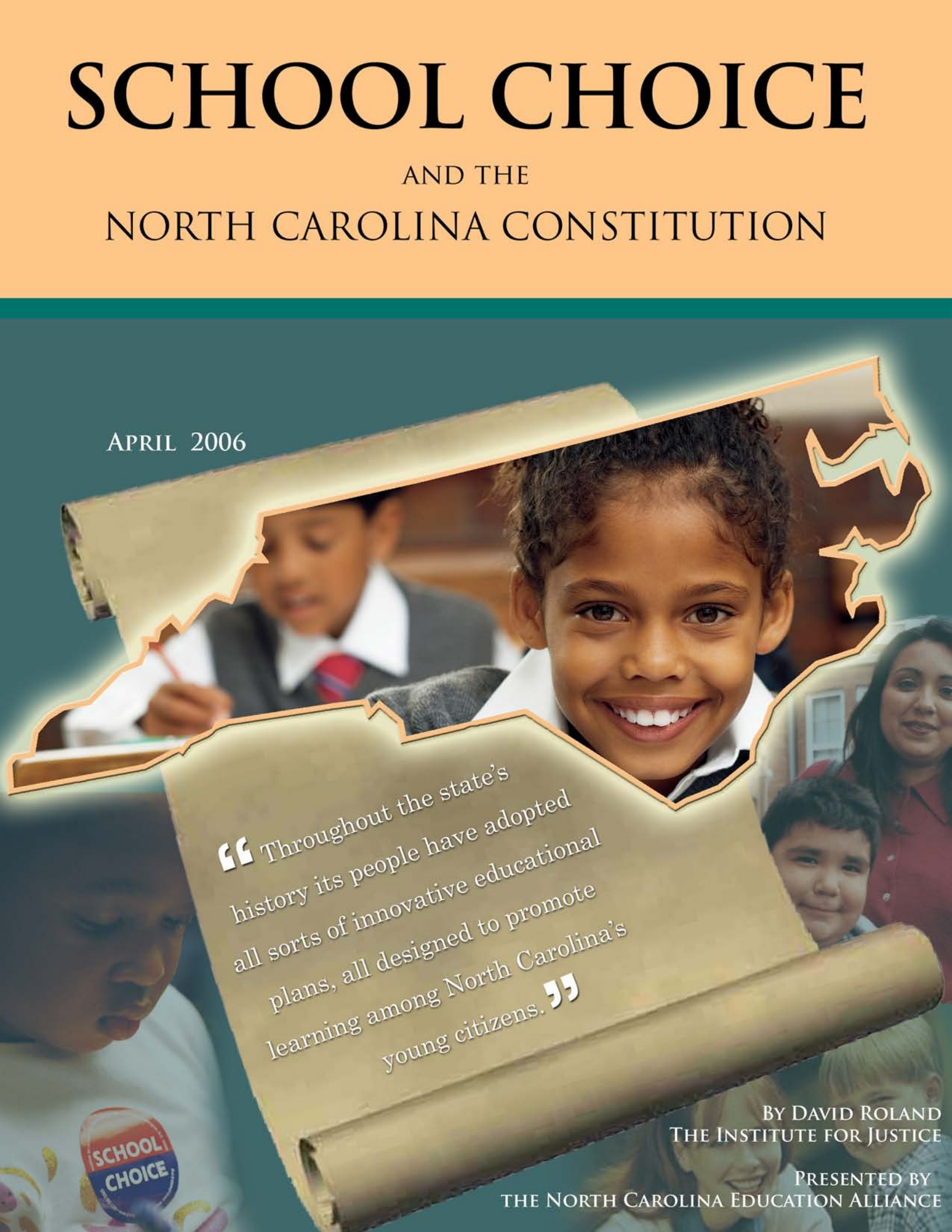


SCHOOL CHOICE

AND THE NORTH CAROLINA CONSTITUTION

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“ Throughout the state’s history its people have adopted all sorts of innovative educational plans, all designed to promote learning among North Carolina’s young citizens. ”

