Misinterpreting the Public Purpose Provision: How *Hart v. State* Eroded North Carolina's Legal Protections for Education*

> *But education is the foundation for all we do in life, it shapes who we are and what we aspire to be.*[1]
>
> —*Former Governor Jim Hunt*

INTRODUCTION

In 2015, for the first time in state history, the Supreme Court of North Carolina determined that nonpublic schools could qualify as constitutionally eligible recipients of public taxpayer dollars.[2] In *Hart v. State*,[3] the Supreme Court of North Carolina held that the expenditure in question, the Opportunity Scholarship Program (the "Program"), met the standards required for designation as for a public purpose.[4] The Program consisted[5] of a $4,200 per year scholarship voucher to be distributed to eligible students living in households with up to 133% of the income necessary to qualify for free and reduced lunch programs.[6] Subject to certain restrictions,[7] parents and students could use the scholarship money "to attend any nonpublic school."[8] The court's designation of the Program's expenditures as for a public purpose allowed for state appropriations to fully fund the expenditure.[9]

1. Jim Hunt, *More Creativity in the Classroom*, HUFFINGTON POST (May 25, 2011, 3:25 PM), http://www.huffingtonpost.com/jim-hunt/more-creativity-in-the-cl_b_453244.html [https://perma.cc/B9KN-VLG5].

2. *See* Hart v. State, 368 N.C. 122, 133, 774 S.E.2d 281, 289 (2015) ("[P]ublic funds may be spent on educational initiatives outside of the uniform system of free public schools . . . .").

3. 368 N.C. 122, 774 S.E.2d 281 (2015).

4. *See id.* at 138, 774 S.E.2d at 292.

5. While the Opportunity Scholarship Program still exists at the time of publication, this Recent Development will primarily discuss the Program in the past tense to convey the specific attributes of the Program as they were discussed at the time of *Hart*.

6. N.C. GEN. STAT. §§ 115C-562.1 to 115C-562.2 (2013).

7. Eligibility for the Program required that students meet one of five criteria, in addition to falling within the income level defined by the statute. § 115C-562.1(3)(a).

8. § 115C-562.2(a).

9. *See Hart*, 368 N.C. at 138, 774 S.E.2d at 292.

In determining the constitutionality of the Program under the North Carolina Constitution's "public purpose" provision,[10] the court neglected to analyze whether the Program adequately met the minimum educational standards required by prior state constitutional decisions.[11] This Recent Development argues that the court wrongly determined that the Program qualified as a public purpose under the standard applied in *Madison Cablevision, Inc. v. City of Morganton*[12] because it failed to recognize that the Program did not meet the minimum constitutional standards for state-funded education. Instead, the court should have adopted a heightened judicial standard for analyzing whether appropriations for private educational expenditures qualify as for a public purpose in future cases.

Analysis proceeds in four parts. Part I provides background on the development of the North Carolina Constitution's public purpose provision, its application in previous case law, and the evolution of state education law. Part II describes the facts, procedural history, and holding of *Hart*. Part III analyzes how the Supreme Court of North Carolina misapplied the *Madison Cablevision* test in *Hart* by finding that the Program's appropriations were for a "public purpose" and discusses potential policy implications arising from the decision. Part IV concludes that the court should apply a higher level of judicial scrutiny if given the chance to reexamine this problem in the future.

I. DEVELOPMENT AND HISTORY OF NORTH CAROLINA'S PUBLIC PURPOSE PROVISION AND EDUCATION LAW

North Carolina has a storied tradition of providing its citizens with high-quality public education.[13] The state has historically treated this responsibility with such reverence that the framers of the state's constitution went so far as to include an "education article" in the state constitution, guaranteeing a uniform system of public schools to its citizens, free of charge.[14] Additionally, North Carolina enacted a

10. N.C. CONST. art. V, § 2(7) (requiring that monetary appropriations be "for the accomplishment of public purposes only").

11. *See Hart*, 368 N.C. at 139, 774 S.E.2d at 293.

12. 325 N.C. 634, 386 S.E.2d 200 (1989).

13. Charles Lee Smith, The History of Education in North Carolina, *in* 2 BUREAU OF EDUCATION CIRCULAR OF INFORMATION 1, 164–74 (Herbert B. Adams ed., 1888).

14. N.C. CONST. art. IX. North Carolina was "one of the first states to make a constitutional provision for both the common and the higher education of her citizens." Smith, *supra* note 13, at 164; *see also* N.C. CONST. of 1776, § 41 (original education provision).

public purpose provision[15] to provide constitutional protection against unwarranted disbursements from the state to private entities and to ensure that public service providers have the resources necessary to carry out their duties.[16] For most of the state's history, however, the courts invoked these two provisions in distinctly different areas, addressing education expenditures purely under article IX (which is entitled "Education") while the constitutionality of broader infrastructure development was measured against the public purpose provision.[17] The *Hart* court, for the first time in state history, analyzed and upheld an educational expenditure under the "public purpose" doctrine instead of article IX.[18] By analyzing the Program under the "public purpose" provision, the court created an easier pathway for private schools and other entities to receive subsidies from the state.[19] The court quickly disposed of the article IX analysis by conflating it with article I, section 15, then holding that this provision has "no applicability outside the education delivered in our public schools."[20] In doing so, the court did not conduct a correct dual analysis of the Program under the public purpose provision *and* article IX. For these reasons, the court failed to ensure that the expenditure was truly for a public purpose.

Section I.A discusses the language of the public purpose provision and chronologically tracks the case law leading up to *Hart*. Section I.B expounds upon the state's commitment to public education by analyzing the history of public education in North

15. For the purposes of this Recent Development, the "public purpose provision" refers to N.C. CONST. art. V, § 2, cls. 1, 7. Together, these two clauses of article V of the North Carolina Constitution frame the parameters of what may constitute a public purpose in North Carolina.

16. *See* Michael McKnight, *"Don't Know What a Slide Rule is For": The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of* Kelo v. City of New London, 28 CAMPBELL L. REV. 291, 295 (2006) (discussing the history of the public purpose provision in North Carolina).

17. *Compare* Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (addressing the scope of article IX in North Carolina), *with* Foster v. N.C. Med. Care Comm'n, 283 N.C. 110, 126–27, 195 S.E.2d 517, 528–29 (1973) (finding that a state allocation to a private hospital could not constitute a public purpose, despite its ancillary benefit to the public).

18. *See* Hart v. State, 368 N.C. 122, 135–36, 774 S.E.2d 281, 290–91 (2015).

19. *Id.* This claim is the focus of this Recent Development. By viewing the public purpose provision as the vehicle through which constitutionality is determined, the court allowed a private expenditure—that this Recent Development argues would not otherwise have met constitutional eligibility standards—to receive full subsidization from the general assembly.

20. *Id.* at 139, 774 S.E.2d at 293.

Carolina and discussing seminal cases from the past fifty years that further clarify the constitutional meaning of "education."

