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**THE FLORIDA SUPREME COURT VS. SCHOOL CHOICE:  
A "UNIFORMLY" HORRID DECISION**

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A “UNIFORMLY” HORRID DECISION

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## I. INTRODUCTION

School choice is *the* civil rights issue of the twenty-first century. In the Information Age, knowledge is not just power—it is destiny. As a result, no issue more fundamentally divides the “haves” and the “have-nots” in America than who gets to choose what schools their children attend and who does not. Around the country, hundreds of thousands of children are literally trapped in public schools that are failing: failing to educate, failing to prepare, failing to inspire—failing to do anything but offer a litany of excuses and demand more money while performance remains stagnant.

This Article is about the first statewide attempt to fix that problem by offering government-funded vouchers to students in failing public schools and about what happened to that program when it landed before the Florida Supreme Court. In rejecting vouchers, the court departed from logic, precedent, and principle and acted more like a third branch of the Florida legislature than a court of law. It also emboldened foes of educational opportunity to delve ever deeper into obscure constitutional thickets in their quest to thwart the trend towards greater parental choice in education. As the popularity of school choice increases, particularly among minorities,<sup>1</sup> opponents will certainly try to get as much mileage as they can from the court’s decision, both in seeking to discourage legislators from enacting school choice programs in other states and in challenging any programs that make it into law.

After a brief overview of school choice and its recent history, this Article describes how Florida became the national leader in the field and how those efforts were opposed in court by an array of special interests led primarily by state and national teachers unions. First, this Article recounts the six-year court battle over Florida’s Opportunity Scholarship program, which provided vouchers to children in failing public schools. This Article then explains how, in striking down Opportunity Scholarships, the Florida Supreme Court ignored bedrock

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1. For a summary of polling data, see INST. FOR JUSTICE, PUBLIC OPINION DATA: AMERICANS WANT SCHOOL CHOICE (2004), [http://ij.org/pdf\\_folder/school\\_choice/public\\_opinion\\_data.pdf](http://ij.org/pdf_folder/school_choice/public_opinion_data.pdf).

principles of constitutional interpretation, record evidence, current and historical practices, and decisions from other courts. Finally, this Article concludes with a brief discussion about the potential consequences of the decision in Florida and elsewhere.

## II. SCHOOL CHOICE

At bottom, “school choice” means nothing more than the idea that all parents should enjoy a reasonable measure of choice about what schools their children attend, regardless of their financial means. Most families exercise school choice by choosing what neighborhood in which to live. Other families exercise choice by sending their children to private school—approximately 6,000,000 or twelve percent of American K–12 students attend private schools.<sup>2</sup> Some families are fortunate enough to live in areas that permit interdistrict public school transfers,<sup>3</sup> while others have access to nontraditional public schools like charter and magnet schools<sup>4</sup>—often over the strong objections of the public school establishment. Some families resort to what might be called “self help” strategies that include sending their children to live with relatives or reporting incorrect addresses to public school authorities. According to Florida Representative Rafael Arza of Hialeah, for example, the leading form of school choice in Miami is address fraud.<sup>5</sup>

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2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SCHOOL ENROLLMENT: 1970–2012 (2000), available at [http://www.census.gov/Press-Release/www/releases/archives/educ\\_table202.pdf](http://www.census.gov/Press-Release/www/releases/archives/educ_table202.pdf).

3. *E.g.*, New Haven Interdistrict Pub. Sch. of Choice, General Information, <http://www.nhps.net/interdistrictmagnets/general.asp> (last visited Apr. 22, 2006); N.J. Dep't of Pub. Educ., Interdistrict Public School Choice, <http://www.nj.gov/njded/choice/genfo.htm> (last visited Apr. 22, 2006); Wis. Dep't of Pub. Instruction, Public School Open Enrollment Homepage, <http://dpi.wi.gov/sms/psctoc.html> (last visited Apr. 22, 2006). *See generally* The Heritage Found., Interdistrict and Intradistrict School Choice, <http://www.heritage.org/Research/Education/SchoolChoice/typesofschoolchoice.cfm#Interdistrict> (last visited Apr. 22, 2006) (listing states that have enacted laws supporting interdistrict public school transfers).