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INTRODUCTION

Education has always been an issue of central concern for the people of North Carolina. Even before statehood, the area's colonists made concerted efforts to secure the blessings of education for their children. In 1776, the authors of North Carolina's first Constitution required the Legislature to provide publicly funded schools to encourage education in the state.ⁱ Throughout the state's history its people have adopted all sorts of innovative educational plans, all designed to promote learning among North Carolina's young citizens. Education's special place of concern in the minds of North Carolinians is further revealed by reading the state's current Constitution, which dedicates both a section of its Declaration of Rightsⁱⁱ and an entire articleⁱⁱⁱ to the subject. Education is, unquestionably, a subject to which

the people of this state have shown a deep and abiding commitment.

In spite of this commitment, there continues to be a significant debate as to the most effective means of providing North Carolina's children with the best possible education. The one point upon which a great majority agree is that, despite substantial increases in funding, public education is not meeting the needs of a large proportion of the state's students. This paper will present parental school choice as a promising alternative to the educational status quo. At the same time, it will explain why school choice is not only consistent with both the Constitution of North Carolina and the Constitution of the United States, but would assume a comfortable place among North Carolina's long history of innovative efforts to secure for its citizens the very best that education has to offer.

WHAT IS SCHOOL CHOICE?

School choice is rooted in one simple idea – it’s a good thing for parents to be able to choose where their kids will go to school. After all, millions of parents all over the country regularly make choices about where their children will go to school, whether that means choosing a neighborhood with good public schools or choosing to send their kids to a preferred private or religious school. No one ever argues that they shouldn’t be allowed to make those choices.

The problem is, not all parents are able to make those choices because each of those choices cost money. Many parents of school-aged children can’t afford to live in neighborhoods with good public schools, and neither can they afford to send their children to private schools. As a result, they have no effective choice: they must send their kids to wherever their school district tells them to go. People who support school choice simply want to give poor and middle-class parents the same options already available to wealthier parents.

There are several different ways that the State can offer parents these choices. North Carolina has already taken advantage of one of those by allowing the creation of charter schools, which are special independent schools that are supported by the State, but allowed to operate separate from the regular public schools system. This state currently has nearly one hundred charter schools, each offering an alternative to the educational status quo. Despite this step in the right direction, charter schools are still only available to a very small percentage of parents. North Carolina can do more.

A well-crafted school choice program will allow parents to choose from among a number of alternatives, which normally will include all of a district’s public schools and a number of private schools, including some religious schools. School choice programs usually come in one of three forms: (1) publicly funded scholarships, (2) privately funded scholarships, or (3) tax credits or exemptions. With publicly funded scholarships, the government lets parents choose from among the schools participating in the program and then

pays or helps pay for the child’s tuition at the chosen school. Where a school choice program uses privately funded scholarships, the government lets individuals and/or corporations donate money to independent scholarship organizations in return for a tax credit in the amount of their donation. The scholarship organization follows State-established procedures to determine which students will get one of the scholarships, then pays all or part of the tuition of the scholarship recipients to the schools chosen by the recipients’ parents. A third school choice option is for governments to offer tax exemptions or credits to parents who choose to send their children to schools outside of the public school system.

School choice programs make sense for several reasons. First, many private schools charge less per student than the public schools require to teach a student. If the government provides the means for parents to choose a private school that can educate a child for less money, the public schools can get to keep the left-over money even though they won’t bear the cost of educating that student. It’s a win-win situation because the family benefits from being able to choose a school that better suits their child and the child’s old public school is able to spend more money on each of the students that remain.

Second, competition can force schools to become more efficient, more innovative, and more responsive to the needs of the children attending them. School choice programs force schools that have stagnated due to a guaranteed stream of students either to improve or to face the prospect of losing students, and possibly being shut down. Successful schools will thrive and expand, while unsuccessful schools will close and make way for new ones better equipped to serve the students.