A. Public Purpose Provision: Origin to Present-Day Madison Cablevision *Standard*

Since 1971,[21] two clauses under article V of the North Carolina Constitution have combined to limit taxation and spending to public purposes.[22] Article V, section 2(1) states that "[t]he power of taxation shall be exercised in a just and equitable manner, for *public purposes only*, and shall never be surrendered, suspended, or contracted away."[23] Section 2(7) reads, "[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the *accomplishment of public purposes only*."[24] Together, these sections limit the state's taxing and spending powers to activities that promote a "public purpose." This provision has historically provided an important legal safeguard for ensuring that state appropriations are only allocated towards programs that benefit the public.[25]

Over time, North Carolina courts have exerted great influence over what may or may not constitute a "public purpose."[26] *Briggs v.*

21. In 1868, following the end of the Civil War, North Carolina took the necessary step of updating the state's constitution. *See* McKnight, *supra* note 16, at 295. Relative to the original state constitution—adopted in 1776—the 1868 version opted for "much more detail," and even included "specific restrictions regarding the manner and items for which state governmental entities could raise and spend money." *Id.* The overarching principles within the 1868 restrictions serve as the inception point for the public purpose provision as we know it today. In 1971, the culmination of nearly forty years of constitutional re-drafting and amending came to fruition in the form of an updated state constitution. *Id.* This version of the state constitution aimed to ensure that the language within each individual article and section accurately reflected the law by which North Carolinians were bound; since 1868, numerous changes were made through both referendums and judicial decision-making, leaving the existing text of the constitution antiquated and no longer applicable in many areas. In 1971, North Carolina voters ratified this new version of the constitution. *See* David Walbert, *The 1971 Constitution*, *in* POSTWAR NORTH CAROLINA ch. 8.3 (2009), http://www.learnnc.org/lp/pdf/the-1971-constitution-p6100.pdf [https://perma.cc/LLP7-7WM3] (ebook).

22. N.C. CONST. art. V, § 2, cls. 1, 7.

23. *Id.* § 2, cl. 1 (emphasis added).

24. *Id.* § 2, cl. 7 (emphasis added).

25. *See, e.g.*, Briggs v. City of Raleigh, 195 N.C. 223, 223–24, 226–28, 141 S.E. 597, 597–98, 599–600 (1928).

26. *See, e.g.*, Jamison v. City of Charlotte, 239 N.C. 682, 682–83, 694–95, 80 S.E.2d 904, 906, 913–14 (1954); Purser v. Ledbetter, 227 N.C. 1, 1–2, 9, 25, 40 S.E.2d 702, 702–04, 709 (1946); Turner v. City of Reidsville, 224 N.C. 42, 42–43, 46, 29 S.E.2d 211, 211–12, 214 (1944).

City of Raleigh[27] was one of the earliest cases to address a taxpayer challenge to an expenditure under the public purpose provision.[28] In *Briggs*, the court considered whether a proposed bond to pay for a state fair would constitute a "public undertaking" sufficient to warrant an expenditure of public funds.[29] In setting the parameters for its analysis, the Supreme Court of North Carolina stated that "[m]any objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the state may be used to accomplish them."[30] However, the court clarified that "the term 'public purpose' is not to be construed too narrowly."[31] In drawing this distinction, the court made clear the importance of recognizing constraints on the ability of the state to spend taxpayer funds on certain types of expenditures, but also signaled that the general interpretation of the provision should not be unduly onerous.[32] Ultimately, the court held that because a state fair promotes "the general welfare of the people, advance[s] their education in matters pertaining to agriculture and industry, [and] increases their appreciation for the arts and sciences," the expenditure was for a public purpose.[33]

To avoid a narrow construction of the public purpose provision, courts following *Briggs* have generally opted for a more hands-off approach, calling for factual determinations on a case-by-case basis.[34] For example, the court in *Mitchell v. North Carolina Industrial Development Finance Authority*[35] considered additional parameters under which the court analyzed public purpose challenges, holding that "the concept expands with the population, economy, scientific knowledge, and changing conditions."[36] By introducing a more nuanced analysis through the "changing conditions" formula, the court opened the door for increasingly broad interpretations of what

27. 195 N.C. 223, 141 S.E. 597 (1928).
28. *See id.* at 225, 141 S.E. at 598–99.
29. *Id.* at 225, 141 S.E. at 599.
30. *Id.* at 226, 141 S.E. at 599.
31. *Id.* (citing Weismer v. Vill. of Douglas, 64 N.Y. 91 (1876)).
32. *See id.* at 226–30, 141 S.E. at 599–601.
33. *See id.* at 225–26, 141 S.E. at 599–600.
34. *See, e.g.*, Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 137–38, 145–59, 159 S.E.2d 745, 751–61 (1968) (comparing North Carolina to other jurisdictions and finding that the North Carolina Industrial Development Financing Authority's primary function of acquiring sites to benefit private industry was not a public purpose).
35. 273 N.C. 137, 159 S.E.2d 745 (1968).
36. *Id.* at 144, 159 S.E.2d at 750.

could count as a public purpose under article V of the North Carolina Constitution.

With few exceptions,[37] the public purpose provision largely became a vehicle for courts to rubber stamp state expenditures during the mid-to-late twentieth century.[38] The Supreme Court of North Carolina deemed expenditures for items ranging from airports to private parks to libraries as for public purposes.[39] Eventually, in order to construct a judicial standard for analyzing future appropriations, the court in *Madison Cablevision v. City of Morganton* set forth a two-prong test still in use today.[40] The court explained that, for an expenditure to be for a public purpose, the undertaking in question must (1) "involve a reasonable connection with the convenience and necessity of the [State,]" and (2) "benefit the public generally, as opposed to special interests or persons."[41] The court—using its newly created standard—found that a municipal cable television expenditure revealed "a clear legislative intent and expression of the public policy of this state to foster public ownership and operation of both radio and television."[42] The court held that the expenditure was for a public purpose on the basis that the television system adequately met each of the standard's two prongs.[43]

While public purpose challenges are still judged by the *Madison Cablevision* standard today, the Supreme Court of North Carolina has refined the doctrine's scope.[44] To start, the court in *Maready v. City of Winston-Salem*[45] addressed whether a broad state statute permitting

37. *See, e.g.*, Foster v. N.C. Med. Care Comm'n, 283 N.C. 110, 126–28, 195 S.E.2d 527, 528–29 (1973) (finding that state allocation to a private hospital could not constitute a public purpose, despite its ancillary benefit to the public); Nash v. Tarboro, 227 N.C. 283, 290, 42 S.E.2d 209, 214 (1947) (holding that a hotel could not constitute a public purpose under article 5, section 3 of the North Carolina Constitution).

38. *See, e.g.*, Maready v. City of Winston-Salem, 342 N.C. 708, 722–27, 467 S.E.2d 615, 624–27 (1996).

39. *See, e.g.*, Jamison v. City of Charlotte, 239 N.C. 682, 694–95, 80 S.E.2d 904, 913–15 (1954) (holding that the construction of a public library is a public purpose); Purser v. Ledbetter, 227 N.C. 1, 9, 40 S.E.2d 702, 708 (1946) (holding that the construction of a park is a public purpose, but funds can only be spent on a park pursuant to a public vote); Turner v. City of Reidsville, 224 N.C. 42, 46, 29 S.E.2d 211, 214 (1944) (holding that the construction of a municipal airport is a public purpose).

40. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). *See, e.g.*, Hart v. State, 368 N.C. 122, 136–38, 774 S.E.2d 281, 291–92 (2015).

41. *Madison Cablevision*, 325 N.C. at 653, 386 S.E.2d at 211.

42. *Id.* at 652–53, 386 S.E.2d at 211.

43. *Id.* at 652, 386 S.E.2d at 211.

44. *See generally* Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996) (finding that economic development incentives for private businesses were for a public purpose).

