THE 2017 CONSTITUTION REVISION COMMISSION:
SCHOOL VOUCHERS AND CHOICE IN EDUCATION TO BE MAJOR
POINTS OF INTEREST

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"Education of the Masses becomes the first necessity for the
preservation of our institutions."1

I. INTRODUCTION

In 1968, the Florida Constitution was amended to allow the citizens of Florida the ability to vote and to make changes to the constitution every twenty years.2 This amendment ensured that this "dynamic document" moved with the growth of population and met the "social, structural, and economic needs" of the state, by never allowing the document to become outdated.3 This is a stark contrast compared to the U.S. Constitution, which takes monumental hurdles in order to add,


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2 FLA. CONST. art. XI, § 2 (showing that the CRC is one of five ways to amend the Florida Constitution); FLORIDA CONSTITUTION REVISION COMMISSION 3, revisefl.com/index.php/resources/citizens-guide.

3 Billy Buzzett & Steven J. Ulfedler, Constitution Revision Commission: A Retrospective and Prospective Sketch, 4 Fla. B. J., 22, 22 (1997), https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/32F3746D496CEC6185256ADBO05D611C.
delete, or amend any parts of the Constitution.4

The Constitution Review Commission ("CRC") is a group of thirty-seven, hand-selected5 members tasked with making final recommendations for the citizens to vote and to consider the proposed constitutional amendments.6 The process begins approximately fifteen months before November elections.7 To make recommendations to the voters, the CRC reviews proposed amendments submitted by Florida citizens, holds public hearings on those initiatives, meets regularly with the designated committee and subcommittees to discuss the proposals, writes up the proposed amendment, and submits it for ballot consideration.8

Since the first Florida revision of 1968, education has been one of the CRC's major points of interest.9 The CRC's attention to education is attributed to the fact that article IX of the Florida Constitution is "the only substantive government function that has its own constitutional article."10 In addition to education's prominence in the Florida Constitution, voters historically rate education as one of their primary concerns in state and federal elections.11 Despite governmental efforts to reform education, Florida's educational system has dropped in national ratings and is the subject of numerous litigation

5 FLORIDA CONSTITUTION REVISION COMMISSION, supra note 2. The CRC is appointed by the governor, the speaker of the Florida House of Representatives, the president of the Florida Senate, the chief justice of the Florida Supreme Court, and the attorney general of Florida. Id.
6 Id.
7 Id.
8 Id.
9 Jon Mills & Timothy McLendon, Strengthening the Duty to Provide Public Education, 9 FLA. B. J. 28, 28 (1998) (stating that of the 187 CRC proposals, twenty dealt in some way with public education and ten of these concerned either education funding or substantive educational quality, as opposed to the structure of school boards or the state board of education).
10 Id.
battles.\textsuperscript{12} Currently, according to the January 2016 Education Week Quality Counts Report, Florida has dropped to thirty-out-of-fifty in national rankings.\textsuperscript{13} Florida was ranked sixth nationally in 2013;\textsuperscript{14} however, due to changes in policy and changes in ranking formulas, Florida has drastically declined since 2014.\textsuperscript{15} Although Education Week cautions against year-to-year comparisons due to the change in ranking formulas,\textsuperscript{16} the average voter may not make that distinction because ranking is still a top concern.\textsuperscript{17}

In the 19th century, the government began assuming the role of education, which was formerly undertaken by churches and families.\textsuperscript{18} The changing of the times and importance of education is evident in President Ulysses S. Grant’s Seventh Annual Message to Congress on December 7, 1875.\textsuperscript{19} President Grant warned Congress that education is the “greatest importance that should be possessed” because our form of government requires intelligence to cast “a vote with a right understanding of its meaning.”\textsuperscript{20} In addition, President Grant stressed that education is not just of great importance, but it is the duty of the government, including the states, to provide free public school education by creating state constitutional amendments on education.\textsuperscript{21} However, fundamental questions remain. What is the role of the

\begin{footnotesize}
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\item\textsuperscript{12} Eric Barton, \textit{Florida education on trial: Lawsuit makes case that system is unfair to poor}, \textit{MIAMI HERALD} (Mar. 12, 2016, 9:51 PM), http://www.miamiherald.com/news/local/education/article65739822.html.
\item\textsuperscript{13} \textit{QUALITY COUNTS MARKS 20 YEARS: REPORT EXPLORES NEW DIRECTIONS IN ACCOUNTABILITY 3} (2016), http://www.edweek.org/media/qualitycounts2016_release.pdf.
\item\textsuperscript{15} Id.
\item\textsuperscript{16} Id.
\item\textsuperscript{17} Frank Newport, \textit{Democrats, Republicans Agree on Four Top Issues for Campaign Gallup}, \textit{GALLUP}, http://www.gallup.com/poll/188918/democrats-republicans-agree-four-top-issues-campaign.aspx (last visited Nov. 10, 2016).
\item\textsuperscript{18} \textit{THOMAS EVERETTE COCHRAN, HISTORY OF PUBLIC- SCHOOL EDUCATION IN FLORIDA 1} (The New Era Printing Co. University of Pennsylvania 1921).
\item\textsuperscript{19} Grant, \textit{supra} note 1.
\item\textsuperscript{20} Id.
\item\textsuperscript{21} Id.
\end{itemize}
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government? Has the time come for the state to facilitate education through means other than public schools? If so, what are the implications for the future? Will it inevitably result in the neglect of public schools in areas of poor socioeconomic development? Will such a policy lead to fractionalization and greater division and conflict among polarized groups and the state? Will greater school choice give the power to families and individuals? Will these powers create innovative educational techniques and methods? Will such "choice" opportunities benefit minorities who might otherwise be subject to poorly performing schools? What is the role, if any, of religious or sectarian schools in public education?

