MEMORANDUM

To: State Senator Florence Shapiro
Chair, Senate Education Committee

From: Dave Roland
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Subject: The Constitutionality of School Choice Under the United States and Texas Constitutions

I. Summary of Conclusions

After reviewing Article I, sections 6 and 7; Article III, section 56; and Article VII, section 1 of the Texas Constitution, and the religion clauses of the United States Constitution, we conclude that the Texas State Legislature could, in compliance with all applicable sections and clauses, craft school choice programs that would make it easier for parents to send their children to public or private schools of their parents' choosing. As long as any proposed legislation follows the guidelines for a constitutional school choice program provided by the United States Supreme Court in *Zelman v. Simmons-Harris*, neither encouraging nor discouraging religion, but merely permitting parents to choose religious schools for their children from among other public and private options, there is no constitutional barrier to religious schools' participation in a school choice program.

II. Introduction

The Institute for Justice appreciates the opportunity to participate in this discussion. In the fifteen years since our founding, we have been involved in the development of numerous legislative proposals intended to enhance the ability of parents to choose the best possible schools for their children. Where such proposals have passed, we have participated in their legal defense by representing families that benefited from the new programs, which have usually been challenged as violating the United States Constitution's establishment clause and corresponding provisions of the state constitutions. In some states, those who preferred more traditional educational finance schemes have challenged these programs under "local control" provisions that constitutionally limit the state legislature's authority to restrict local school districts' policies and use of funds. Other states have prohibitions against the passage of "local or special laws," which could be construed to prevent legislation that would only apply to select localities. And most recently, the Florida Supreme Court relied on the "uniformity" requirement of its education article to strike down a statewide school choice program. This letter is intended to address each of these concerns, and to assess the constitutionality of school choice under the federal and Texas constitutions.

III. What is School Choice?

Currently, parents of many school-aged children have only one choice for where they will send their children if they want the kids to have a free education: the local public schools to which they are assigned by the public school district, based on where they live. While wealthy parents can choose either to live in areas with the most desirable public schools or to pay for their children to attend private schools, many parents remain without viable educational alternatives because they can neither move away from neighborhoods with bad public schools nor afford the expense of private schooling. Their only real option is to send their children where the public school district tells them to go.[1]

Under a well-crafted school choice program, a government body ensures that parents have the financial means to select schools for their children from among a number of alternatives, which usually include all of an area's public schools and a number of private schools. These programs can come in different forms, but they usually present educational opportunities in one of three ways: 1) publicly-funded scholarships, 2) privately-funded scholarships, or 3) tax credits or exemptions. With publicly-funded scholarships, the government creating the program allows parents to direct funds drawn from the public treasury to the school of their choice.[2] Where a school choice program uses privately-funded scholarships, the government permits corporations to donate money to independent scholarship organizations in return for a tax credit. The scholarship organization then issues the funds as directed by the parents of children receiving the scholarships.[3] Governments may also offer tax exemptions or credits to parents who choose to send their children to schools outside of the public school system.[4]

Despite the opportunity that school choice provides to parents, some groups consistently use any available avenue to challenge the constitutionality of governmental efforts to help parents choose the best available education for their children. Concern about these sorts of legal challenges sometimes discourages legislatures from approving school choice programs. Based on our review of the applicable constitutional provisions, as interpreted by both Texas and federal courts, it is the opinion of the Institute for Justice that nothing in either the Texas Constitution or the Constitution of the United States should prevent the Legislature of this state from offering well-crafted school choice programs, giving parents the chance to select the best available school for their children.

IV. The Federal Religion Clauses

The religion clauses found in the First Amendment of the United States Constitution simply read: "Congress shall make no law regarding an establishment of religion, or prohibiting

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[1] The state legislature has approved four different types of charter schools, which allow students an alternative to traditional public schools, although the vast majority of charter schools in Texas are "open-enrollment" charters. The Texas Board of Education is currently allowed to approve up to 215 open-enrollment charter schools.

[2] This type of program has already shown great success in Milwaukee, Cleveland, and in the state of Florida.

[3] Corporate Tax Credit scholarships have been a useful part of the school choice program in Florida and have also been implemented in Pennsylvania and Arizona.