45. 342 N.C. 708, 467 S.E.2d 615 (1996).

local governments to make economic development expenditures could meet the *Madison Cablevision* standard.[46] Further clarifying the first prong of the *Madison Cablevision* standard, the *Maready* court held that "whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this court has held to be within the permissible realm of governmental action."[47] *Maready* also elaborated on the second prong, providing that "[i]t is not necessary, in order that a use may be regarded a public, that it should be for the use and benefit of every citizen in the community."[48] The court went on to say that "an expenditure does not lose its public purpose merely because it involves a private actor," but rather "if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose."[49] After determining that the economic development expenditure in question would "create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy," the court held that the plan benefited the public generally.[50] Combined with the court's conclusion that economic development "has long been a proper governmental function,"[51] the expenditure of funds for local economic development efforts encouraged by the state statute in question met both prongs of the *Madison Cablevision* standard.[52]

Ultimately, the Supreme Court of North Carolina has opted to give great deference to the legislature in determining what may constitute a public purpose within the state.[53] Despite this deferential posture, the court still analyzes "public purpose" challenges on a case-by-case basis.

46. *Id.* at 714–16, 467 S.E.2d at 619–20.

47. *Id.* at 722, 467 S.E.2d at 624.

48. *Id.* at 724, 467 S.E.2d at 625 (quoting Briggs v. City of Raleigh, 195 N.C. 223, 226, 141 S.E. 597, 599–600 (1928)).

49. *Id.*

50. *Id.*

51. *Id.* at 723, 467 S.E.2d at 624.

52. *Id.* at 714, 722–27, 467 S.E.2d at 619, 624–27.

53. *See id.* at 714, 467 S.E.2d at 619; *see also* Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968); Briggs v. City of Raleigh, 195 N.C. 223, 227, 141 S.E.2d 597, 601 (1928).

B. What is "Education" in North Carolina?

On January 20, 1840, a small schoolhouse located in Rockingham County opened its doors and became the first public school to operate in North Carolina.[54] Only seven years later, all of North Carolina's sixty-seven counties had at least one operational public school.[55] Fast-forward to 2015, and North Carolina now operates over 2,500 public schools and provides tuition-free education to over 1.5 million students across the state.[56] Certainly, things have changed over the past 175 years, but one thing has remained constant—North Carolina's unwavering commitment to the maintenance of a robust public education system for its children.[57]

Many governors, like Terry Sanford and Jim Hunt, along with countless legislators and other protectors of the North Carolina Constitution have worked to ensure that North Carolinians' collective right to public education does not erode.[58] Article I, section 15 of the North Carolina Constitution reads, "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[59] Further, article IX, section 1 states that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."[60] Additionally, article IX, section 2 provides that the "General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months

54. Vance Swift, *Williamsburg Elementary School "First Public School in North Carolina"*, WILLIAMSBURG ELEMENTARY, http://www.rock.k12.nc.us/Page/2051 [https://perma.cc/5U96-ZFUR].

55. *Id.*

56. H.R. 249, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).

57. Some have questioned whether this commitment has waned since the North Carolina GOP took control of both chambers of the general assembly in 2010. With drastic reductions in funding to schools, lack of increases in teacher pay, and proposals to lay off thousands of teacher assistants, many around the state have spoken out against what they see as the turning of the tide in the way that North Carolina's state government treats public education. James Hogan, *The War on North Carolina's Public Schools*, WASH. POST (Aug. 4, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/07/north-carolinas-step-by-step-war-on-public-education/ [https://perma.cc/9ARM-J2NP].

58. *See, e.g.*, Trip Stallings, *Jim Hunt: The Rise of an Education Governor*, EDUC. N.C. (June 8, 2015), https://www.ednc.org/2015/06/08/jim-hunt-the-rise-of-an-education-governor/ [https://perma.cc/3Y7B-K9PG] (providing a brief history of Governor Hunt's education policy).

59. N.C. CONST. art. I, § 15.

60. *Id.* art. IX, § 1.

in every year, and wherein equal opportunities shall be provided for all students."[61]

While it is clear from these sections of the constitution that North Carolinians have a right to public education, courts have struggled to define education and determine what the constitution requires the state to provide to its citizens. In *Leandro v. State*,[62] the seminal Supreme Court of North Carolina case addressing this question, plaintiff taxpayers argued that the "education" promised to citizens in the state constitution guaranteed more than merely a schoolhouse and a teacher.[63] Rather, they argued that the constitution required the "education" delivered by the state to meet minimum qualitative standards.[64] The court agreed, holding that "the right to education provided in the state constitution is a *right to a sound basic education*" and that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[65] Furthermore, the court laid out the following minimum qualitative standards:

> (1) [S]ufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;
>
> (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation;
>
> (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and

61. *Id.* § 2.

62. 346 N.C. 336, 488 S.E.2d 249 (1997).

63. *See id.* at 342–44, 488 S.E.2d at 252–53.

64. *See id.* at 347, 488 S.E.2d at 255. The decision in *Leandro* gave rise to the "*Leandro* doctrine," which affirms that the North Carolina Constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools." *Id.* at 345, 488 S.E.2d at 254.

65. *Id.* (emphasis added).

(4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[66]

In *Hoke County Board of Education v. State*,[67] the court further clarified the "sound basic education" standard constructed in *Leandro*.[68] In addressing a claim that the state had failed to provide the students of Hoke County with a "sound basic education," the court examined a series of allegations made by the school board.[69] The state claimed that its actions met the *Leandro* standard[70] through "its combination of 'inputs'—i.e., expenditures, programs, teachers, [and] administrators," which "added up to be an aggregate that met or exceeded this Court's definition of providing students with an opportunity for a sound basic education."[71] However, the court disagreed, holding that the existence of these "inputs" alone was not sufficient to meet *Leandro*'s requirements.[72] Instead, the court required a higher standard, holding that each classroom should "be staffed with a competent, certified, well-trained teacher," and requiring that "every school be led by a well-trained[,] competent principal."[73] This decision supplemented *Leandro*, providing a fuller contextual understanding of what type of "education" the citizens of North Carolina have a right to receive. These two holdings provide the standard by which education is currently judged.

II. *HART V. STATE*

In *Hart*, for the first time in North Carolina's history, private and parochial schools were declared to be constitutionally eligible recipients of public, taxpayer dollars under the public purpose provision.[74] Section II.A sets forth the facts and procedural history of *Hart*, Section II.B discusses the majority opinion, and Section II.C outlines Justice Robin Hudson's dissent.[75] An analysis of each respective opinion's merits is reserved for Part III.

66. *Id.* at 347, 488 S.E.2d at 255.

67. 358 N.C. 605, 599 S.E.2d 365 (2004).

68. *See id.* at 619, 599 S.E.2d at 379 (noting that "the extent of the guarantee, as expressed in *Leandro*, was not entirely clear").

69. *Id.* at 631, 599 S.E.2d at 386.

70. *See id.* at 608, 599 S.E.2d at 372.

71. *Id.* at 631, 599 S.E.2d at 386.

72. *Id.* at 631–38, 599 S.E.2d at 386–91.

73. *Id.* at 636, 599 S.E.2d at 389.