The goal of this Article is to examine the constitutional history of public education in Florida and to present likely discussion the CRC may have on school mandates, voucher programs, and the no-aid-to-religion clause. Part II of this Article provides a historical overview of public school education in Florida and the evolving role assumed in providing education. Part III examines Florida’s educational mandate and the role of the government established under that mandate. Part IV discusses the judicial and legislative history of the school voucher program in Florida and how article I, section 3 of the Florida Constitution, known as the "no-aid provision," relates to alternative education. Part V of this Article concludes with the current challenges to school vouchers in Florida and the new issue of standing.

II. HISTORY OF PUBLIC SCHOOL EDUCATION IN FLORIDA

Public education is a "fundamental value" of the people of the State of Florida; however, that was not the original viewpoint in Florida or the viewpoint of much of the country during the conception of the United States. The responsibility of education rested on

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22 See infra Part II.
23 See infra Part III.
24 See infra Part IV.
25 See infra Part V.
26 FLA. CONST. art. IX.
27 Cochran, supra note 18.
families and religious leaders. The government’s role in education focused on property rights and not the essentials of education.

Education in Florida dates back to 1822, prior to Florida becoming a state, when the “General Government” reserved “every sixteenth section of land” for primary schools. In 1845, Florida’s first education constitutional provision focused on land and provided authority to the townships to ensure prevention of waste and not the quality of education. However, the focus on townships’ ownership of education quickly shifted to the state at-large. In 1849, Florida’s legislature adopted an act to provide common education for children ages five through eighteen. This act created superintendents, county superintendents, and school trustees to oversee the school districts. The act also provided tasks such as making annual reports to the governor, apportioning taxes to school districts, holding meetings with voters, hiring teachers, purchasing land, and performing any other essential task for the common education system.

Although the act was a step in the right direction, it had serious flaws because “it was too restrictive with the regard to the investment of the school fund.” Thus, another legislative act was created in 1851 to allow counties to tax property, real and personal, to generate funds for the common school, as long as the tax did not exceed four dollars annually for each common school-age child. Initially, public education was not producing fruitful results because few counties actually taxed its citizens to support education; however, by 1857-58, “there was an awaking of interest.” Unfortunately, education interest

28 Id. at 1.
29 Id. at 5.
30 Id. at 1.
31 Id. at 16.
32 Id. at 20.
33 Id. at 17. Unfortunately, this Act only recognized education for white children.
34 Id. at 16-17.
35 Id. This is not an exhaustive list.
36 Id. at 18.
37 Id. at 19.
38 Id. at 23.
39 Id. at 26.
declined in 1861-65 as the focus shifted to the American Civil War and racial division.\textsuperscript{40} Even after the war, the instability of the current state left Florida with no funds to support education, and continual racial fears of Reconstruction loomed over the state.\textsuperscript{41} The lack of interest was temporary, and Florida's legislature saw a need to educate all of its citizens, which was evident in Florida's first and strongest educational mandate established in 1865.\textsuperscript{42} This mandate has evolved since the first mandate due to several attempts by legislators, the Florida Supreme Court, and the CRC to address the role of government and its duty to educate its citizens.

With the increasing strength of Florida's educational mandate, the legislature passed Governor Jeb Bush's Florida's Opportunity Scholarship Program.\textsuperscript{43} This plan meant to provide high quality education to families with limited financial means by giving those families in failing school districts vouchers to attend private schools.\textsuperscript{44} Within four years of the passage of the law, the voucher program faced legal challenges because the program allowed payment of state funds to pay for education in religious or sectarian schools.\textsuperscript{45} The 2007 Taxation Budget Reform Commission proposed an amendment to the Florida Constitution, which allowed education funding, through vouchers, to sectarian schools.\textsuperscript{46} Those changes again became subject to litigation and were stricken from the ballot because the proposed amendment was outside the authority of the commission.\textsuperscript{47} Legislators amended the Opportunity Scholarship Program in 2016 in an attempt to avoid at least some of the constitutional problems that doomed the governor's original program.\textsuperscript{48} However, the amended program remains in serious doubt.

\textsuperscript{40} Id. at 28.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 35.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 739, 741, 745, 753.
\textsuperscript{46} Ford v. Browning, 922 So. 2d 132, 132, 135 (Fla. 2008).
\textsuperscript{47} Id. at 132.
\textsuperscript{48} FLA. STAT. § 1002.395(3)(c) (2016).
with pending litigation.\textsuperscript{49}

Given the uncertainty of the current school choice program and the continual question surrounding the government’s role in educating its citizens, the CRC is likely to address the issues of Florida’s education mandate and the use of school vouchers as an alternative or supplement to public education.