4. *See* U.S. DEP'T OF EDUC., HELPING FAMILIES BY SUPPORTING AND EXPANDING SCHOOL CHOICE (2006), <http://www.ed.gov/nclb/choice/schools/choicefacts.pdf> (noting that in 2006 “more than a million students in 40 states and the District of Columbia are being educated in 340,000 charter schools”). *See also* CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL DATA AT-A-GLANCE (2005), <http://www.ed.gov/nclb/choice/schools/choicefacts.pdf> (noting that an additional ninety charter schools are approved to open in 2006–2007).

5. Rafael Arza, Fla. State Representative, Remarks at the American Legislative Exchange Council School Choice Academy (Sept. 17, 2006) (No transcript was prepared, but the author was present when Rep. Arza made this remark.).

Finally, school choice means government programs such as vouchers and tax-credit-funded scholarships that enable parents to choose among a full range of public and private school options, regardless of whether they can afford those options themselves.

Although virtually any form of school choice draws criticism from at least some members of the public education establishment,<sup>6</sup> programs that include private school transfer options are public enemy number one for defenders of the status quo. Generally speaking, such programs involve scholarships or tax breaks that enable parents to send their children to private schools of their choice, including religious schools. Scholarships may be directly funded by the government, in which case they are generally called vouchers,<sup>7</sup> or they may be funded by tax credits.<sup>8</sup> Tax credit programs include those that give tax breaks to parents for private school expenses and those that give tax credits to people and businesses for contributing money to organizations that award scholarships based on eligibility criteria, typically including financial need. Maine and Vermont have long had “tuitioning programs” that provide what amount to publicly funded K–12 scholarships for students living in areas that do not maintain their own public school systems. Tuitioning payments may be used to attend a wide variety of public and private schools, both in-state and out-of-state, but not religious schools.<sup>9</sup>

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6. These include teachers unions, parent-teacher associations (PTA), school board associations, superintendents' associations, state departments of education, and many others.

7. *E.g.*, FLA. STAT. ANN. § 1002.38 (West 2004 & Supp. 2006) (Florida's Opportunity Scholarship program).

8. *E.g.*, FLA. STAT. ANN. § 220.187 (West 2004) (Florida's Corporate Income Tax Credit Scholarship program).

9. Notably, both states exclude religious options from their tuitioning programs. The Vermont Supreme Court held in 1999 that the state constitution prohibited program participants from using public funds to attend religious schools. *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 541–42 (Vt. 1999). By contrast, while Maine's constitution lacks any specific religious establishment provisions that might limit the scope of the program, the legislature amended state law in 1981 to exclude religious schools based on the state attorney general's mistaken belief that including religious schools would violate the Establishment Clause of the First Amendment to the U.S. Constitution. ME. REV. STAT. ANN. tit. 20-A, § 2951 (1993 & Supp. 2005). The Institute for Justice is currently challenging the continued exclusion of religious schools from Maine's tuitioning program. On April 26, 2006, Maine's Supreme Judicial Court upheld the exclusion of religious schools from the state's tuitioning program. *Anderson v. Town of Durham*, No. Cum-04-591, 2006 WL 1083972 (Me. Apr. 26, 2006). *See also* Inst. for Justice, *Maine School Choice*, <http://www.ij.org/schoolchoice/maine2/index.html> (last visited Apr. 22, 2006). A similar lawsuit brought in federal court by the American Center

But the first voucher program designed specifically to enable families of limited means to enjoy private school alternatives to substandard public schools was established in Milwaukee, Wisconsin in 1990.<sup>10</sup> School choice opponents challenged the Milwaukee Parental Choice Program on various constitutional grounds, including the claim that allowing aid recipients to attend religious schools violated state and federal religious establishment provisions. Rejecting those arguments, the Wisconsin Supreme Court upheld the program in 1998, and the U.S. Supreme Court denied certiorari.<sup>11</sup>

Next was the Cleveland Scholarship and Tutoring Program, which, among various other educational choice options, allowed eligible families to receive a voucher of up to \$2,250 that they could use to attend participating private schools, including religious schools.<sup>12</sup> Choice opponents again challenged the program, and after six years of litigation in state and federal court, the U.S. Supreme Court declared in *Zelman v. Simmons-Harris* that Cleveland's voucher program did not violate the federal Establishment Clause.<sup>13</sup>