74. Hart v. State, 368 N.C. 122, 141, 774 S.E.2d 281, 294 (2015).

75. Justice Cheri Beasley authored an additional dissent, but the particular subjects addressed within are not relevant to the public purpose discussion. This dissent, therefore,

A. Facts and Procedural History

Governor Pat McCrory signed the Opportunity Scholarship Program into law as part of the Current Operations and Capital Improvements Act of 2013.[76] The Program consisted of a $4,200 per year scholarship for low-income students that could be spent on tuition at participating nonpublic schools around the state.[77] The 2013 Act appropriated roughly $10.8 million to the Program from the Board of Governors' general revenue fund.[78]

On December 11, 2013, mere months after the law's enactment, plaintiffs filed suit in Wake County Superior Court challenging the Program's constitutionality.[79] Plaintiffs' complaint alleged that because the Program had no accountability requirements to ensure that students attending private schools with Program money would receive a constitutionally adequate education, this expenditure could not "accomplish any public purpose."[80] Plaintiffs alleged that the lack of standards violated article V, sections 2(1) and 2(7) of the North Carolina Constitution, rendering the Program facially unconstitutional.[81] Under these assumptions, plaintiffs asked the court to permanently enjoin the Program's implementation.[82]

Senior Resident Superior Court Judge Robert H. Hobgood granted the plaintiffs' motion for summary judgment and permanently enjoined the state from implementing the Program[83] after concluding that expenditures for the Program did not accomplish a public purpose through its funding mechanism.[84] Judge Hobgood founded his ruling on the lack of adequate educational standards for private and secondary schools receiving money under the Program, stating that "appropriating taxpayer funds to

is not addressed. *Id.* at 152, 774 S.E.2d at 301 (Beasley, J., dissenting) (discussing additional concerns with the Opportunity Scholarship Program challenged in *Hart*).

76. Opportunity Scholarships, ch. 100, § 8.29, 2013 N.C. Sess. Laws 1064, 1064–67 (codified as amended at N.C. GEN. STAT. §§ 115C-562.1 to 115C-562.7 (2015)).

77. N.C. GEN. STAT. §§ 115C-562.1 to 115C-562.3 (2015).

78. NORTH CAROLINA OFFICE OF BUDGET AND MANAGEMENT, 2014–2015 CERTIFIED BUDGET, http://www.osbm.nc.gov/library/2013-15-certified [https://perma.cc/R9C8-UFT5].

79. *Hart*, 368 N.C. at 129, 774 S.E.2d at 286.

80. Amended Complaint at 14, Hart v. State, No. 13-CVS-16771 (N.C. Super. Ct. Jan. 13, 2014), 2014 WL 3841925, ¶¶ 74–76.

81. *Id.*

82. *Id.* at 4.

83. *Hart*, 368 N.C. at 130, 774 S.E.2d at 287.

84. *See id.*

unaccountable schools does not accomplish a public purpose."[85] The state appealed this decision, and, in a rare move, the Supreme Court of North Carolina granted a review of the case prior to examination by the court of appeals.[86]

B. Majority Opinion

The Supreme Court of North Carolina overturned Judge Hobgood's decision, holding that "the appropriations made by the General Assembly for the Opportunity Scholarship Program were for a public purpose under Article V, Sections 2(1) and 2(7)."[87] In conducting its own public purpose analysis, the court held that the expenditure adequately met both prongs of the *Madison Cablevision* test.[88] The court relied upon the designation of the Program as for education to establish that the expenditure was for a public purpose.[89]

Chief Justice Martin, writing for the majority, stated that "[i]n addressing th[e] question [of whether or not the Program constitutes a public purpose,] we are mindful of the general proposition articulated by this Court over forty-five years ago: 'Unquestionably, the education of residents of this State is a recognized object of State government.' "[90] Further, the court emphasized the proper scope of the long-established definition of public purposes, instructing that "[t]he term 'public purpose' is not to be narrowly construed."[91] Despite these general propositions, the majority opinion made clear that the court has "declined to 'confine public purpose by judicial definition, leaving each case to be determined by its own peculiar circumstances as from time to time it arises.' "[92] Chief Justice Martin explained, however, that while acts by the legislature are afforded "great weight" during the review process, the ultimate power of determination remains with the court.[93]

85. Order and Final Judgment at 4, Hart v. State, No. 13-CVS-16771 (N.C. Super. Ct. Aug. 28, 2014), 2014 WL 6724598, *3.

86. *Hart*, 368 N.C. at 130, 774 S.E.2d at 287.

87. *Id.* at 138, 141, 774 S.E.2d at 292, 294.

88. *See id.* at 136–38, 774 S.E.2d at 291–92 (citing Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989)).

89. *See id.* at 138, 774 S.E.2d at 292.

90. *Id.* at 135–36, 774 S.E.2d at 290–91 (quoting State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970)).

91. *Id.* at 136, 774 S.E.2d at 291 (quoting Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citations omitted)).

92. *Id.* (quoting Maready v. City of Winston-Salem, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996)).

93. *Id.* (citing Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 644–45, 386 S.E.2d. 200, 206 (1989)).

Chief Justice Martin then focused his analysis on the case at hand, applying the *Madison Cablevision* test to determine that the Program constituted a permissible appropriation under the public purpose provision of the North Carolina Constitution.[94] In doing so, the court found that the two necessary conditions were satisfied: (1) the Program was reasonably connected to the convenience and needs of the state, and (2) it would provide a general public benefit.[95]

The court quickly disposed of any potential roadblocks to constitutionality on the basis of the first factor, holding that "[h]ere, the provision of monetary assistance to lower-income families so that their children have additional education opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."[96] The court primarily relied upon two cases to support this assertion: *State Education Assistance Authority v. Bank of Statesville*,[97] and *Delconte v. State*.[98] These cases stand for the general proposition that there is an "unquestionable" and "compelling interest" for a state to provide for the education of its citizens.[99] There was, however, no discussion by the court of the specific elements of the Program that would qualify it as the type of "education" referred to in *Leandro* and *Hoke County*. Instead, the court determined that the invocation of *Leandro* analysis only arose in the context of public schools.[100] Because the court determined that the public school minimum standards set by the *Leandro* court were specific to public schools, the fact that the Program directed funds to private educational entities sufficiently distinguished it from *Leandro* in the eyes of the majority.[101]

Moving to the second factor of the *Madison Cablevision* test, the court once again looked to case law to assist with its analysis.[102] In making determinations as to whether an expenditure "benefits the public generally, as opposed to special interests or persons," Chief Justice Martin, citing *Briggs*, instructed that the law does not require

94. *See id.* at 136–38, 774 S.E.2d at 291–92.

95. *Id.*

96. *Id.* at 136, 774 S.E.2d at 291.

97. 276 N.C. 576, 174 S.E.2d 551 (1970).

98. 313 N.C. 384, 329 S.E.2d 636 (1985).

99. *See, e.g.*, *id.* at 401–02, 329 S.E.2d at 647 ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education."); State Educ. Assistance Auth., 276 N.C. at 587, 174 S.E.2d at 559 ("Unquestionably, the education of residents of this State is a recognized object of State government . . . .").

100. *See Hart*, 368 N.C. at 137, 774 S.E 2d at 292.

101. *Id.*

102. *See id.* at 137–38, 774 S.E.2d at 292.

the activities in question to be designed in such a way so as to allow for the use and benefit of all citizens.[103] Instead, as long as an expenditure has a "primary public purpose," mere "incidental private benefit" will not prove dispositive in assessing its constitutionality.[104] The court elaborated further, stating that "the fact that [an] individual obtains a private benefit *cannot be considered sufficient ground* to defeat the execution of 'a paramount public purpose.' "[105] The court went on to find that the Program met the second factor, asserting that "the promotion of education generally, and educational opportunity in particular, is of paramount public importance to our state."[106] Based on the preceding analysis, the court determined that the Program and its appropriations qualified as a public purpose under article V, sections 2(1) and 2(7). In making this claim, the court avoided engaging in any substantive analysis of why the Program sufficiently constituted "education" under the confines of North Carolina law.[107]

C. Dissenting Opinion

Arguing that this expenditure could not constitute a public purpose based on the Program's "total absence of [educational] standards," Justice Hudson began her dissent by recognizing the fundamental principles announced in Chief Justice Martin's majority opinion.[108] Hudson agreed that "education generally serves a public purpose," and that "the provision of monetary assistance to lower-income families so that their children have greater education opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."[109] However, the dissent took issue with the majority's unspoken conclusion that the Program constitutes "education" as defined by North Carolina case law.[110] For an expenditure to qualify as "education[al]," the activity in question must meet the standards of a "sound basic education," as well as provide "competent, certified,

103. *Id.* (quoting Briggs v. City of Raleigh, 195 N.C. 223, 226, 141 S.E. 597, 599–600 (1928)).