And finally, giving parents a choice for their children’s education will encourage those parents to become more attentive to and involved with the entire educational process, which will be tremendously beneficial for everyone involved. Several studies of school choice programs already in operation have confirmed the potential benefits of school choice on all students involved – even those that remain in the public school system.^{iv} For all of these

reasons, North Carolina should consider such an alternative as a way to improve its own education system.

Despite both the theoretical and demonstrated benefits of school choice some groups – usually including teachers’ unions and other special interest groups – use any conceivable theory to challenge the constitutionality of governmental efforts to help parents move their children from failing public schools into the private schools of their choice.^v Concern about these sorts of legal challenges sometimes discourages legislatures from approving school choice programs. The Institute for Justice has for years served as an advocate and legal advisor for those who would help parents get the best possible education for their children. We are happy to explain why nothing in either the North Carolina Constitution or the U.S. Constitution should prevent this state from offering school choice as an alternative to public schools that are failing to provide the education promised to North Carolina’s children.

UNDERSTANDING STATE CONSTITUTIONS

American constitutions are unique creations. While they tend to share similarities in structure and substance, each document was shaped by its authors to fit the needs and interests of the people whose government it would establish. Even where one state’s constitution uses language similar to another state’s constitution or the federal Constitution, it should not be taken as a given that those similarities will lead to identical results in court.^{vi} State courts regularly point out that each state constitution has a unique history, and courts have to try to understand why the constitution’s drafters chose the words they did.^{vii} Sometimes these courts will decide that similar parts of different constitutions have essentially the same meaning and purpose. But courts also frequently determine that some of these similar parts were actually intended to function in very different ways.

North Carolina is no exception to this rule. The people who drafted and ratified North Carolina’s constitutions in 1776, 1868 and 1971, created charters that were specifically tailored to North Carolinians’ ideas about how they should be governed. In the later constitutions, the drafters frequently used language very similar to that used in the U.S. Constitution. In recent years, however, the North Carolina Supreme Court has made clear that even if the state Constitution uses the exact same words as the federal Constitution, it will not follow the guidance of the U.S. Supreme Court if the history behind North Carolina’s charter shows that the state Constitution was meant to function differently.^{viii} In the same way, even where North Carolina’s Constitution might sometimes share similarities with other state constitutions, the North Carolina Supreme Court’s constitutional decisions will always be determined by the unique heritage and meaning of this state’s charter.

Each of North Carolina’s constitutions addressed the General Assembly’s role in educating the state’s children, as well as the proper relationship between government and religious groups. These subjects are of particular importance because those who would maintain the educational status quo frequently argue that school choice programs would violate the sections of state constitutions that speak on these topics. This paper will discuss influences that affected the way the drafters of North Carolina’s constitutions addressed these issues and will demonstrate that the state Constitution has never been seen as a barrier to the Legislature’s innovative efforts to make education available to its citizens. To the contrary, North Carolina’s courts have interpreted the state’s constitutional provisions in such a way that there should be no constitutional impediment to a well-crafted school choice program.

FLORIDA'S CONSTITUTION AND *BUSH V. HOLMES*

Unfortunately, some states' courts have agreed with school choice opponents and have struck down programs intended to help underprivileged children leave failing schools. Recently, in *Bush v. Holmes*, the Florida Supreme Court relied on the education article of that state's Constitution to hold that the Florida Legislature is prohibited from pursuing the goal of educating its schoolchildren through any avenue except the currently existing system of free public schools. The Court struck down the Opportunity Scholarship Program, a statewide school choice program that provided parents the means to choose the best available school, public or private, for their children if their assigned public school received failing grades under the state's assessments in two out of four years. This decision followed a ruling by one of the state's appellate courts that Opportunity Scholarships violated a different section of the Florida Constitution that prohibits the use of public funds to aid religious organizations.^{ix} Neither of these courts' interpretation of Florida's Constitution should have any bearing on North Carolina courts' interpretation of their Constitution.