*Zelman* was a major blow to the anti-choice crowd. For over a decade, they had put most of their eggs in the Establishment Clause basket, only to lose what Institute for Justice co-founder and leading school choice advocate Clint Bolick described as the "Super Bowl for school choice."<sup>14</sup> School choice opponents quickly retrenched, shifting their emphasis to obscure provisions of state constitutions that could be dusted off and pressed into service as mechanisms for blocking school house doors—not to keep children out of public schools as opponents of equal educational opportunity had done in the 1950s and 1960s, but rather to keep them *in*. Although school choice opponents had generally included such claims all along, they tended to

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for Law and Justice to require Maine to reinstate religious options in its tuitioning program was unsuccessful. *Eulitt v. Maine*, 386 F.3d 344, 346 (1st Cir. 2004). The Institute for Justice plans to seek certiorari from the U.S. Supreme Court to review the *Anderson* decision.

10. See, e.g., Inst. for Justice, Milwaukee School Choice, <http://www.ij.org/schoolchoice/milwaukee/index.html> (last visited Apr. 22, 2006) (providing background information on the Milwaukee Parental Choice Program).

11. *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998), cert. denied, 525 U.S. 967 (1998).

12. OHIO REV. CODE ANN. § 3313.974–979 (West 2005).

13. *Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2002).

14. Warren Richey & Gail Russell Chaddock, *Key Win for School Vouchers*, CHRISTIAN SCI. MONITOR, June 28, 2002, at 1.

downplay them in favor of the more sweeping Establishment Clause argument, which would have provided something akin to total victory had they prevailed on it. With that argument no longer viable, however, discrete state-law claims were dragged to the fore.

### III. FLORIDA TAKES THE LEAD IN PROVIDING EDUCATIONAL OPTIONS

Florida is by far the leading state in the country when it comes to choice-based education reform. In terms of total students enrolled, Florida's school choice programs are substantial.<sup>15</sup> The driving force behind these programs has been Governor Jeb Bush and his "A-Plus Plan for Education." The major components of this plan are transparency, accountability, and parental choice. Transparency and accountability are promoted by publicly grading schools according to student performance on the Florida Comprehensive Assessment Test (FCAT) and by making those grades fully available to the public.<sup>16</sup> But the key accountability feature of the A-Plus Plan was the Opportunity Scholarship, which enabled students at failing schools to transfer to the higher performing public or private schools of their choice using state-funded vouchers.<sup>17</sup>

Besides Opportunity Scholarships, Florida has two other major K–12 school choice programs: the McKay Scholarship for Students with Disabilities and the Corporate Income Tax Credit. McKay Scholarships are available to parents of children with various physical, mental, and learning disabilities who are

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15. Between Florida's three major school choice programs—Opportunity Scholarships (733), McKay Scholarships for Children with Disabilities (16,144), and Corporate Tax Credits (13,497)—over 30,000 students are attending private schools either at state expense or using scholarships funded by tax credits. *See* OFFICE OF INDEP. EDUC. AND PARENTAL CHOICE, FLA. DEP'T OF EDUC., OPPORTUNITY SCHOLARSHIP PROGRAM (2005), available at [http://www.floridaschoolchoice.org/Information/OSP/files/Fast\\_Facts\\_OSP.pdf](http://www.floridaschoolchoice.org/Information/OSP/files/Fast_Facts_OSP.pdf) [hereinafter OPPORTUNITY SCHOLARSHIP PROGRAM]; OFFICE OF INDEP. EDUC. AND PARENTAL CHOICE, FLA. DEP'T OF EDUC., JOHN M. MCKAY SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES PROGRAM (2005), available at [http://www.floridaschoolchoice.org/Information/McKay/files/Fast\\_Facts\\_McKay.pdf](http://www.floridaschoolchoice.org/Information/McKay/files/Fast_Facts_McKay.pdf) [hereinafter MCKAY SCHOLARSHIP PROGRAM]; Office of Indep. Educ. and Parental Choice, Fla. Dep't of Educ., Corporate Tax Credit Scholarship Program, [http://www.floridaschoolchoice.org/Information/CTC/fast\\_facts.asp](http://www.floridaschoolchoice.org/Information/CTC/fast_facts.asp) (last visited Apr. 22, 2006).

