideals and apply them to the state constitution. Therefore, *League of Women’s* analysis is flawed. The consequences of this has major negative implications for the future education of Washington students who are left with a legislature unable to innovate and experiment with the modern hybrid nature of today’s public education in order to provide an education for its students that meets the needs of current society.