104. *Id.* at 138, 774 S.E.2d at 292 (citing Maready v. City of Winston-Salem, 342 N.C. 708, 724, 467 S.E.2d 615, 625 (1996)).

105. *Id.* (quoting State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 588, 174 S.E.2d 551, 560 (1970)) (emphasis added).

106. *Id.*

107. *Id.*

108. *Id.* at 145, 774 S.E.2d at 296 (Hudson, J., dissenting).

109. *Id.* at 144, 774 S.E. 2d at 296.

110. *See id.* at 145–51, 774 S.E.2d 296–99.

well-trained" school faculty and "well-trained[,] competent" principals.[111]

The dissent went on to assert that, because many of the "schools that may receive Opportunity Scholarship Program money *have no required teacher training or credentials and no required curriculum*[,]"[112] the Program cannot constitute the type of "sound basic education" required by the North Carolina Constitution. The dissent argued that, based on the lack of measurable standards at many of the schools eligible for public funding through the Program, there are no means of ensuring that "the education received by students at these schools prepares them to 'participate and compete in the society in which they live and work.' "[113]

The dissent's attack on the Program's constitutionality was premised on the Program's inability to meet the second *Madison Cablevision* prong by failing to provide a general public benefit.[114] The dissent argued that if the Program is not delivering an "education" by at least some general standard, then it is wrong to characterize it as a "public purpose."[115] The majority opinion leaned heavily on the inferential logic that education always serves a public purpose and, therefore, the Program qualified as being for a public purpose because it claims to serve an educational goal.[116] The dissent stressed that the majority missed a critical step in determining whether the Program could constitutionally qualify as a public purpose. Justice Hudson noted that, "while students enrolled in private school may be receiving a fine education" in the eyes of their parents, "if taxpayer money is spent on a private school education that does not prepare them to function in and to contribute to our state's society, that spending cannot be for 'public purposes only.' "[117]

The dissent rejected a series of the state's arguments. In particular, Justice Hudson rejected the argument that the standards governing nonpublic schools are sufficient to ensure an education furthering the public purpose of "education."[118] In response to the state's claims that statutory requirements imposed on private schools, such as "attendance, health, and safety," along with "standardized

111. *Id.* at 145, 774 S.E.2d at 296 (quoting Hoke Cty. Bd. of Educ. v. State, 358 N.C. 605, 636, 599 S.E.2d 365, 389 (2004)).

112. *Id.*

113. *Id.* (quoting Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997)).

114. *Id.* at 144–46, 774 S.E.2d at 296–97.

115. *See id.* at 145–46, 774 S.E.2d at 297.

116. *See id.* at 134–39, 774 S.E.2d at 290–93 (majority opinion).

117. *Id.* at 145–46, 774 S.E.2d at 297 (Hudson, J., dissenting).

118. *Id.*

testing at certain intervals" are sufficient to meet the education standard, the dissent stated that "[w]hen considering these statutory standards in a public purpose context, it is clear that they do not help measure whether the students enrolled are receiving an education that prepares them to function in our state's society."[119] The dissent elaborated, saying "[e]ven the requirement regarding standardized testing falls short: that provision simply mandates that all private schools 'administer, at least once in each school year, a nationally standardized test.' "[120] The dissent pointed out that the statutory requirements are silent about the type of test or the minimum results required for nonpublic schools.[121] This raises the significant question of how the Program could ensure that students receive a constitutionally adequate education that prepares them to compete in society, as mandated by the definition crafted in *Leandro* and further defined in *Hoke County*.[122] Though Justice Hudson stops short of explicitly endorsing the incorporation of *Leandro* and *Hoke County* considerations into the *Madison Cablevision* public purpose analysis, her arguments highlight the importance of ensuring that any purported "educational" expenditure is accompanied by some minimum standards. In Justice Hudson's words "[w]hen taxpayer money is used, the total absence of standards cannot be constitutional."[123]

The dissent concluded that these shortcomings and the lack of the Program's accountability measures clearly showed that a state expenditure to fund the Program would be unconstitutional. Such an expenditure would be unconstitutional because it falls short of the public purpose standard because it does not "benefit[] the public generally" as required by *Madison Cablevision*.[124] Absent "meaningful standards" to ensure students are being educated adequately, "public funds cannot be spent constitutionally through this Opportunity Scholarship Program."[125]

119. *Id.* at 146–47, 774 S.E.2d at 297.
120. *Id.* at 147, 774 S.E.2d at 297 (quoting N.C. GEN. STAT. § 115C-449 (2013)).
121. *Id.* at 146, 774 S.E.2d at 297.
122. *Id.* at 149–50, 774 S.E.2d at 299.
123. *Id.* at 147, 774 S.E.2d at 296
124. *Id.* at 137, 774 S.E.2d at 292 (majority opinion) (quoting Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989)).
125. *Id.* at 149, 774 S.E.2d at 299 (Hudson, J., dissenting).

III. HOW *HART* WRONGLY APPLIED THE *MADISON CABLEVISION* PUBLIC PURPOSE TEST AND AN ANALYSIS OF FUTURE POLICY IMPLICATIONS

Before *Hart*, North Carolina courts analyzed educational and public purpose expenditures as separate and distinct legal doctrines.[126] *Hart* changed this by commingling the two doctrines and allowing the public purpose doctrine to, in a sense, supersede a previous line of educational standards cases in North Carolina.[127] In ruling on the constitutionality of the Program, the *Hart* court failed to consider the full breadth of applicable law in making their determination that this expenditure adequately served a "public purpose." Instead of looking to tests established by *Leandro* and *Hoke County* prior to designating the Program as "educational," the court merely relied on the state's superficial and self-serving characterization of the Program. By doing this, and holding *Leandro* and its progeny inapplicable to nonpublic educational institutions, the court evaded hard questions about what it means to provide a sound education. Section A argues that the court should have fully analyzed whether the Program met the definition of "education" under *Leandro* and *Hoke County* before designating the expenditure as a public purpose under *Madison Cablevision*. Section B forecasts adverse policy implications that will arise from the *Hart* decision, focusing on the near certain degradation of the quality of education delivered to students across North Carolina under the Program's voucher regime.

A. Missing Leandro *and* Hoke County *Considerations in the Public Purpose Analysis*

In holding that the Program constituted a public purpose, the majority relied upon unsound logic and an incomplete analysis. While the court generally approached this issue through the appropriate lens of the *Madison Cablevision* test, it evaded the critical step of examining the minimum constitutional standards for education outlined in *Leandro* and *Hoke County*, leading to an incorrect application of the public purpose provision.[128] The court's holding expanded the reach of the public purpose provision and created the potential for a flood of state appropriations to nonpublic educational

126. *Id.* at 144, 774 S.E.2d at 296.
127. *Id.*
128. *Id.* at 145, 774 S.E.2d at 296.

entities that do not provide constitutionally adequate education opportunities.[129]

The court effectively explained that the Program meets the first prong of the *Madison Cablevision* test because "the provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."[130] This proposition is well supported and bears no further analysis.[131]

Despite adequately laying the foundation for a proper application of the second prong of the *Madison Cablevision* test, serious problems arise from the court's analysis. First, the court rightly stated that education constitutes a purpose of "paramount public importance" to the state. Further, the court held that "the ultimate beneficiary of providing these children additional *educational* opportunities is our collective citizenry."[132] It is with the support of these assertions that the court concluded that the appropriations to the Program "were for a public purpose under Article V, Sections 2(1) and 2(7)."[133] Yet, conspicuously absent from this conclusion is any meaningful analysis related to how and why the Program constitutes "education" as defined in North Carolina.[134] Instead, the court chose not to apply the *Leandro* standard in the context of expenditures benefiting non-public schools.