[4] Arizona, Iowa, Illinois, and Minnesota have successfully utilized tax credits as a way of enabling parental school choice.

the free exercise thereof." The Supreme Court recently decided *Zelman v. Simmons-Harris* (in 2002) and *Locke v. Davey* (in February 2004), two cases that deal with the general question of what limits, if any, the First Amendment's religion clauses set in regard to publicly-funded scholarship or school choice programs that include religious schools or students.

In *Zelman*, the Ohio teachers' union, accompanied by the American Civil Liberties Union and People for the American Way, tried to use the Establishment Clause to destroy a school choice program in Cleveland, Ohio, because it provided scholarships to low-income, inner-city students whose public schools were among the worst in the nation. The Institute for Justice helped the Ohio state government defend the school choice program by intervening on behalf of five families for whom the scholarships offered the only hope they had of a decent education for their children. Ruling in favor of the parents and the program, the United States Supreme Court held that the federal Establishment Clause does not bar parents from directing publicly-provided funds to religiously-affiliated schools as long as the school choice program neither favors nor disfavors religious schools or students.

The *Zelman* decision left open two significant questions: 1) whether the Free Exercise Clause could be interpreted in such a way as to *require* that religious options be included in school choice programs; and 2) whether state constitutional provisions violate the United States Constitution where they have been interpreted by the state supreme courts to forbid religious schools' inclusion in similar educational programs.

Many groups anticipated that these two questions would be resolved by the Court's decision in *Locke v. Davey*. That case involved a scholarship program created by the state of Washington for the purpose of assisting exceptional students of slender economic means who wished to go to college at a participating school within the state's borders. The Washington Constitution had long been interpreted to forbid the distribution of public funds to students who would use them to pursue ministerial training. Because of this historical interpretation of its constitution, the Washington Legislature specifically prohibited scholarship recipients from majoring in theology, even while the program allowed recipients to use the scholarships to study any other subject offered at the eligible religious schools. Davey met the neutral criteria and was awarded one of the scholarships, but had the award revoked when he announced his intention to major in Pastoral Ministry. He sued the state, claiming that it was a violation of students' Free Exercise of religion for the state to single out theological courses of study from a general educational benefit based on otherwise neutral criteria.

The Supreme Court decided that the exclusion of theology students from Washington's scholarship program did not violate Joshua Davey's Free Exercise of religion under the First Amendment. It is clear that the Court intended its holding to be very narrow, stressing 28 times in only 12 pages that the only issue ruled upon was whether states were required by the Free Exercise Clause to fund ministerial training, leaving for another case the question of whether Blaine Amendments will be held to violate the First Amendment's religion clauses. The Court also made clear that states continue to be free to decide for themselves whether or not they wish to include theology students in religion-neutral scholarship programs. What remains uncertain is precisely what standard or test the Court used in order to reach its conclusion in *Locke* and how the case will be applied to future circumstances. Justice Rehnquist, writing for the Court, noted

that there exists "play in the joints" between the Establishment Clause, which does not forbid the inclusion of religious institutions and individuals according to *Zelman*, and the Free Exercise Clause, which had been argued to *require* such an inclusion anywhere it was not forbidden. Justice Rehnquist reasoned that because many states have historically desired to avoid levying a state tax for the support of clergy and churches, state constitutional provisions intended to serve that purpose are not invalid under the Free Exercise Clause. While it is still too early to understand the full implications of how the Court will develop this idea of "play in the joints," we believe it is safe to say that the Court will impose no more restrictions on state legislatures than are imposed by the state constitutions. Therefore, the Federal Constitution does not prevent Texas from creating a religion-neutral school choice program such as the one approved in *Zelman*, but any program created must be consistent with the state's own constitution.

V. The Texas Religion Clauses

The question must turn, then, to the religion clauses of the Texas Constitution and their interpretation by the Texas Supreme Court. Recently, in *Williams v. Lara*, 52 S.W.3d 171 (2001), the Texas Supreme Court stated that sections 6 and 7 of Article I "together… are considered Texas' equivalent of the [Federal Constitution's] Establishment Clause." While the Court has not yet settled this question with finality, this statement implies that the state and federal Establishment-type provisions should be given at least a roughly parallel interpretation.[5] If the U.S. Supreme Court's interpretation of the First Amendment is seen as defining the requirement of the state's anti-establishment provisions, then that Court's decision in *Zelman* should control, and religion-neutral school choice programs would not violate the religion clauses of the Texas Constitution.