\textbf{III. Florida’s Mandate}

In 1868, in an attempt to revive interest and fairness in education, the legislature amended Florida’s education provision in its constitution.\textsuperscript{50} Florida’s educational constitution provision stated:

\begin{quote}
It is the \textit{paramount duty} of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference. The Legislature shall provide a uniform system of Common schools, and a University, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.\textsuperscript{51}
\end{quote}

This mandate created the foundations for a public school system and established the role of the state in providing the “uniform system of Common schools . . .”\textsuperscript{52} The Florida Legislature amended the mandate in 1885 by removing the language “paramount duty” and by stating that “[t]he legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.”\textsuperscript{53} The adoption of the 1968 constitution brought with it the substantial revision of the education article, creating article IX, section 1 and removing “liberal maintenance” and establishing an “adequate provision.”\textsuperscript{54} The adequate provision remains in the Florida Constitution to this day.\textsuperscript{55} In 1978, the first CRC attempted to make

\textsuperscript{49} McCall v. Scott, 199 So. 3d 359, 361 (Fla. Dist. Ct. App. 2016).
\textsuperscript{50} Mills & McLendon, \textit{supra} note 9.
\textsuperscript{51} \textit{Id.} (emphasis added).
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
revisions to Florida’s mandate by granting its citizens the right “to an efficient and high quality education from the kindergarten to the secondary level.” However, this proposal was never adopted. The 1968 educational mandate remained the same until the 1997-98 CRC.

A. Florida’s Mandate: The 1998 Change

From 1968 through 1997, the “adequacy” of education and the right of its citizens were in debate. In Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, the Florida Supreme Court affirmed the dismissal of a complaint alleging that the legislature was in violation of the mandate to make adequate provisions for the public school system. Appellants urged the court to hold that “adequate education is a fundamental right” because the State failed to “allocate adequate resources for a uniform system of free public schools...” The court held that the phrase “adequate provision” lacked specificity and was not capable of enforcement by a court. Under the text of the constitution, the court determined that the adequacy provision was not for the courts to define, but it was within the role of the legislature.

In 1998, in response to Coalition for Adequacy, the 1997-98 CRC addressed in detail proposed changes to article IX. Certain advocates urged the CRC to propose language to provide standards and greater specificity in order to create a mandate that could be enforceable against the legislature. The CRC set forth twenty education proposals, of which ten proposals “concerned either education funding or substantive educational quality...” Two proposals, Proposal 157

56 Id.
57 Id.
58 Id.
59 Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 402 (Fla. 1996).
60 Id.
61 Id. at 406.
62 Id. (stating that the legislature’s role is to define the meaning of “a uniform system of free public schools” (citing Fla. Dep’t of Edu. v. Glasser, 622 So. 2d 944 (Fla. 1993))).
63 Mills & McLendon, supra note 9.
64 Id.
65 Id. (stating that the CRC proposed 187 changes, of which twenty proposals
and Proposal 181, passed out of the committee, addressing questions from *Coalition for Adequacy* and about the state’s role in education.\(^{66}\)

Proposal 157 sought to provide a standard in which “adequacy could be measured” by making education a fundamental right.\(^{67}\) In addition, Proposal 157 defined “adequate provision as the provision of financial resources to achieve a thorough, efficient, high-quality, safe, and secure system of public education for all public schools and access to public institutions of higher learning or education.”\(^{68}\)

Proposal 181 sought to provide a standard in which “adequacy could be measured” by making education not a fundamental right but a “fundamental value.”\(^{69}\) Fundamental value, first introduced in the dissenting opinion in *Coalition for Adequacy*, provided a standard for adequacy without the fear of placing huge burdens on the school districts.\(^{70}\)

The CRC adopted the two proposals\(^{71}\) and placed them on the 1998 ballot for voters to decide as Revision 6.\(^{72}\) It is clear the intent of the CRC was to endorse a strong educational standard by making adequate education a fundamental value and by “restoring education” as a paramount duty, in which the Florida government must provide an educational system that is “efficient, safe, secure, and high quality.”\(^{73}\) Article IX, section 1(a) was amended in 1998 and currently states in relevant part:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its

concerned public education).

\(^{66}\) *Id.*

\(^{67}\) *Id.*

\(^{68}\) *Id.*

\(^{69}\) *Id.* at 32-33.

\(^{70}\) *Id.* at 32; see *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 410 (Fla. 1996) (Anstead, J., dissenting).

\(^{71}\) *Mills & McLendon*, *supra* note 9, at 32-33.

\(^{72}\) *Id.* at 33.

\(^{73}\) *Id.* at 34.
borders. Adequate provision shall be made by law for a uniform, efficient, safe, and secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .

**B. Florida’s Mandate Today**

Despite significant attempts by the 1997-98 CRC, Florida’s educational mandate remains subject to significant debate and uncertainty. In *Haridopolis v. Citizens for Strong Schools, Inc.*, the First District Court of Appeal (“First DCA”) certified a question to the Florida Supreme Court asking: What judicial standards “can be used to determine the adequacy, efficiency, safety, security, and high quality of public education?” The respondents argued that the government failed to provide its citizens adequate education by “providing insufficient funding for public education, shifting responsibilities for educational funding to local government, providing inadequate resources for teachers’ salaries in particular, and adopting a so-called accountability policy that is an obstacle to high quality.”

Petitioners argued that the judiciary branch lacked jurisdiction because the claims were a political question and adjudicating the claims was a violation of separation of powers. The Florida Supreme Court declined the Petition for Review.