While it is true that an educational expenditure as defined by the constitution will serve the public generally, a program that falls short of this minimum standard should not be deemed to serve a public purpose. Because North Carolina courts have determined that any public educational program must meet certain minimum standards, the potential state subsidization of private expenditures for education

129. *Id.* at 136, 774 S.E.2d at 291 (majority opinion).

130. *Id.*

131. *See* State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) ("Unquestionably, the education of residents of this State is a recognized object of State government."); *see also Hart*, 386 N.C. at 136–37, 774 S.E.2d at 291; Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992) ("Education is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' "); Delconte v. State, 313 N.C. 384, 401–02, 329 S.E.2d 636, 647 (1985) ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education.").

132. *Hart*, 386 N.C. at 138, 774 S.E.2d at 292 (emphasis added) (citing Maready v. City of Winston-Salem, 342 N.C. 708, 724, 467 S.E.2d 615, 625 (1996)).

133. *Id.*

134. *See id.* at 134–39, 744 S.E.2d at 290–92.

that does not meet these standards is anathema to the protection of taxpayer dollars and the maintenance of a suitable education for the state's children.[135] Before concluding that the Program constituted a public purpose, the majority should have conducted a more thorough analysis of the voucher scheme's components, measuring those elements against the requirements established in *Leandro* and *Hoke County*.[136] Merely calling an expenditure "educational" does not make it so.

If the court had conducted such an analysis, the Program's clear inability to meet the "sound basic education" requirement of North Carolina's state constitution should have excluded it from classification as a public purpose.[137] The Program, at the time of the court's analysis, did not include "requirements [that] relate to the quality of education received by enrolled students."[138] Further, as the dissent highlighted, the "[d]efendants themselves admit that the program lacks the standards outlined in *Hoke County* for the employment of certified teachers and principals and for curriculum."[139] Additionally, the Program does not include any standards by which the *Leandro* requirements could be met, adding further support to the notion that a state expenditure to fund the Program falls short of the minimum constitutional standards for education.[140] This directly calls into question the constitutionality of the Program based on its failure to meet the second prong of the *Madison Cablevision* test.[141] The second prong of the test requires that constitutionally eligible expenditures benefit the public generally, and if such an expenditure clearly meets the minimum standards of "education" as defined by the court, the public would realize some benefits. However, without a proper analysis of the Program under the *Leandro* and *Hoke County* standards, the majority cannot definitively conclude that such an expenditure adequately constitutes education and therefore benefits the public generally. In analyzing

135. *See* Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989).

136. *Hart*, 386 N.C. at 134–35, 744 S.E.2d at 290.

137. *See* Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) ("[T]he right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.").

138. *Hart*, 386 N.C. at 148, 774 S.E.2d at 298 (Hudson, J., dissenting).

139. *Id.* at 149, 774 S.E.2d at 298.

140. *Leandro*, 346 N.C. at 345, 488 S.E.2d at 254.

141. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989).

expenditures under a "public purpose" analysis, the law should require the *Leandro* and *Hoke County* analyses when determining if expenditures constitute "education" under the second-prong of the Madison Cablevision test.

Additionally, the plaintiffs in *Hart* argued that when judging whether an expenditure meets a public purpose, the ultimate determination should rest on whether the appropriation *accomplishes* a public purpose.[142] However, the court disagreed, holding that the *legislative intent* of the expenditure, not the effect, is the determinative factor.[143] In the majority opinion, Chief Justice Martin wrote that "in resolving challenges to legislative appropriations under the public purpose clause, this Court's inquiry is discrete—we ask whether the legislative purpose behind the appropriation is public or private."[144]

Such analysis leads to an overly broad and extremely lenient definition of what serves a "public purpose."[145] Although the *Briggs* court did state that "the term 'public purpose' is not to be construed *too narrowly*," the majority in *Hart* may have overemphasized this vague admonition.[146] Of course, proponents of the majority's position in *Hart* would argue that the court followed *Briggs*' exacting standard. Proponents of the majority in *Hart* would also argue that incorporating educational standards into the public purpose analysis violates *Briggs*' instructions directing courts to avoid narrow interpretation of public purpose expenditures.

These arguments are flawed. While it is true that the *Briggs* court established that a public purpose should not "be construed too narrowly," its holding did not endorse the overly broad analysis conducted by the *Hart* majority.[147] Instead, other elements of the *Briggs* opinion seem to support a more searching analysis to protect against unwarranted intrusions into state revenues by government through taxation.[148] For example, the *Briggs* court stated that "the power to tax *only for a public purpose*, and not arbitrarily, is one of

142. *Hart*, 386 N.C. at 129, 774 S.E.2d at 287.

143. *Id.* at 135, 774 S.E.2d at 290.

144. *Id.* While Justice Martin describes the inquiry as "discrete," the test endorsed by the *Hart* majority provides little guidance for determining whether an appropriation is constitutional.

145. *See* Briggs v. City of Raleigh, 195 N.C. 223, 226, 141 S.E. 597, 599 (1928) (discussing the proper scope by which public purpose challenges are judged); *see also supra* Section I.A.

146. *Id.* at 226, 141 S.E. at 599 (emphasis added).

147. *See id.* at 226, 141 S.E. at 599.

148. *See id.* at 228–31, 141 S.E. at 600–02.

the chief distinctions between representative government and autocracy" and that "unless the difference is to be observed, the tyranny of the one, in matters of taxation, may become just as burdensome as the tyranny of the other."[149] Additionally, the court conceded that "[o]f all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited."[150] The court's caution against giving the state unchecked power over its citizens through the power of taxation is a clear indication that a heightened level of analysis is required when an expenditure is challenged under the public purpose provision.[151] While the power to tax is quite clearly distinct from the power to spend, the two are intimately tied so as to make an inferential connection between each principle appropriate. One without the other renders both impotent.[152] *Briggs*' warning against narrowness is simply a component of the generalized balancing test that courts must employ in public purpose challenges.

The analysis suggested by the dissent in *Hart*—that an expenditure without any educational standards cannot be for a public purpose—is correct and justified in light of precedent, and it adequately supplies precisely what is missing from the majority's assessment of the Program. The dissent highlighted several areas in which the Program falls short of the minimum standards discussed by *Leandro* and *Hoke County*.[153] Echoing the trial court's findings, the dissent properly observed that "the schools that may receive . . . money have no required teacher training or credentials," as well as "no required curriculum or other means of measuring whether the education received by students at these schools prepares them," as *Leandro* requires, "to participate and compete in the society in which they live and work."[154] The fact that North Carolina's courts have gone to great lengths to establish and ensure that minimum constitutional standards are met in the delivery of

149. *Id.* at 228, 141 S.E. at 600 (emphasis added).

150. *Id.* at 230, 141 S.E. at 601 (quoting Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874)).

151. *See id.* at 228–29, 141 S.E. at 600.