Article IX, section 1 of the Florida Constitution says that the "adequate provision for the education of all children residing within [Florida's] borders" is a "paramount duty of the state." That sentence is followed with a sentence stating that "adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." The Florida Supreme Court determined that this provision acts as both a mandate (to provide education) and a prohibition (against the state's use of resources to pursue education for its schoolchildren "through means other than a system of free public schools.")^x The Court also held that the program would violate Article IX, section 1, because the program failed to create "uniformity" by imposing regulatory obligations on participating schools that would require them to meet administrative requirements similar to those imposed upon public schools.

A very important feature of the *Holmes* decision – one that should dramatically limit its persuasiveness in North Carolina and elsewhere – is that the Florida Supreme Court ignored one of its fundamental judicial principles in reaching its result. The law in Florida requires that "a law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt."^{xi} Florida courts are only granted the authority to strike down laws that are "clearly contrary to some express or implied [constitutional] prohibition."^{xii} The majority in *Bush v. Holmes* admitted that they considered the constitutional provision at issue to be unclear and ambiguous,^{xiii} which should have compelled the court to resolve such ambiguity in favor of the program's constitutionality. By refusing to do so, the majority compromised its long-established principles and left the credibility of its result in question.

The Florida Supreme Court's treatment of its education provision stands in stark contrast to that of the Wisconsin Supreme Court – the only other state high court to previously consider a similar question. The Wisconsin court affirmed the constitutionality of the Milwaukee Parental Choice Program in the face of numerous constitutional challenges, including one based on the education and uniformity provisions of the Wisconsin Constitution.^{xiv} In *Davis v. Grover*, the plaintiffs argued that the private schools chosen by scholarship recipients had to satisfy the state's uniformity requirement, and that they could not do this because they provided a different "character of instruction" than their public school counterparts. The state supreme court disagreed, holding that the concern of the uniformity clause was that the legislature provide every Wisconsin student the opportunity to attend a public school with a uniform character of instruction. The Court further held that because the legislature had done so, and because the MPCP in no way prevented any child's access to that public education, the MPCP did not violate the uniformity clause.

Summarizing the point, the Court said: "The legislature has fulfilled its constitutional duty to provide for the basic education of our children. Their experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic

education in the public school system.”^{xxv}

Article IX, section 2(1) of North Carolina’s Constitution has some similarities to the Florida and Wisconsin provisions in that it also requires the state legislature to establish a system of free public schools, with a particular emphasis on the notion that the system should be “general and uniform.” If North Carolina adopts a school choice program, the state’s courts will first need to address arguments that the Constitution’s education article is intended to limit methods through which the Legislature is permitted to encourage education. If they decide that the legislature does have this authority, the next question will involve how the “general and uniform” clause should be understood in relation to private schools participating in the program.

This state’s courts have previously made clear that North Carolina’s Constitution allows the legislature to exceed its minimum requirements in attempting to improve education for the state’s citizens. The North Carolina Supreme Court has permitted legislation providing for high schools,^{xvi} kindergartens,^{xvii} and loans for college students attending both public and private institutions,^{xviii} even though none of these were anticipated by the Constitution. The state’s lower courts have followed the high court’s example in this regard, permitting the creation of a technical school for adults^{xix} and a local after-school educational service that required payment of tuition.^{xx} The North Carolina Supreme Court has also recognized that the provisions of Article IX, section 2 establish a *minimum* standard, but do not prevent the General Assembly from acting “in accordance with its judgment and in response to the wishes of the people” to “exceed the minimum fixed by the Constitution”.^{xxi}

Even more firmly supporting the legislature’s authority to take measures to advance education in North Carolina, the Court has held that the Constitution’s limitations on the government’s use of public funds^{xxii} will not prevent their being used for educational purposes.^{xxiii} In short, North Carolina’s courts have consistently and thoroughly upheld the General Assembly’s authority to undertake programs that will improve the education of the state’s citizens, outside and apart from the system of free public schools. There is no constitutional reason that a school choice program would be treated differently than those programs whose constitutionality the courts have already affirmed.