Judge Wolf, in his concurring opinion, raised two fundamental questions the CRC may want to address. The first fundamental question was the right of its citizens to enforce and implement their will regarding Florida’s educational mandate. The second fundamental question was the role of the judiciary, if any, in deciding whether Florida’s government has provided its citizens sufficient support for

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74 FLA. CONST. art IX § 1(a) (1998).
75 Mills & McLendon, see supra note 9.
77 Id. at 467.
78 Id.
79 Haridopolos v. Citizens for Strong Schs., Inc., 103 So. 3d 140 ( Fla. 2012 unpublished opinion).
80 Haridopolos I, 81 So. 3d at 473 (Wolf, J., concurring).
81 Id. at 473-74.
educational purposes.\textsuperscript{82} If the citizens adopt provisions to the Florida Constitution requiring their legislators to make laws to provide an efficient, safe, secure, and high-quality education and the legislators fail to do so, what is the remedy available to implement the people’s will? Although the CRC provided a strong mandate to provide education, the mandate failed to “provide measurable goals by which the court could judge legislative performance and enforce the provision in a particular manner.”\textsuperscript{83}

The mandate established education as a fundamental value and imposed a paramount duty on the legislature, but how do we determine whether Florida has a “uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . .”?\textsuperscript{84} Should each school district receive equal funding? Should each educational program guarantee a high success rate? What is the role of each local government?\textsuperscript{85} What is the role of the families to ensure their children utilize the resources available? How is fundamental value assessed? Is it based on national rankings or individual state scores? Does the mandate or other provisions within the Florida Constitution, such as the no-aid clause, hamper the legislature from performing their paramount duty? Does the mandate set forth unrealistic expectations? If so, what is the proper balance to ensure quality education in Florida?

These unresolved questions, along with others, are precisely why the CRC is likely to readdress the educational mandate.

\textbf{IV. School Choice}

In 1999, after the passage of Florida’s new mandate, Governor Jeb Bush signed into law a compressive education bill that would

\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 474.
\textsuperscript{84} \textit{FLA. CONST.} art XI § 1(a) (amended 1998); \textit{see generally} Mills & McLendon, \textit{supra} note 9 (discussing five series of questions raised during the debate. These questions include the constitutionality of the mandate prior to change, more money spent, concerns over litigation, obligation of the state, and impacting the uniformity standard.).
\textsuperscript{85} \textit{See} Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 406-07 (Fla. 1996).
provide educational opportunities to low-income families in failing school districts.\textsuperscript{86} The legislature created two programs to offer families education choices: (1) the Opportunity Scholarship Program ("OSP") and (2) the Florida Tax Credit Scholarship Program ("FTCSP").\textsuperscript{87}

The OSP, established in 1999, allowed a student who attended a failing school two choices.\textsuperscript{88} The student could either attend another school that was performing higher or use a scholarship fund, provided by the state, to attend a private school of their choice.\textsuperscript{89} After extensive litigation and the court finding portions of the OSP unconstitutional, legislators sought different solutions.

The FTCSP, established in 2001, allowed students, regardless of whether they were in a failing school system, to attend any school they chose.\textsuperscript{90} Under the OSP, the State paid the scholarship voucher directly from the treasury.\textsuperscript{91} Under the FTCSP, Scholarship Funding Organizations ("SFO") fund the scholarships.\textsuperscript{92} Voluntary contributions from individuals and corporations provide funding to SFOs in return for a dollar-to-dollar credit against tax liability owed to the state.\textsuperscript{93}

\section*{A. Bush v. Holmes}

The issue of school vouchers came before the Florida Supreme Court in \textit{Bush v. Holmes}, decided in 2006.\textsuperscript{94} Central to the court's decision was the distinction between the foundational principles of the U.S. Constitution, on the one hand, and state constitutions, such as Florida, on the other.\textsuperscript{95} The U.S. Constitution represents a grant of

\textsuperscript{86} Wood & Castro, \textit{supra} note 43.  
\textsuperscript{87} McCall v. Scott, 199 So. 3d 359, 362 (Fla. Dist. Ct. App. 2016).  
\textsuperscript{89} Id.  
\textsuperscript{94} Bush v. Holmes, 919 So. 2d 392, 397 (Fla. 2006).  
\textsuperscript{95} Id. at 405-06.
power from the states to the federal government.\textsuperscript{96} Under the U.S. Constitution, in order to consider whether a certain function of Congress or the president is authorized, a court must find a grant of authority to do so.\textsuperscript{97} Absent an express or implied grant of power, the action is not authorized or constitutional.\textsuperscript{98} Under state constitutions, such as Florida's, the constitutionality of state action is based on different foundational principles.\textsuperscript{99} Florida's state government is deemed to have authority to exercise any power inherent in the concept of a sovereign state.\textsuperscript{100} Such inherent authority could be seen as bottomed in the concept of a social contract among individuals.\textsuperscript{101}

Accordingly, when considering the constitutionality of action by the State of Florida, the question is not whether there is authority for such action in the constitution; rather, the question is whether there are any provisions in the constitution that prohibit the government from taking action. In Bush \textit{v.} Holmes, the governor's advocates acknowledged the mandate for a high quality system of free public schools.\textsuperscript{102} If that mandate is not being met, then political or perhaps legal action could be taken to force the legislature or executive branch to take corrective action.\textsuperscript{103} However, the constitution does not explicitly prohibit the legislature from providing vouchers to families whose children are attending failing schools in order to empower those families to find better educational opportunities for their children.\textsuperscript{104}

\textsuperscript{96} See U.S. CONST. art. I § 8.
\textsuperscript{97} Youngstown Sheet & Tube Co. \textit{v.} Sawyer, 343 U.S. 579, 585-86 (1952).
\textsuperscript{98} For example, the Affordable Care Act was only upheld as authorized by the power of Congress to impose taxes. See Nat’l Fed’n of Indep. Bus. \textit{v.} Sebelius, 132 S. Ct. 2566, 2584 (2012).
\textsuperscript{100} This, of course, is subject to the Supremacy Clause and the primary authority of the powers granted by the U. S. Constitution. U.S. CONST. art. VI, cl. 2.
\textsuperscript{101} Such a social contract was first articulated by Thomas Hobbs and Jean-Jacques Rousseau. The sovereign powers associated with a government generally include (1) the power to raise revenue, (2) the power to organize, and (3) the power to police. \textsc{John F. Cooper, Tishia A. Dunham, \& Carlos L. Woody,} \textsc{Florida Constitutional Law Cases and Materials} 3-4 (Carolina Academic Press, 5th ed. 2013).
\textsuperscript{102} Bush v. Holmes, 919 So. 2d 392, 400 (Fla. 2006).
\textsuperscript{103} Id. at 412.
\textsuperscript{104} Id. at 412-13.
Florida’s legislature is free to provide vouchers to affected families in the same way that the legislature would be free to appropriate monies to protect environmentally endangered lands, build a statewide high speed rail transit system, or even engage in a state funded space exploration program.  