If, however, the Texas Supreme Court determines that the Texas Constitution requires a higher degree of separation between church and state than does the federal document, then federal precedent will be of little predictive value. After *Locke v. Davey*, we can reasonably assume that the U.S. Supreme Court will defer to a state constitution's religion clauses if they are interpreted to forbid the funding of vocational training for ministers. We do not know for certain whether the federal courts will extend the "play in the joints" logic to the context of children receiving a general, non-vocational education at sectarian primary and secondary schools, or whether those courts will determine that the Free Exercise Clause will not allow the exclusion of religious schools from the benefit of school choice programs. The most pressing question for Texas at present, then, is whether the state Supreme Court will determine that the state constitution requires such an exclusion. The Texas Supreme Court's limited case law concerning the state constitution's religion clauses suggests that it would not.

Texas' Constitution has one provision that limits the extent to which Texas is permitted to make laws regarding religion and religious institutions, and two provisions that limit the use of

[5] In *Tilton v. Marshall*, 925 S.W.2d 672, 677 n. 6 (Tex. 1996), the Texas Supreme Court explicitly refused to resolve the question of whether Article I, section 6, should *always* be understood as coextensive with the requirements of the First Amendment, although the Court in that case chose to apply the provisions as if their requirements *are* coextensive. In *Williams*, the Court discerned a violation of the federal Establishment Clause and so found no need to consider whether the Texas Constitution demanded more substantial limitations on government actors. *Williams*, 52 S.W.3d at 192.

state funds in regard to religious institutions. Article 1, section 6 of the Texas Constitution prohibits the State from requiring any person "to attend, erect or support any place of worship, or to maintain any ministry against his consent" and states that "no preference shall ever be given by law to any religious society or mode of worship." Section 7 of the same article reads: "No money shall be appropriated or drawn from the treasury for the benefit of any sect or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for such purposes." Article VII, section 5 requires that the available and permanent school funds be used exclusively for "the support of the public free schools."[6] The Legislature's authority to fund a school choice program that includes sectarian schools hinges on the interpretation of these provisions by the Texas Supreme Court.

In *Church v. Bullock*, 109 S.W. 115 (Tex. 1908), the plaintiff alleged a violation of Article I, sections 6 and 7, and Article VII, section 5, because the superintendent of Corsicana's public schools prescribed that prayers and readings from the King James Bible should be part of the "daily order." The Supreme Court took that occasion to uphold the schools' practices and to explain the purpose of the religion clauses of Texas' Article I. In regard to section 6, the Court said:

> "[T]he provision in our Constitution was a protest against the policy of Mexico in establishing and maintaining a church of State and compelling conformity thereto, and was intended to guard against any such action in the future. The primary purpose of that provision of the Constitution was to prevent the Legislature from in any way compelling the attendance of any person upon the worship of a particular church, or in any manner, by taxation or otherwise, cause any citizen to contribute to the support of 'any place of worship.' As used in the Constitution the phrase 'place of worship' specifically means a place where a number of persons meet together for the purpose of worshipping God." Id. at 118.

A school choice program merely allows parents to choose the school that their child will attend. It compels neither church attendance nor taxpayer support of a "place of worship," as the Texas Supreme Court defined those ideas in *Church*. It is therefore reasonable to assume that the Supreme Court will not find a religion-neutral program to violate the compelled support clause.

Addressing the importance of section 7, the court specifically noted that its purpose was "to forbid the use of public funds for the support of any *particular denomination* of religious people, whether they be Christians or of other religions." *Id.* at 117 (emphasis added). This explanation strongly suggests that expenditures from the public treasury would be permissible as long as they are not intended for the use of an identifiable religious group favored by the Legislature. If a school choice program avoids favoring any "particular denomination" and is crafted to do no more than give parents the opportunity to choose from an array of educational alternatives, it should be permissible under Article I, section 7.