152. *See id.* at 228–29, 141 S.E. 600–01 (clarifying that the power to tax is dependent upon the existence of a valid expenditure, the Supreme Court of North Carolina stated, "There is no power to tax for an object not within the purposes for which governments are established.").

153. *See* Hart v. State, 368 N.C. 122, 149–52, 774 S.E.2d 281, 298–300 (2015) (Hudson, J., dissenting).

154. *Id.* at 145, 774 S.E.2d at 296 (quoting Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997)).

education to its citizens is compelling evidence that the court made a significant error in its failure to apply the *Leandro* standard in its analysis of the Program.[155]

Given that the Program falls woefully short of meeting the constitutional standard for "education" in many areas,[156] it is an inappropriate expenditure of taxpayer dollars under the public purpose analysis. The court in *Hart* wrongly concluded otherwise and, in doing so, set a dangerous precedent for future cases; now, it is considerably easier for the legislature to make educational appropriations to private entities.[157]

B. Hart*'s Policy Implications for the Delivery of Education*

The court's determination that the Program is an expenditure for a public purpose will have both foreseeable and unintended impacts in North Carolina. By allowing the state to subsidize the private schools with taxpayer dollars,[158] the *Hart* court laid an unwise foundation for future taxpayer distributions to private entities. Given the stated desire of those within the North Carolina General Assembly to expand the Program to reach more students, it is prudent to question whether or not additional state funding might result in the state siphoning off dollars previously allocated for public schools to fund nonpublic schools.[159]

A study conducted by Duke University School of Law sheds light on the types of schools that will receive voucher dollars from the

155. *See supra* Section I.B (giving a brief history of North Carolina's efforts to ensure that constitutional standards are met in the area of education).

156. *See Hart*, 368 N.C. at 149–52, 774 S.E.2d at 298–300.

157. *See id.* at 141, 774 S.E.2d at 294.

158. While the appropriation for the Program currently comes from the Board of Governors fund, as the Program expands beyond the reach of the fund itself, more money will have to come from elsewhere, potentially jeopardizing precious public school dollars. *See* S. 862, 2015 Gen. Assemb., 2015 Reg. Sess. (N.C. 2015) (projecting appropriations for the Opportunity Scholarship Program will reach $124,840,000 by fiscal year end 2027); *It's Official—Opportunity Scholarship Expand!*, PARENTS FOR EDUC. FREEDOM IN N.C. (Sept. 18, 2015), http://pefnc.org/news/its-official-opportunity-scholarships-expand/ [https://perma.cc/YD7R-L86M] (detailing the budget increase over the next two years from $5 million in 2014–2015 to $24.8 million for 2016–2017).

159. *See generally* Lindsay Wagner, *Lawmakers Renew Push to Expand North Carolina's School Voucher Program*, NC POL'Y WATCH (Mar. 25, 2015), http://www.ncpolicywatch.com/2015/03/25/lawmakers-renew-push-to-expand-north-carolinas-school-voucher-program/ [https://perma.cc/N7ZF-GB5R] (discussing the desires of Rep. Paul "Skip" Stam to increase funding from $10 million to $40 million).

Program.[160] The study found that out of 696 nonpublic schools in North Carolina, 70% of those are parochial, while 30% are independent and do not list a religious association.[161] However, 92% of nonpublic primary schools where the voucher amount of $4,200 would cover the entire cost of tuition are religiously affiliated.[162] At the middle- and high-school levels where the voucher amount is sufficient to fully cover tuition, 95% of the schools are religiously affiliated.[163] Further, the study found that, at nonpublic schools where tuition is fully covered by the voucher amount, only "five percent of high schools have any type of accreditation and less than 10 percent of grade schools and middle schools have accreditation."[164] Regarding the general demographic makeup of these nonpublic schools, over "30 percent of the private schools reported that more than 90 percent of the students are of one race. Twenty-nine percent reported that more than 90 percent of the students are white . . . ."[165]

These figures paint a grim picture of what the ruling in *Hart* might do to the potential for North Carolina's students' ability to compete in a global economy. Many of the top private schools in North Carolina have tuition that is roughly $10,000 or more per year of attendance.[166] The voucher program covers less than half of this amount, thereby signaling that the recipients of Program-funded scholarships will not have access to the highest performing schools, even with state assistance.[167] Instead, as the statistics from Duke Law's study reflect, these students will attend schools that are both religiously and racially homogenous, as well as largely unaccredited

160. CHILDREN'S LAW CLINIC, DUKE UNIV. SCH. OF LAW, CHARACTERISTICS OF NORTH CAROLINA PRIVATE SCHOOLS 2 (2014), https://law.duke.edu/news/pdf/characteristics_of_private_schools-preliminary-2-11.pdf [https://perma.cc/46TF-R3SX].

161. *Id.* at 3.

162. *Id.* at 3–4.

163. *Id.* at 4.

164. *Id.*

165. *Id.*

166. *See 2016 Best Private High Schools in North Carolina*, NICHE, https://k12.niche.com/rankings/private-high-schools/best-overall/s/north-carolina/ [https://perma.cc/84ZT-H6MS] (revealing that only two out of the top ten private schools in North Carolina are parochial in nature). Tuition at schools that are considered "top private schools within" the state of North Carolina for K–12 programs ranges from $17,025–$23,825 at Carolina Day School, *2016–17 Annual Tuition*, CAROLINA DAY SCH., http://www.carolinaday.org/page.cfm?p=1419 [https://perma.cc/QD6B-R2PH]; to $20,500 at Cary Academy, *Tuition & Financial Aid*, CARY ACAD., http://www.caryacademy.org/page.cfm?p=5936 [https://perma.cc/Y59F-VTKY]; to $13,395–$23,205 at Durham Academy, *Affording DA*, DURHAM ACAD., http://www.da.org/page.cfm?p=524 [https://perma.cc/WCH6-XM7B].

167. *See* N.C. GEN. STAT. §§ 115C-562.1 to 115C-562.3 (2015).

and without teachers who have formal training and certification.[168] Additionally, these nonpublic schools operate outside the scope of the acceptable curriculum that the state has designed to meet at least the minimum standards required by the North Carolina Constitution.[169] In effect, because there are no minimum standards, there is no oversight, as there should be. This oversight could come in the form of mandatory state board approval "contingent on a showing that the quality of the curriculum is at least as high as that mandated for similarly situated public schools."[170] North Carolina's Program requires no such approval.[171] These statistics and comparisons illuminate the Program's vast deficiencies and forecast an uncertain future for the type of education that the voucher scheme will deliver to North Carolina's children.

State legislators have already increased spending for the Program in the 2015 fiscal year, resulting in more students who will have access to the scholarships moving forward.[172] Assuming that the Program will continue to grow, a number of inferences can be made regarding future educational outcomes for students in North Carolina. Given the amount of the scholarship itself, the children most likely to benefit from the Program by attending schools where a proper education is delivered are those at the top of the income eligibility range.[173] For students at the lower end of the spectrum, their families are unlikely to have the financial resources necessary to supplement the cost of attending a high-performing, nonpublic school.[174] This increases the likelihood that students who want to take advantage of the grants will be relegated to nonpublic schools that are disproportionately unaccredited and run by teachers and administrators without formal training.[175]

168. *See* CHILDREN'S LAW CLINIC, DUKE UNIV. SCH. OF LAW, *supra* note 160, at 2.

169. *Id.*; *see also* Jasmine Evans, *Beyond Tuition: Hidden Costs of Private School*, EDUCATION.COM (Mar. 27, 2013), http://www.education.com/magazine/article/hidden-costs-private-school/ [https://perma.cc/A95S-VEKD] (highlighting common additional costs associated with private school such as transportation, field trips, and books).