The Bush v. Holmes majority, however, emphasized that the constitution not only mandated that adequate protection be made for education but that the mandate also states the way in which it was to be met; that is, by and through a system of free public schools. The dissenters argued that the mandate was for a system of free public schools, not that a system of schools should provide education. However, the majority countered that when a statute or constitutional provision provides that a certain action will be done in a certain manner, there is an implied limitation that prohibits that action from being carried out in any other way. The dissent challenged the majority’s reliance on the statutory rule of construction “the expression of one thing implies exclusion of another” as being inappropriate in the construction of broad constitutional principles. Indeed, this remains at the core of the controversy surrounding Bush v. Holmes. The majority contended that the rule is an appropriate way in which to resolve an ambiguity. The dissent argued that resorting to the rule was not necessary and that it is inappropriate and inconsistent with the construction of constitutional provisions to interpret the mandate for a system of public schools as requiring that public schools should be the exclusive method to educate children.

B. The No-Aid-to-Religion Clause

To maintain the delicate balance between church and state, the U.S. Constitution and the state constitutions contain clauses that

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105 Id. at 398.
106 Id. at 405.
107 Id. at 413-16.
108 Id. at 415.
109 Id. at 407, 413.
110 Id. at 425.
111 Id. at 408.
112 Id. at 423-25.
mandate a separation between both church and state.\textsuperscript{113} The First Amendment's Establishment Clause has been consistently held to require neutrality between the different religions and between religion and nonreligion.\textsuperscript{114} Hence, the Supreme Court's decision in \textit{Zelman v. Simmons-Harris} allowed for a state program to provide financial support to parents of children in failing schools so that the parent can use that support to send their child to a more successful school of the parent's choosing, including schools with religious affiliations.\textsuperscript{115}

Establishment Clause challenges are evaluated under several different tests crafted by the Supreme Court.\textsuperscript{116} However, the primary test in circumstances of governmental financial support to religious institutions or organizations is the test applied in \textit{Lemon v. Kurtzman}.\textsuperscript{117} The \textit{Lemon} test asks first whether the challenged laws and regulations have a secular purpose.\textsuperscript{118} Without a clear secular purpose, the challenged act is in violation of the Establishment Clause.\textsuperscript{119} Furthermore, a law can be invalidated based on factors that suggest an excessive entanglement between church and state.\textsuperscript{120} Likewise, a violation of the Establishment Clause occurs if the primary purpose of the law or regulation is to advance or prohibit religion.\textsuperscript{121}

The cross section of the Establishment Clause and the Free Exercise Clause is where the disagreement over modern-day interpretations of the Blaine Amendment arises. The Establishment Clause does mandate that there be no state "establishment of religion."\textsuperscript{122} However, the Free Exercise Clause requires laws to treat everyone in a neutral manner, irrespective of their religious

\textsuperscript{114} See Smith, 494 U.S. at 879; see also Lukumi, 508 U.S. at 531.
\textsuperscript{115} Zelman v. Simmons-Harris, 536 U.S. 639, 683-84 (2002).
\textsuperscript{117} Lemon, 403 U.S. at 612.
\textsuperscript{118} \textit{Id}.
\textsuperscript{119} \textit{Id} at 613.
\textsuperscript{120} \textit{Id}.
\textsuperscript{121} \textit{Id} at 612.
\textsuperscript{122} U.S. CONST. amend. I, cl. 1.
motions.\textsuperscript{123} While neutrality seemed to be the cornerstone for a constitutional analysis under the religion clauses, the Supreme Court’s implementation of the “play in the joints” theory between the Establishment Clause and the Free Exercise Clause makes clear that complete neutrality between religion and nonreligion is no longer required by the First Amendment.\textsuperscript{124} The Supreme Court’s interpretation of the Establishment Clause, permitting the government to financially support individuals using those funds for religious organizations,\textsuperscript{125} and the Free Exercise Clause, requiring states to treat neutrally all individuals regardless of religious motivations,\textsuperscript{126} left in limbo whether the Blaine Amendment was a violation of the U.S. Constitution.