Both Article I, section 7 and Article VII, section 5 were added to the Texas Constitution in 1876, when public schools in this state and elsewhere were far from the secular institutions we

[6] Both Article I, section 7 and Article VII, section 5 are Blaine Amendments, which will be discussed below.

are familiar with today. As a matter of historical fact, the public schools nationwide were conceived and designed to be "nondenominationally" Protestant in character, with bible reading and study a routine, indeed critical, part of the curriculum. This led to the creation of their own schools by Catholics and other religious groups unwilling to accept the indoctrination of their children in Protestant public schools, and to efforts by Catholics to receive equivalent direct public support for their schools. In an exercise of raw majoritarian power and political hypocrisy, states across the nation passed "Blaine Amendments" – named after Congressman James Blaine, who tried to add a similar amendment to the United States Constitution – in an effort to preserve the Protestant monopoly on the public educational purse by reserving public funding for their protestant public schools and denying any funding to the Catholic "sectarian" schools. Both the United States Supreme Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), and the Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606, *cert. denied*, 528 U.S. 921 (1999), have recognized that "hostility to aid to pervasively sectarian schools has a shameful pedigree" "born of bigotry" that "should be buried now." 530 U.S. at 828-29. Faced with this sordid pedigree, the Arizona Supreme Court wisely declined to give an expansive interpretation to its similar Blaine language, and we believe that the Texas Supreme Court would follow suit if called upon to address this question directly.

Already in Texas, the impact of the Blaine Amendments has been somewhat mitigated by interpretive efforts. As suggested above, the first Texas Blaine Amendment (Article I, section 7) has been read by the Texas Supreme Court as a natural counterpart to the compelled support clause, providing protections against the establishment of religion similar to those provided by the federal First Amendment. The second Texas Blaine Amendment, however, addresses a different issue and therefore could permit a separate potential challenge. Article VII, section 5(c) of the Texas Constitution reads:

> The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the Legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.

While the Texas Supreme Court has not yet directly addressed the Blaine language of this constitutional provision, the "Interpretive Commentary" on section 5(c) in Vernon's Texas Statutes and Codes Annotated explains:

> Until the end of the Civil War, education in Texas was, for the greater part, left in the hands of private and denominational enterprises, most of which secured financial assistance and land endowments from the state. In the two constitutions immediately following the Civil War (Const. 1866; Const. 1869) no constitutional limitations were placed on using the available school fund to support such institutions. During the debates on education in the Constitutional Convention of 1875, there were two violently opposed points of view, some delegates favoring a free public school system while others favored measures to preserve sectarian and private schools opposing state control and support of education. This latter group proved to be in a minority, and the majority contention – that, in order to align the

provision on education with Article I, section 7, forbidding the appropriation of money or property belonging to the state for religious purposes, it was imperative to prohibit any disbursement from the available school fund for sectarian institutions – won by a vote of 44 to 27.

From this history, we can draw a number of conclusions. First, since the compelled support clause predates the addition of the Blaine Amendments in the Texas Constitution of 1876, and it took the Blaine clauses to overturn Texas' previous practice of supporting private and religious schools with *direct* grants of land and money, the compelled support language was never interpreted to forbid those direct grants, let alone student scholarships that might at most *incidentally* benefit religious schools. Second, as their language reflects, the Blaine amendments themselves were aimed at prohibiting the then-current practice of making direct public grants and endowments to sectarian schools and religious institutions.[7] The provision of institutional aid previously undertaken by Texas had to be discontinued under these provisions, but that in no way implies that the state is now forbidden to provide scholarships to individual students who may choose to attend religious schools. Indeed, were that the case, various Texas student assistance programs in the area of higher education[8] would violate the broader Blaine language of Article I, section 7, and also the narrower language of Article VII, section 5 (insofar as they might use money from the permanent or available school funds), because Texas students can use those programs in attending religious colleges and universities.

Previous school choice legislation proposed in this state made a point of clarifying that the contemplated scholarships could not be appropriated from the available school fund. As long as this sort of limitation is included, and as long as revenue from the permanent school fund is also included, it appears that any potential problem with Article VII, section 5 can be avoided.[9] If, however, the program were to rely on either the permanent or available school funds, the Court would be called upon to determine both whether Article VII, section 5(c) forbids the distribution of these funds directly to children for the *purposes* of "public free" education, rather than to the "public free" schools established and administered by the state. As long as the Court upholds the constitutionality of state education funds flowing directly to the students, no reading of the constitution's religion clauses would prohibit such an arrangement simply because the student uses those funds to obtain services from a religious provider.[10]

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[7] As explained in the Interpretive Commentary to Article I, section 6, in Vernon's Annotated Texas Constitution, the "public schools" addressed in the education article of Texas' original constitution were, in fact, "*private* schools charging tuition and receiving bounty and support from the state in a per capita payment for each attending child." Further, this understanding—that private schools could be considered part of the system anticipated by the constitution—carried over to the earliest days of the current Texas Constitution of 1876, under which the prior "system of state-subsidized private schools" briefly resumed before giving way to the "free public education" of the New England mold.