16. *See, e.g.*, Fla. Dep't of Educ., Florida Comprehensive Assessment Test: FCAT Scores and Reports, <http://www.firn.edu/doe/sas/fcat/fcatscor.htm> (last visited Apr. 22, 2006).

17. FLA. STAT. ANN. § 1002.38 (West 2004 & Supp. 2006).

unsatisfied with their child’s progress in public schools. Parents can use these scholarships to enroll their children in a participating private school of their choice, including religious schools.<sup>18</sup> There are currently over 16,000 students receiving McKay Scholarships in Florida.<sup>19</sup>

Established in 2001, Florida’s Corporate Tax Credit Scholarship provides tax credits to companies that contribute money to nonprofit organizations that give scholarships to students who qualify for free or reduced-price school lunches so that they may attend private, including religious, schools.<sup>20</sup> Capped by the statute at \$88 million per fiscal year,<sup>21</sup> the program serves more than 13,000 children.<sup>22</sup>

Both the McKay Scholarship and the Corporate Tax Credit programs are dwarfed in size by Florida’s new, universal Voluntary Prekindergarten Education Program, which went into effect in the fall 2005 and currently serves over 80,000 children.<sup>23</sup> The program offers government-funded vouchers to parents who wish to enroll their four-year-old children in early learning programs at eligible schools, including religious schools.<sup>24</sup> Notably, despite the fact that all three programs—McKay Scholarships, Corporate Tax Credits, and voluntary prekindergarten—allow recipients to choose among a full range of religious or nonreligious options, they have not been challenged in court.

#### IV. THE LEGAL CHALLENGE TO OPPORTUNITY SCHOLARSHIPS

Governor Jeb Bush signed the “A-Plus Plan for Education,” which included Opportunity Scholarships as its centerpiece, into law on June 21, 1999. The next day, an array of special interest groups including state and national teachers unions, the ACLU, and the NAACP challenged the program in court, claiming that

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18. FLA. STAT. ANN. § 1002.39 (West 2004 & Supp. 2006).

19. Office of Indep. Educ. and Parental Choice, Fla. Dep’t of Educ., McKay Scholarship Program Statistics, [http://www.floridaschoolchoice.org/Information/McKay/program\\_statistics.asp](http://www.floridaschoolchoice.org/Information/McKay/program_statistics.asp) (last visited Apr. 22, 2006).

20. FLA. STAT. § 220.187 (West 2004).

21. *Id.*

22. Office of Indep. Educ. and Parental Choice, Fla. Dep’t of Educ., Corporate Tax Credit Scholarship Program Statistics, [http://www.floridaschoolchoice.org/Information/CTC/program\\_statistics.asp](http://www.floridaschoolchoice.org/Information/CTC/program_statistics.asp) (last visited Apr. 22, 2006).

23. Jerome R. Stockfisch & Marilyn Brown, *Court Rejects School Vouchers*, TAMPA TRIB., Jan. 6, 2006, at 1.

24. FLA. STAT. ANN. §§ 1002.51–.79 (West Supp. 2006).

it violated the religious establishment provisions of the state and federal constitutions as well as state constitutional provisions concerning the funding and delivery of public education services. Specifically, school choice opponents alleged that Opportunity Scholarships violated the Establishment Clause of the U.S. Constitution; article I, section 3 of the Florida constitution prohibiting “aid” to religious organizations; article IX, section 1 of the Florida constitution requiring that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools”; and article IX, section 6 of the Florida constitution limiting expenditures from the state school fund for “the support and maintenance of free public schools.”<sup>25</sup>

After consolidating lawsuits that had been brought by two different sets of interest groups, the trial court decided *sua sponte* to carve out the so-called “uniformity” claim based on article IX, section 1 of the Florida constitution, because the judge believed that no evidentiary record was required to resolve that claim.<sup>26</sup> The trial judge then read into the Florida constitution a command that “[t]ax dollars may not be used to send the children of this state to private schools as provided by the Opportunity Scholarship Program.”<sup>27</sup>

The Opportunity Scholarship program was jointly defended by lawyers representing the Governor and the attorney general, along with a group of parents who intervened in the lawsuit to defend the program and were represented by the Institute for Justice. The State and the intervenor-parents appealed the trial court’s decision to the First District Court of Appeal in Tallahassee, where a unanimous three-judge panel reversed the trial court, concluding that “nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary.”<sup>28</sup> Notably, the court specifically rejected the plaintiffs’ *expressio unius est exclusio alterius* argument,<sup>29</sup> finding it

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25. *E.g.*, *Bush v. Holmes (Holmes I)*, 767 So. 2d 668, 671 (Fla. Dist. Ct. App. 2000).