In \textit{Bush v. Holmes}, the en banc First DCA decision rejected two significant arguments advanced in support of the school voucher program.\textsuperscript{127} First, the court rejected the argument that paying funds to sectarian schools in return for the schools providing education was paying for service and not providing aid.\textsuperscript{128} The court held that providing even insignificant funds to the school meant that the State was necessarily providing aid for that school.\textsuperscript{129} The court further found that the schools were sectarian, in the sense that specific religious teaching were part of the school’s curriculum.\textsuperscript{130} The court also rejected the argument that the State disbursed the funds to the parents, not to the sectarian schools, and that it was the parents who chose whether to use the funds at a sectarian or nonsectarian school.\textsuperscript{131}

It is also significant that the First DCA’s decision expressly, and in detail, addressed the history of Florida’s no-aid-to-religion clause in article 1, section 3.\textsuperscript{132} This amendment traced its history back to an era

\begin{thebibliography}{99}
\bibitem{123} \textit{Employment Div.}, 494 U.S. at 876; \textit{Church of Lukumi Babalu Aye}, 508 U.S. at 533.
\bibitem{126} \textit{Locke}, 540 U.S. at 712.
\bibitem{128} Id. at 343-44.
\bibitem{129} Id.
\bibitem{130} Id. at 346.
\bibitem{131} Id.
\bibitem{132} See id. at 348-49.
\end{thebibliography}
in the late 19th century, when many states adopted similar amendments. These amendments were inspired by political advocacy from congressional representative James G. Blaine. The amendments were advanced in reaction to a rise in immigrant population and the growth of sectarian institutions, primarily Roman Catholic schools. The First DCA’s en banc opinion expressly rejected the notion that the Blaine Amendment was born of religious bigotry, noting a similar conclusion reached by Chief Justice Rehnquist in his opinion in *Locke v. Davey.* In contrast, in 2011, the Florida Legislature passed a joint resolution proposing an amendment to the state constitution that would in effect eliminate the “no-aid clause” from the Florida Constitution. In its findings in support of the proposed amendment, the legislature stated, “Florida’s Blaine Amendment language was born in an atmosphere of, and exists as a result of, anti-Catholic bigotry and animus.” Accordingly, the debate as to the origin and legitimacy of Florida’s no-aid clause may well again resurface in the deliberations of the 2017 CRC.

The amendment proposed in 2011 would have removed Florida’s no-aid provision from the Florida Constitution and replaced it with the following: “Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief.” According to a House Judiciary Committee Report, the amendment was designed to address concerns that Florida courts were interpreting the no-aid provision in such a way as to single out religious individuals and institutions because of their religious motivations. Therefore, the amendment proposed would repeal the no-aid provision to bring the Florida Constitution into

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133 *Id.*
134 *Id.*
135 *See id.* at 377.
136 *Id.* at 350-51; *see also* *Locke v. Davey*, 540 U.S. 712, 712 (2004).
137 H.J.R. Res. 1471, 2011 Leg., at 1 (Fla. 2011).
138 *Id.*
139 *Id.* at 4-6.
140 *Id.* at 5.
141 *Id.* at 3-5.
conformity with the less restrictive interpretations of the Federal Establishment Clause.\textsuperscript{142} This concern was brought about by language used by the courts recognizing that “[a]rticle I, section 3 imposes further restrictions on state’s involvement with religious institutions than [imposed by] the Establishment Clause.”\textsuperscript{143}

In 2012, the legislature’s proposed amendment to delete the no-aid clause failed to gain even a simple majority vote of the people, falling far short of achieving the sixty percent majority necessary for adoption of the amendment.\textsuperscript{144} Despite the voters’ rejection to remove the no-aid clause in 2012, the CRC’s discussion of education issues will inevitably lead to consideration of religion.\textsuperscript{145} No private school voucher program can operate without the participation of parochial or other private schools.\textsuperscript{146}

V. POST BUSH V. HOLMES

BUSH v. HOLMES did not settle the school choice debate among educators and lawmakers. In fact, the BUSH v. HOLMES opinions by the Florida Supreme Court and the First DCA have raised more issues that remain unresolved today.\textsuperscript{147} The decision in BUSH v. HOLMES caused opposition, partly because the Florida Supreme Court relied upon the statutory interpretation \textit{expressio unius est exclusio alterius}\textsuperscript{148} to derive that “providing a free education . . . by paying tuition . . . to attend private schools is a ‘substantially different manner’ of providing a publicly funded education . . . than the one prescribed by the Constitution.”\textsuperscript{149} By using such interpretation, the argument has been made that the court shifted the legislative powers to the judiciary by

\textsuperscript{142} Id. at 5.
\textsuperscript{143} Id.
\textsuperscript{145} See id.
\textsuperscript{146} See generally Bush v. Holmes, 919 So. 2d 392, 397 (Fla. 2006) (opining whether or not Florida can allow public funds to be used for private education).
\textsuperscript{148} See id. at 41.
\textsuperscript{149} Id. at 38 (citing Bush v. Holmes, 919 So. 2d 392, 407 (Fla. 2006)).
“minimiz[ng] legislative discretion” and establishing “a standard exposed to ambiguity, at least in this context, [that] has considerable potential for abuse, especially in highly-politicized issue[s].”

In addition to the statutory interpretation, the Florida Supreme Court in *Bush v. Holmes* focused on the mandate but never addressed the First DCA’s ruling that left the issue of the no-aid-to-religion clause open.

Since 2006, the legislature has attempted to resolve some of the issues in education; however, litigation over Florida’s mandate, no-aid provision education, has yet to cease. The judiciary is still faced with questions first presented in *Bush v. Holmes* and is now addressing issues such as standing and remedies available.

### A. 2007 Taxation Budget Reform Commission

In 1988, article XI, section 6, created the Taxation Budget Reform Commission (“TBRC”) to address, every twenty years, Florida’s taxation or budgetary laws and budgetary process.