[8] For example, Tuition Equalization Grants, Tex. Educ. Code Ann. § 61.227 (Vernon 2004), which offer educational funding to students attending private colleges and universities, including religiously-affiliated schools.

[9] Funding could conceivably be drawn from parts of the Treasury not specifically assigned for the use of public schools. In the alternative, the state could create a new revenue stream from either taxation or the lottery that could fund the program without using the permanent or available school funds.

[10] Several states with Blaine Amendments have upheld the constitutionality of publicly funded programs which assisted children attending religious schools, even where the attended schools might be benefited in some way. *See Embry v. O'Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) (statute constitutional "notwithstanding possible incidental benefit" to religious institutions); *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) (sectarian schools only

It must be noted that there are three early cases in which individuals challenged the constitutionality of some connection between public school officials and private schools. It would be useful to consider why these cases are readily distinguishable from the situation that would be presented by a school choice program.

In *Ussery v. Laredo*, 65 Tex. 406 (1886), the Court determined that a teacher of a private school was not entitled to funds promised him by the superintendent of public instruction, for two reasons: (1) the teacher had not been hired according to the proper procedure; and (2) the superintendent had no authority to distribute public funds to a private school. The *Ussery* Court *did not* hold that it would be unconstitutional for public funds to be offered directly to a teacher at a private school, merely that there had been no proper authorization of such a use.

In *Nance v. Johnson*, 19 S.W.2d 559 (Tex. 1892), the plaintiff alleged that a school should be denied public funds because it was situated on the property of the San Marcos Baptist Association, run by a member of the Baptist church, and school days were commenced with prayers. The *Nance* Court held that because the school system had an established administrative hierarchy and because the complainant had not exhausted their remedies within that system before approaching the courts, the courts had no jurisdiction over the issue. Again, the court reached no conclusion as to the constitutionality of such an arrangement.

In *Adkins v. Heard*, 163 S.W. 127 (Tex. Civ. App. 1914), taxpayers alleged that a public school was being conducted in a sectarian manner in violation of the Texas Constitution because the school was operated by Catholic nuns in a building owned by the members of an order of the Catholic Church. The Court of Civil Appeals refused to rule on the constitutionality of the arrangement because the plaintiffs had not first pursued the proper administrative remedy.

None of these cases establish any clear understanding of what circumstances would render unconstitutional an allocation of public funds to a private and/or sectarian school. In each of these cases, the courts refused to address the merits of the complaints. Therefore, they in no way contradict or supercede the interpretations of the Texas Supreme Court in *Church*, under which the Court should find a religion-neutral school choice program to be consistent with the state constitution's religion clauses.

"incidental beneficiaries" of permissible program); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) ("incidental benefit" permissible where statute had secular "primary effect"); *State ex rel. Creighton Univ. v. Smith*, 353 NW.2d 267, 272 (Neb. 1984) ("possible indirect benefit" to religion permitted where "primary purpose" of program is secular); *Americans United v. State*, 648 P.2d 1072, 1083-84 (Colo. 1982) ("remote and incidental benefit" to religious institution not "aid"); *Alabama Educ. Ass'n v. James*, 373 So.2d 1076, 1081 (Ala. 1979) (grants were for benefit of students, not institutions); *California Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974) (benefits to religion "incidental to a primary public purpose"); *Durham v. McLeod*, 192 S.E.2d 202, 203 (S.C. 1972) (aid was to students, not institutions); *Americans United v. Ind. School Dist. No. 622*, 179 N.W.2d 146, 156 (Minn. 1970) (benefits to religion "purely incidental and inconsequential"); *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967) (benefit to religion is "collateral effect", not primary purpose); *Chance v. Mississippi St. Textbook Rating and Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (statute's purpose was to aid students); *Bd. of Educ. v. Wheat*. 199 A. 628, 632 (Md. 1938) (aid was incidental byproduct of "proper legislative action").