North Carolina’s courts have also long interpreted its “uniformity clause” to function in a very differently from the “uniformity” requirements of either the Florida or Wisconsin constitution.^{xxiv} In one of its earliest cases dealing with the uniformity clause, the North Carolina Supreme Court ruled that the clause was intended to ensure that the system of free public schools would apply and operate in the same manner everywhere in the state, “the purpose being to extend to all children... the same opportunity to obtain the benefits of education in free public schools.”^{xxv} The Court later clarified that the term “uniform” applies to the *system of public schools* and is complied with where the government has provided public schools “of like kind throughout all sections of the state and available to all of the school population of the territories contributing to their support.”^{xxvi} As long as the General Assembly has met this obligation, there is no reason for North Carolina courts to hold that a school choice program raises concerns based on this state’s uniformity requirement.

RELIGION CLAUSE CHALLENGES TO SCHOOL CHOICE PROGRAMS

Opponents of school choice also rely upon several other arguments when contesting the constitutionality of these programs. Recognizing that the majority of private education providers are affiliated with religious organizations, one challenge to any sort of a school choice program is that the First Amendment's Establishment Clause does not permit parents to choose their child's school if religious schools are among their options. In addition, many state constitutions have provisions dealing with religion that school choice opponents claim make parental choice programs unconstitutional. These will be addressed below.

School Choice and the First Amendment

In 2002 in *Zelman v. Simmons-Harris*,^{xxvii} the U.S. Supreme Court definitively established the constitutionality of school choice programs under the First Amendment to the U.S. Constitution – even where parents might choose for their children to attend religious schools. In that case, the Institute for Justice represented parents whose children had been permitted to leave Cleveland's failing public schools in favor of non-public schools better suited to their children's educational needs. The Court ruled that Cleveland's program was constitutional because it was not biased either for or against religion and because it was the parents, rather than any state actor, who would determine which school was best for their children. With this set of criteria having earned the support of a majority, properly constructed school choice programs will no longer have to be concerned with challenges under the Establishment Clause.

School Choice and State Religion Clauses

While the constitutional validity of school choice has been established at the federal level, school choice programs must also survive scrutiny under various types of state constitutional provisions, including the state versions of the Establishment Clause, provisions that deny the government's authority to compel someone to support religious groups, and

specialized provisions called Blaine Amendments.^{xxviii} Almost every state constitution has a "compelled support" clause, a Blaine Amendment, or both. Compelled support clauses are typically older than Blaine Amendments, written into a state's original constitution in an effort to end the historical policy of establishing or appropriating taxes for the purpose of supporting specially favored churches and their clergy. These provisions are almost never seen as being an impediment to religion-neutral programs that incidentally permit public funds to flow to religious organizations.^{xxix} Blaine Amendments, however, are somewhat different in both historical purpose and subsequent interpretation in state courts.

For much of the nation's history, public schools were conceived and designed to be "nondenominational" Protestant in character, with Bible reading and study a routine, indeed critical, part of the curriculum. Uncomfortable with the Protestant slant of the public schools, Catholics and other minority religious groups created their own schools and lobbied to receive direct public funding for their schools. Furious that Catholics – many of whom were recent immigrants – would try to exert control over public educational funding, Congressman James Blaine led an effort to amend the federal Constitution to forbid the use of public funds for "sectarian" schools. "Sectarian," of course, referred only to religious groups not content with the "nondenominational" Protestantism that prevailed in the public schools. When the proposed federal amendment failed, many states – some voluntarily, and most others as a condition of statehood imposed by Congress – adopted similar language into their own state constitutions.^{xxx} The U.S. Supreme Court has acknowledged that Blaine Amendments are the product of religious bigotry, but it has not yet had the opportunity to address whether states may, consistent with the federal Free Exercise Clause, continue to apply and enforce the provisions.^{xxxi}

North Carolina is unique among all of the states in that it has the only constitution that has none of these kinds of provisions – it does not even have an establishment clause. In the absence of such a limitation, the State is bound

only by the Establishment Clause of the First Amendment. As a result, the General Assembly may constitutionally adopt a school choice program that includes religious schools, so long as the program treats those schools with the same scrupulous neutrality that was offered under the voucher program upheld by the U.S. Supreme Court in *Zelman*.