Article XI, section 6(d) requires the TBRC to examine:

- the revenue needs and expenditure processes of the state,
- the appropriateness of the tax structure of the state, and governmental productivity and efficiency; review policy as it relates to the ability of state and local government to tax and adequately fund governmental operations and capital facilities required to meet the state’s needs during the next twenty year period; determine methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; determine measures that could be instituted to effectively gather funds from existing tax sources; examine constitutional limitations on taxation and expenditures at the state and local level; and review the state’s comprehensive planning,
budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decisionmaking process.\textsuperscript{153}

In 2007, the TBRC met for the first time.\textsuperscript{154} In the immediate aftermath of \textit{Bush v. Holmes} and in direct opposition to the court’s ruling, the TBRC proposed constitutional amendments to revise the no-aid-to-religion clause ("Proposal 7") and extend Florida’s educational mandate beyond public schools ("Proposal 8").\textsuperscript{155} Proposal 7 restricted the no-aid-to-religion clause and allowed individuals or entities to participate in public programs regardless of whether that program involved religion.\textsuperscript{156} Proposal 8 amended the public education provision found in article IX, section 1 by requiring school districts to spend at least sixty-five percent of funding on classroom instruction and by stating that the legislature’s duty to provide for public education is not exclusively limited to free public schools.\textsuperscript{157}

Prior to the November 2008 election, a group of citizens filed an injunction in Leon County challenging the TBRC’s constitutional authority to submit Proposals 7 and 8 on the ballot.\textsuperscript{158} The TBRC argued that it has the authority to “propose constitutional amendments regarding state revenue expenditures because expenditures are encompassed within the state budgetary process.”\textsuperscript{159} The trial court agreed with TBRC’s argument; however, the Florida Supreme Court disagreed and held that Proposals 7 and 8 were unconstitutional because the proposals fell outside the constitutional authority of the TBRC.\textsuperscript{160} The court further held that the TBRC is limited to propose constitution amendments if “the proposal addresses taxation or the process by which the State’s budget is procedurally composed and considered by the Legislature.”\textsuperscript{161} Thus, despite the efforts by the TBRC, Florida’s no-

\textsuperscript{153} \textit{Id.} at § 6(d).
\textsuperscript{154} \textit{Id.} at § 6(a).
\textsuperscript{155} See \textit{Ford v. Browning}, 922 So. 2d 132, 132, 140-41 (Fla. 2008).
\textsuperscript{156} \textit{Id.} at 140.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 135-36.
\textsuperscript{159} \textit{Id.} at 137.
\textsuperscript{160} \textit{Id.} at 141.
\textsuperscript{161} \textit{Id.} at 140.
aid-to-religion provision remained unchanged, and as interpreted in *Bush v. Holmes*, Florida’s mandate limited state funding for education only to free uniform public schools.\(^{162}\)

**B. Joanne McCall, et al v. Rick Scott, as Governor, et al**

Following *Bush v. Holmes*, the legislature made significant changes to the OSP.\(^{163}\) Foremost among the changes is the way in which the funding for the voucher program is secured.\(^{164}\) Under the prior program, the money to fund vouchers came directly from the treasury by legislative appropriations.\(^ {165}\) Under the program as revised, the State of Florida grants a dollar-for-dollar credit against a taxpayer’s tax liability for the amount of any contributions it makes to a state controlled entity set up to receive and disburse funds for vouchers.\(^ {166}\) The funds, therefore, never go into the treasury and are not the subject of legislative appropriations.\(^ {167}\) The funding mechanism is thus set to avoid the prohibition in article I, section 3, that no revenue shall be “taken from the public treasury directly or indirectly in aid of . . . any sectarian institution.”\(^ {168}\) The revised OSP does not include any changes that would directly address the constitutional problem of the program violating the article IX, section 1 mandate that a system of free schools provide education.\(^ {169}\)

In 2014, individuals filed a civil action in the circuit court of Leon County seeking an injunction, arguing section 1002.395, Florida Statutes, violates article I, section 3, and article IV, section 1 of the Florida Constitution.\(^ {170}\) Appellants argued that the FTCSP violates the no-aid provision of article I, section 3 by indirectly using tax funds to pay for religious affiliated education.\(^ {171}\) Appellants also argued that

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162 *See id.* 140-41.
163 *See supra* Part IV.A.
166 *See § 1002.395(5)(b).*
167 *See id.*
168 *Fla. Const.* art. I, § 3.
169 *Fla. Const.* art. IX, § 1(a).
171 *Id.*
FTCSP violates article IV, section 1 by “redirecting taxpayer funds from public schools to provide private-school scholarship and by creating a non-uniform system of public education.” The circuit court did not address the constitutionality of the FTCSP, but instead dismissed the case due to lack of standing. The First DCA affirmed the dismissal.

Appellants argued that dismissing the case due to standing “amounts to a determination that the Scholarship Program is not subject to challenge under Article I, § 3 and Article IX, § 11.” The standing issue raises the question: What harm can individuals show due to the diversion of corporate tax revenues to fund school vouchers that could be used in private schools? In McCall v. Scott, the First DCA stated, “Appellants lacked special injury standing because they failed to allege that they suffered a harm distinct from that suffered by the general public.” The only harm asserted by the appellants was that FTCSP’s diversion of public revenues harms the children who attend public school. The court held that the appellant’s “diversion theory is incorrect as a matter of law” because no funds under the FTCSP derive from the “state treasury or from the budget for Florida’s public schools.” The court further rejected appellants’ argument based on speculation that the tax credits would necessarily result in an equal reduction in tax revenues or that the legislature would not decide otherwise to fund the public school system at an adequate level.