VI. The Texas Education Article

Recently, in *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), the Florida Supreme Court relied on the education article of its constitution to hold that the Florida Legislature is prohibited from seeking to educate 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 section of the Florida Constitution that prohibits the use of public funds to aid religious organizations. Neither of these courts' interpretation of Florida's constitution should have any bearing on Texas courts' interpretation of their constitution.[11]

In response to the Florida court's decision, the Texas Federation of Teachers issued a press release claiming that Texas has a provision of its Constitution that, like Florida's constitution, requires the state to "provide a uniform system of free public education."[12] This statement is patently false.

Article IX, section 1, of the Florida Constitution proclaims the "adequate provision for the education of all children residing within [Florida's] borders" to be 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.") *Id.* at 407. 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.

Article VII, section 1, of the Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Unlike the Florida Constitution, Texas' education article has no uniformity clause, nor does it in any way purport to establish the public school system as the sole constitutionally permissible mechanism through which the Texas Legislature may attempt to educate its schoolchildren. Interpreting this article of the constitution, the Texas Supreme Court held, in *Mumme v. Marrs*, 40 S.W.2d 31, 33 (Tex. 1931), that "the enumeration in the Constitution of what the Legislature may or shall do in providing a

[11] 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 shape. Even where one state's constitutional convention drew inspiration from another state's constitution or the Federal Constitution, it should not be taken as a given that textual similarities necessarily lead to identical results when state courts apply their respective constitutions' provisions to identical facts. *See Davenport v. Garcia*, 834 S.W.2d 4, 12 (Tex. 1992) ("When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.").

[12] http://www.unionvoice.org/tft/notice-description.tcl?newsletter_id=1545000

system of education is not to be regarded as a limitation on the general power of the Legislature to pass laws on… the subject of education." In keeping with this principle, the Texas Supreme Court has consistently stated that the judiciary will not use this provision to second guess the *policies* through which the Legislature attempts to provide educational opportunities for its citizens; its role is merely to determine whether the Legislature has fulfilled the basic qualitative requirements established by Article VII, section 1.[13]

VII. Other Texas Clauses of Potential Application

Article III, section 56 of the Texas Constitution forbids the passage of "local or special laws." The Texas Supreme Court has determined that the purpose of this section is to "prevent the granting of special privileges and to secure uniformity of law throughout the state as far as possible," and to prevent vote-trading that would advance legislators' personal interests rather than public interests. George D. Braden, in his *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, succinctly described the intention of this section as being "to stop the Legislature from meddling in local matters." According to the Supreme Court's opinion in *Maple Run v. Monaghan*, 931 S.W.2d 941 (1997), "a local law is one limited to a specific geographic region of the State, while a special law is limited to a particular class of persons distinguished by some characteristic other than geography." In *Maple Run*, the Legislature admitted that it had created an extremely narrow classification within the statute because it intended that the law should apply only to one particular district. The Court struck down the statute, but reaffirmed the Legislature's "broad authority to make classifications for legislative purposes," so long as the classification is "broad enough to include a substantial class… based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished by the proposed legislation." The essential question that Texas courts will consider is whether the Legislature has a "reasonable basis" for any distinctions it makes. In every case in which the Texas Supreme Court found a statute to violate Article III, section 56, the Court acted to remedy apparently arbitrary classifications that effectively singled out cities, counties, or districts for the application of laws.

In *Robinson v. Hill*, 507 S.W.2d 521 (1974), the Supreme Court held constitutional a statute that provided for the licensing and regulation of bail bondsmen, but which exempted "persons executing bonds in counties having a population of less than 150,000 according to the last preceding federal census." The Court held that "the statute is not a special and local law even though Section 3(c) means that none of its provisions shall apply in counties having a population of less than 150,000." The *Robinson* Court noted that the reference to the census did not establish the 1970 census as a permanent benchmark, referring as the statute did only to the "last preceding federal census," but it is uncertain whether their holding would have changed if