CONCLUSION

School choice is an innovative, equitable solution to the question of how North Carolina's legislature can fulfill its constitutional mandate to provide all of its students the opportunity for the best available education. As has been demonstrated above, a well-crafted school choice program is extremely likely to survive judicial scrutiny under the relevant provisions of the state and federal constitutions. North Carolina's citizens and elected officials should carefully consider the opportunities that such a program would present for the state's schoolchildren and their families, as well as the overall benefits that school choice potentially holds for the quality of publicly funded education in the state.

- ⁱ “That a School or Schools shall be established by the Legislature for the convenient Instruction of Youth, with such Salaries to the Masters paid by the Public, as may enable them to instruct at Low Prices; and all useful Learning shall be duly encouraged and promoted in one or more Universities.” N.C. Const. of 1776, Article XLI.
- ⁱⁱ “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. Art. I, § 15.
- ⁱⁱⁱ N.C. Const. Article IX.
- ^{iv} Clive R. Belfield and Henry M. Levin, “The Effects of Competition on Educational Outcomes: A Review of US Evidence,” National Center for the Study of Privatization in Education, March 2002 (<http://www.ncspe.org/readrel.php?set=pub&cat=37>); Rajashri Chakrabarti, “Closing the Gap,” *Education Next*, Summer 2004; Caroline Hoxby, “Analyzing School Choice Reforms that Use America’s Traditional Forms of Parental Choice,” in Paul E. Peterson and Bryan C. Hassel, eds., *Learning from School Choice*, Brookings Institution, 1998.
- ^v Opponents of school choice typically bring claims under the Establishment Clause of the First Amendment as well as any claims that seem even remotely applicable under the state’s constitution.
- ^{vi} The North Carolina Supreme Court has held that even where the wording of part of North Carolina’s Constitution is *identical* to that of the U.S. Constitution, the state’s courts “are not bound by opinions of the Supreme Court of the United States” in construing the identical provisions. *State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999). *See also State v. Jackson*, 503 S.E.2d 101, 103-04 (N.C. 1998).
- ^{vii} *See Virmani v. Presbyterian Health Services Corp.*, 515 S.E.2d 675, 692 (N.C. 1999) (The North Carolina Supreme Court “is the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution.”); *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002) (“This Court will consider the history of the questioned provision and its antecedents, the questions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation[.]”).
- ^{viii} *State v. McClendon*, 517 S.E.2d 128, 132 (N.C. 1999); *see also State v. Jackson*, 503 S.E.2d 101, 103-04 (N.C. 1998).
- ^{ix} As will be discussed at length below, North Carolina is the only state in the nation whose constitution lacks a provision limiting the government’s interaction with religious groups. In the absence of such a limitation in the state Constitution, the state is bound only by the U.S. Supreme Court’s interpretation of the federal Establishment Clause.
- ^x *Bush v. Holmes*, p. 22.
- ^{xi} *Taylor v. Dorsey*, 19 So. 2d 876, 882 (Fla. 1944).
- ^{xii} *Chapman v. Reddick*, 25 So. 673, 677 (Fla. 1899).
- ^{xiii} *Bush v. Holmes*, p. 24
- ^{xiv} *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W.2d 602. In each of these cases the Wisconsin Supreme Court determined that the MPCP did not violate Article X, section 3 which reads: “The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable[.]”
- ^{xv} *Davis v. Grover*, 480 N.W.2d at 474.
- ^{xvi} *See Board of Education v. Board of Commissioners of Granville County*, 93 S.E. 1001, (N.C. 1917); *Elliott v. Gardener*, 166 S.E. 918, 922 (N.C. 1932).
- ^{xvii} *See Posey v. Board of Education of Buncombe County*, 154 S.E. 393, 397 (N.C. 1930).
- ^{xviii} *See State Education Assistance Authority v. Bank of Statesville*, 174 S.E.2d 551 (N.C. 1970).
- ^{xix} *See Benvenue PTA v. Nash County Board of Education*, 167 S.E.2d 538 (N.C.App. 1969).
- ^{xx} *See Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education*, 285 S.E.2d 110 (N.C.App. 1981).
- ^{xxi} *Frazier v. Board of Commissioners of Guilford County*, 138 S.E. 433, 440 (N.C. 1927).
- ^{xxii} Sections 6 and 7 of Article IX restrict the use of the state and county school funds, respectively, to the exclusive use in maintaining the “free public schools.” Article