Appellants further argued they had standing as taxpayers because of the exception to the special injury rule established in

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172 Id.
173 Id.
174 Id. at 361.
175 Brief for Appellant at 7, McCall v. Scott, 199 So. 3d 359 (Fla. Dist. Ct. App. 2016) (No. 1D15-2752); see also Coalition, 680 So. 2d at 403 (holding that article IX limits the legislature’s spending authority).
176 Brief for Appellant, supra note 175, at 4; see also Council for Secular Humanism, Inc., v. McNeil, 44 So. 3d 112, 121 (Fla. Dist. Ct. App. 2010) (holding to challenge a government action, plaintiff needs to prove citizen suffered an injury).
178 Id.
179 Id.
180 Id. at 365-67.
Wallace

In Horne, the court held a taxpayer has standing to challenge a specific constitutional limitation "based directly upon the Legislature’s taxing and spending power." The court used its rationale established in Flast v. Cohen, a U.S. Supreme Court case that allowed standing to challenge the constitutionality of the Education Act. The U.S. Supreme Court held, “[A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.”

The First DCA in McCall held that appellants lacked taxpayer standing for two reasons. First, article XI, section 1(a) does not limit the legislature’s taxing power. Second, the court held appellants failed to allege the appropriation of public funds to sectarian or other private schools or that the State failed to appropriate adequate funds for education. In doing so, the First DCA’s decision rejected appellants’ argument that the FTCSP does implicate the legislature’s spending authority, at least indirectly, because the funds paying for the vouchers would otherwise have gone to the treasury but for the tax credit granted for contributing the funds to a state-controlled entity. The likely consequence of McCall is that standing may now be curtailed for citizens who try to bring a civil action, seeking judicial review of

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181 Dept't of Adm'r v. Horne, 269 So. 2d 659, 663 (Fla. 1972).
182 Id.
184 Id. at 105-06.
186 Id.
187 Id.
188 See Petitioner Brief on Jurisdiction at 8-9, McCall v. Scott, 199 So. 3d 359 (Fla. Dist. Ct. App. 2016) (No. SC16-1668) (arguing that all constituencies—the state treasury, tax payers receiving credits, public schools, students, and schools receiving vouchers—will be identically situated regardless of whether vouchers are funded by tax credits or appropriations grants); see generally Stanley v. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 717 (1970) (“A dollar is a dollar—both for the person who receives it and the government that pays it, whether the dollar comes with a tax credit label or a direct expenditure label.”).
whether school programs established by the legislature violate the Florida Constitution.\textsuperscript{189} In fact, \textit{McCall} expressly approves this outcome and asserts that removing the courts from such disputes is consistent with the separation of powers doctrine.\textsuperscript{190} With the role of the judiciary so limited, \textit{McCall} concludes that citizens’ appropriate remedy is at the ballot box.\textsuperscript{191}

With a reduced role for the judicial branch, the role of the CRC is magnified. Other than the ballot box, clarity and precision in any constitutional mandates or limitations may be the only check on the legislature’s plenary power. Thus, the 2017 CRC should consider proposals to clarify whether the mandate for public education must be provided exclusively by and through a system of free public schools. The CRC should address whether to recommend proposals that would expressly allow or provide in some way for the use of school vouchers as an alternative or supplement to public school education. Finally, the CRC also will need to address whether to propose that sectarian schools may receive state-funded vouchers.

\textbf{VI. CONCLUSION}

Florida’s history shows that education has always been the top priority of the state. The past CRCs and courts have held that providing its citizens quality education is paramount to ensure its citizens are free from tyranny.\textsuperscript{192} As James Madison said:

\begin{quote}
Knowledge will forever govern ignorance; and a people who mean to be their own governours must arm themselves with the power that knowledge gives . . . . Learned institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.\textsuperscript{193}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item \textit{McCall}, 199 So. 3d at 369.
\item \textit{Id.}
\item \textit{Id.}
\item Mills & McLendon, \textit{supra} note 9; Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 409 (Fla. 1996).
\item \textit{Coalition}, 680 So. 2d at 409.
\end{enumerate}
\end{footnotesize}
The public school experience unites citizens as Americans or Floridians in establishing a societal fabric that connects us and helps promote a civilized and orderly society. From this perspective, the public school system promotes common and shared values and heritage. The other side of the debate tends to focus on the family as having primary responsibility for rearing children. Such values have been expressed, and constitutional decisions have affirmed, the parents’ right to control their children’s education as a fundamental aspect of a constitutionally protected liberty interest. This view takes the position that parents should have the freedom to decide how best to educate their children. This view considers the family superior at this role and generally questions the competency of government. But the question remains: What is the government’s role in educating its citizens? Should the legislature narrow Florida’s mandate by explicitly stating what adequate means or by providing further explanation as to what is “uniform, efficient, safe, secure, and high quality system of free public schools”? Should the only manner of providing education exclusively remain in public schools? Is there ever an exception in which alternative school choice can be utilized? Is Florida’s “no-aid” language too restrictive? Should the language comport with the Establishment Clause of the First Amendment of the U.S. Constitution? Is it feasible to offer school choice without private religious schools? Should legislators leave it for the judiciary to decide Florida’s education mandate? If so, what remedy is available, who can sue, and what interpretation should be used?

All of these questions and more will be presented by the CRC. The next twenty years and more of Florida’s future may well be determined or greatly affected by decisions made by the CRC. The CRC and the citizens of the State of Florida have an opportunity to shape the future of Florida’s institutions of government and reshape Florida’s values and priorities. Education issues may be primary among those considered by the 2017 CRC for the very reason that education remains one of the primary roles or functions of state government.

195 See id.
196 See generally id. at 176-77 (holding that the Constitution will not allow the government to interfere with parental decisions concerning a child’s education).
197 Fla. Const. art. IX, § 1(a).
Thus, the CRC will be faced with fundamental decisions as to how Floridians view the future of education.