170. Hart v. State, 368 N.C. 122, 150, 774 S.E.2d 281, 300 (2015) (Hudson, J., dissenting).

171. *Id.*

172. *Students, Parents Win Big with Final N.C. State Budget*, PARENTS FOR EDUC. FREEDOM IN N.C. (Sept. 15, 2015), http://pefnc.org/news/children-parents-win-big-with-final-n-c-state-budget/ [https://perma.cc/3S92-NNEM] ("[I]t is truly significant to see that the final budget ends with $17.6 million for 2015–16 and $24.8 million for 2016–17—a truly extraordinary increase as it's a nearly 500% increase in funding for current and future Opportunity Scholarship student applicants.").

173. *See* Evans, *supra* note 169.

174. *See id.*

175. *See* CHILDREN'S LAW CLINIC, DUKE UNIV. SCH. OF LAW, *supra* note 160, at 2.

Taken to its logical conclusion, students whose families can afford to make up the supplemental costs of high-quality private education will likely take advantage of this option, leaving public schools with a student population dominated by lower-income students who, historically, are the furthest behind in their own education and need the most support to achieve success.[176] Combine this with the high probability that funding for the Program will continue to increase, and it is easy to see how the education provided to students in public schools might soon fail to meet the constitutional minimum standards required by the North Carolina Constitution.[177]

IV. A SOLUTION TO PREVENT FUTURE MISAPPLICATIONS OF *MADISON CABLEVISION* IN THE EDUCATIONAL CONTEXT

Despite the problems created by *Hart*'s holding, the court can correct this issue and prevent the future deterioration of North Carolina's educational system. In the future, the court should employ a higher standard in determining whether educational expenditures like the Program constitute a public purpose.[178] This higher standard would incorporate the *Leandro* and *Hoke County* minimum constitutional educational standards into the second *Madison Cablevision* prong, ensuring that any educational expenditure deemed a public purpose would provide an education that prepares students "to participate and compete in the society in which they live and work."[179]

As it relates to public purpose determinations, education deserves unique treatment based on its historically elevated status in North Carolina.[180] North Carolina's past reverence and respect for education is clear from the education article of the state's constitution,[181] the state's significant funding of education,[182] and the

176. *See* SEAN F. REARDON, THE WIDENING ACADEMIC ACHIEVEMENT GAP BETWEEN THE RICH AND POOR: NEW EVIDENCE AND POSSIBLE EXPLANATIONS 4 (Russell Sage Foundation ed., July 2011), https://cepa.stanford.edu/sites/default/files/reardon%20whither%20opportunity%20-%20chapter%205.pdf [https://perma.cc/P9C3-5LD6] ("The achievement gap between children from high- and low-income families is roughly 30 to 40 percent larger among children born in 2001 than among those born twenty-five years earlier. In fact, it appears that the income achievement gap has been growing for at least fifty years . . . .").

177. *See Students, Parents Win Big with Final N.C. State Budget*, *supra* note 172.

178. Educational expenditures in this context would constitute programs similar to the Program that allocate public dollars to nonpublic K–12 educational entities.

179. Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997).

180. *See generally* N.C. CONST. art. IX (enshrining an article exclusively dedicated to "Education" within the North Carolina Constitution).

181. *Id.*

state's employment of almost 100,000 teachers.[183] An undertaking of such significance necessitates greater safeguards against the misappropriation of taxpayer dollars than the *Hart* decision provides.

Moving forward, the court should modify the *Madison Cablevision* test to include a subsection to the second prong that is automatically triggered when educational expenditures are challenged.[184] Courts would still conduct the public purpose analysis through the traditional process, ensuring that, first, each expenditure would "involve a reasonable connection with the convenience and necessity of the [state]," and, second, that those expenditures would "benefit the public generally, as opposed to special interests or persons."[185] But the court would be further required to determine whether the expenditure meets the constitutional standards for "education" before deciding whether the expenditure benefitted the public generally. Incorporating the *Leandro* and *Hoke County* standards into the public purpose analysis would ensure that schools, whether public or not, that receive taxpayer dollars for educational appropriations would provide adequate education. It is likely that expenditures that met the constitutional standard for education would also meet the second prong of the *Madison Cablevision* test; conversely, the failure to meet the education standard would end the public purpose inquiry and invalidate the challenged program or expenditure.

This approach better protects educational interests than the current *Madison Cablevision* test and would not run afoul of any prior case law.[186] Additionally, this consideration of the *Leandro* and *Hoke County* standards would only be triggered when educational expenditures are challenged;[187] all other challenges would be evaluated under the existing version of the *Madison Cablevision* test. Further, this consideration would not apply retroactively. Thus,

182. *See generally* NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING 2012–2014 STATE SPENDING 15–22 (2014), https://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202012-2014%29S.pdf [https://perma.cc/8YRR-DZ8Y] (detailing state budget expenditures for North Carolina, which shows the outsized portion of the state budget devoted to education).

183. Emery Delesio, *NC Has Fewer Teachers and More Students*, WRAL (Dec. 5, 2013), http://www.wral.com/nc-has-fewer-teachers-and-more-students/13180607/ [https://perma.cc/SU43-UHPZ].

184. The second prong requires that the expenditure be for an "activity [that] benefit[s]the public generally." *See* Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989).

185. *Id.*

186. *See supra* Section I.A.

187. *See supra* Section I.B.

expenditures previously allowed under the public purpose provision would remain permissible and intact.

Given the historical importance of public education in North Carolina, it is vital to ensure the protection, quality, and resources of this institution for future generations. If a private voucher system could meet the requirements for a minimally qualified education, this test would allow for that expenditure to be deemed a public purpose and to be funded, at least in part, by taxpayer dollars. This test would not allow for the state funding of programs with no minimum standards, institutions that do not employ effectively trained and certified teachers, or entities that call into question the quality of the education students will receive—no matter whether they are private or public. Under the test proposed by this Recent Development, these sorts of programs and institutions would not be permitted to benefit from taxpayer dollars by masquerading under the guise of a public purpose, when in fact they do not meet the state's minimum requirements to be deemed "educational."

CONCLUSION

According to article V, section 2(7) of the North Carolina Constitution, the legislature's power to spend is restricted to expenditures that constitute "public purposes[.]"[188] This constitutional limitation protects against governmental appropriation abuses.[189] Unfortunately, the Supreme Court of North Carolina has failed to ensure that these protections will remain in place for future government expenditures for educational purposes. The court's holding in *Hart*, determining that the Program was a public purpose, misapplied the *Madison Cablevision* test to the detriment of the state's students and their ability to "compete in the society in which they live and work."[190] Through this misapplication, the court opened the floodgate for state appropriations to nonpublic educational entities that do not "benefit the public generally."[191] Potential consequences of this holding include diminishing levels of overall education across our state, as well as the continual draining of resources from public education. Given an opportunity in the future to correct this errant decision, the court should implement a higher

188. N.C. CONST. art. V, § 2 cl. 7.

189. *See supra* Section I.A.

190. *See Hart*, 368 N.C. at 139, 774 S.E.2d at 293 (quoting Leandro v. State, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997)).

191. *See* Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 653, 386 S.E.2d 200, 211 (1989).

level of judicial review for expenditures involving educational spending. Adopting this proposal would better serve the goals of the state and would protect the vital institution of education.[192] Until then, however, North Carolina will need to adjust to a new environment and prepare for unintended consequences.

RICHARD A. INGRAM**

192. *See Hart*, 368 N.C. at 146–51, 774 S.E.2d at 296–300 (Hudson, J., dissenting).

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