[13] *See Neeley v. West Orange-Cove Consol. I.S.D*, 176 S.W.3d 746, 778 (Tex. 2005) ("The Constitution commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues involved in providing for public education… the judiciary's duty is to decide the legal issues properly before it without dictating policy matters."); *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563-564 (Tex. 2003) ("[T]he Legislature has the sole right to decide *how* to meet the standards set by the people in article VII, section 1, and the Judiciary has the final authority to determine *whether* they have been met."); *Mumme v. Marrs*, 40 S.W.2d 31, 35-36 (Tex. 1931) ("The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, excepts when so arbitrary as to be violative of the constitutional rights of the citizen.").

the statute *had* created such a benchmark. The Texas Commission of Appeals held in *City of Fort Worth v. Bobbitt*, 36 S.W.2d 470 (1931), that a statute was unconstitutional that authorized "cities having between 106,000 and 110,000 inhabitants by the 1920 census" to authorize bonds. Only the city of Fort Worth met this definition, and the court ruled that because Fort Worth was the only city that could ever meet this definition, the statute constituted a prohibited "local law." When the statute was later amended to apply to "cities in the State of Texas having a population of more than 100,000 inhabitants according to the last preceding United States census," the same court upheld its constitutionality. A similar question arose in *City of Houston v. United Compost Services, Inc.*, 477 S.W.2d 349 (Tex. Civ. App. 1972), in which the Court of Civil Appeals held constitutional a law that applied "only to cities having a population in excess of 900,000, according to the last preceding Federal Census or any future Federal Census. Again, the court seemed most concerned with whether the challenged statute could ever be applied to other cities.

In light of Article III, section 56, the Legislature will need to craft school choice legislation in such a way that it does not affect a "closed set" of school districts or cities. The most recent school choice bill considered by the Legislature proposed a pilot program focused on urban areas, bracketed so it would affect only Texas counties with a population of 750,000 or greater, and specifically the largest school districts in each of those counties where a majority of the students are economically disadvantaged and any other of those counties' districts in which 90% or more of the student population were classified as economically disadvantaged during the preceding school year. Since the population of counties is subject to fluctuation, any Texas county could eventually meet the criteria established for inclusion in the program and therefore the bill did not restrict the application of the statute to a specially identified, closed set of districts. Rather, the bill simply directed the program's effects to those districts whose children are most in need of flexibility in their educational options. As long as any school choice program the Legislature adopts is similarly open, courts will likely find it consistent with the requirements of Article III, section 56.

Another question sometimes raised where school choice programs are concerned is that of "local control." Texas has no constitutional provision that requires local control of education, and the Texas Supreme Court has long recognized that the principle does not bind the Texas Legislature. The Legislature has delegated almost all oversight of the state's educational system to the local school districts, but still retains the ultimate responsibility for meeting the educational requirements of the Constitution. The state's courts have recognized that this clearly includes the authority to dictate certain educational policies.

In *King v. Board of Trustees*, 555 S.W.2d 925 (1977), in the context of general regulation of employment within a given school district, the Court of Civil Appeals, El Paso, stated that "school districts are creatures of the Legislature with only those powers and responsibilities which have been granted to them by that body. The legislative control is absolute and any degree of autonomy or local control is by grace of legislative direction and policy." The Legislature's authority in these matters was confirmed in *Edgewood I*, 777 S.W.2d 391 (1989), where the Texas Supreme Court argued that the principle of local control would actually be *enhanced* if property-poor districts were provided new economic alternatives. It stressed that a community could only truly "exercise the control of making choices" if those economic alternatives were made available by the Legislature's plan. The Supreme Court added in

Edgewood III, 826 S.W.2d 489 (1992), that "[t]he Constitution does not prescribe the functions for a school district, and we have long regarded the Legislature to have plenary power to constitute and regulate school districts." In light of these precedents it seems clear that the Texas Constitution does not impose a "local control" limitation on the Legislature's ability to craft educational programs generally, and school choice programs in particular.

VIII. Conclusion

Based upon our review of the aforementioned provisions of the United States and Texas Constitutions, we conclude that neither of these documents would prevent the passage and implementation of well-crafted school choice legislation for the educational benefit of Texas families.

We appreciate the opportunity to provide you with our views. Should Texas eventually adopt school choice legislation, the Institute for Justice would seriously consider assisting in the defense of the program against a constitutional challenge.