V, section 2 limits the use of tax revenue to “public purposes.” The North Carolina Supreme Court has made clear that education is a “public purpose” as that phrase is used in Article V. There should, therefore, be no constitutional inhibition to the use of tax or bond revenue pursuant to this sort of an education program. The Court has not yet addressed whether the state or county public school funds may be used as part of a scholarship program that includes non-public schools. Any future school choice program could best sidestep a potentially negative ruling on this issue by forgoing the use of the state and county school funds.

^{xxiii} See *State Education Assistance Authority*, 174 S.E.2d at 559-60.

^{xxiv} The Florida Supreme Court determined that its provision required a uniform degree of regulatory control over schools receiving public funding. The Wisconsin Supreme Court said that its provision addresses the “character of education” offered in the public schools.

^{xxv} *City of Greensboro v. Hodgin*, 11 S.E. 586, 587 (N.C. 1890).

^{xxvi} *Board of Education v. Board of Commissioners of Granville County*, 93 S.E. 1001, 1002 (N.C. 1917).

^{xxvii} 536 U.S. 639 (2002).

^{xxviii} In *Bush v. Holmes*, Florida’s First District Court of Appeal struck down that state’s Opportunity Scholarship Program by ruling that it was inconsistent with Florida’s Blaine Amendment. School choice in North Carolina will not face such an obstacle.

^{xxix} There is one example, however, of a compelled support clause being read in a very restrictive manner. See *Chittenden Town School District v. Vermont Department of Education*, 738 A.2d 539, 563 (Vt. 1999).

^{xxx} A few states had already incorporated such provisions into their constitutions before Blaine got into the act.

^{xxxi} It should be noted that not every Blaine Amendment discriminates against religion on its face. Some states forbid the use of public educational funds at all private schools – see S.C. Const. Art. XI, § 4 – or prohibit the use of educational funds at any institution not under the exclusive control of the state – see Neb. Const. Art. VII, § 11.

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THE INSTITUTE FOR JUSTICE

The Institute for Justice, the nation's leading legal advocate for school choice, defends school choice programs nationwide. The Institute helped win a tremendous victory in the U.S. Supreme Court for school choice when it represented parents participating in Cleveland's parental choice program. IJ also successfully defended the school voucher program in Milwaukee and tax credit programs in Illinois and Arizona from legal attacks by school choice opponents.

The Institute is an Arlington, Va.-based public interest law firm, which through strategic litigation, training and outreach, advances a rule of law under which individuals control their own destinies as free and responsible members of society. It litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties, and to restore constitutional limits on the power of government. In addition, it trains law students, lawyers and policy activists in the tactics of public interest litigation to advance individual rights. The Institute was founded in September 1991. For more information, visit www.ij.org.

THE NORTH CAROLINA EDUCATION ALLIANCE

The North Carolina Education Alliance is dedicated to fundamental reform of North Carolina's education system. The Alliance believes that the focus of education should be on students rather than the system, because the system exists to serve the students.

The mission of the Alliance is to identify and publicize innovative, effective solutions to educational problems.

The Alliance was created in 1998 and is now directed by Lindalyn Kakadelis, a former teacher and Charlotte school board member. Its Steering Committee is made up of reform-minded school board members, county commissioners, business executives, educators and other local leaders. For more information, visit www.nceducationalliance.org.