26. *Id.*

27. *Id.* at 673 (quoting trial court).

28. *Id.* at 675 (internal footnote omitted).

29. A “canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” *Id.* at 674 (quoting BLACK’S LAW DICTIONARY 602 (7th ed. 1999)).

inconsistent with the basic premise that “[t]he Florida Constitution is a limitation upon, rather than a grant of, power.”<sup>30</sup> In other words, the *expressio unius* doctrine must be applied sparingly in situations where the legislature’s power to act (and, by extension, the legislature’s power to experiment and innovate) is presumed, as it is in the field of education.<sup>31</sup>

School choice opponents appealed the appellate court’s rejection of their “uniformity” argument to the Florida Supreme Court, which denied review in April 2001, sending the case back to the trial court for resolution of the three remaining claims—whether the Opportunity Scholarship program provided aid to religion under either the federal or state constitutions and whether it was improperly funded by proceeds from the state school fund.<sup>32</sup> In the trial court, litigation focused on the religion issues and specifically whether the inclusion of religious schools in the Opportunity Scholarship program violated the Establishment Clause of the U.S. Constitution and the “no aid” provision of article I, section 3 of the Florida constitution. While the parties proceeded with discovery in the trial court, a voucher case in Ohio was slowly working its way up to the U.S. Supreme Court. That case, *Zelman v. Simmons-Harris*, involved the constitutionality of a voucher program in Cleveland that, like Opportunity Scholarships, allowed recipients to choose among a full range of religious and non-religious options.<sup>33</sup> After winding through both the state and federal court systems, the Cleveland voucher case finally arrived at the U.S. Supreme Court in 2001, where the sole question presented was whether allowing voucher recipients to attend religious schools violated the Establishment Clause of the First Amendment.<sup>34</sup> On June 27, 2002, the Supreme Court upheld Cleveland’s vouchers, holding that the program was one of “true private choice” in which benefits were conferred to a “wide spectrum of individuals” on a religion-neutral basis.<sup>35</sup>

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30. *Holmes I*, 767 So. 2d at 673.

31. *See id.* at 674 (stating that the *expressio unius* principle “should be used sparingly with respect to the constitution”) (internal quotation and citation omitted).

32. *Holmes v. Bush*, 790 So. 2d 1104 (2001) (unpublished table decision).

33. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 835–36 (N.D. Ohio 1999), *aff’d*, 234 F.3d 945 (6th Cir. 2000).

34. *Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2002).

35. *Id.* at 662.

Having lost their Establishment Clause claim in *Zelman*, school choice opponents in Florida voluntarily dismissed that claim in the *Holmes I* litigation along with their claim that the Opportunity Scholarship program was improperly funded using proceeds from the state school fund.<sup>36</sup> Thus, the only remaining issue in the trial court was whether the program violated article I, section 3 of the Florida constitution, which provides that “[n]o revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”<sup>37</sup>

In August 2002, the trial court granted summary judgment in favor of the plaintiffs, finding that the inclusion of religious options for voucher recipients necessarily resulted in impermissible “aid” to religious schools participating in the program.<sup>38</sup> Two years later, in an oddly fractured 6-5-1 decision, the en banc court of appeals affirmed.<sup>39</sup> In reaching that holding, the court of appeals concluded that article I, section 3 of the Florida constitution was intended to be “more restrictive” than the federal Establishment Clause.<sup>40</sup> The court of appeals’ decision was a stretch insofar as the Florida Supreme Court had previously interpreted the article I, section 3 “no aid” provision to permit churches and religious entities to receive a wide range of public benefits including the use of public school property to conduct *church services*.<sup>41</sup> Indeed, the Florida Supreme Court had even interpreted the “no aid” provision as permitting Bible reading and recitation of the Lord’s Prayer in public schools.<sup>42</sup> The U.S. Supreme Court struck down that decision under the

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36. *Bush v. Holmes (Holmes III)*, 919 So. 2d 392, 399 & n.1 (Fla. 2006). The plaintiffs offered no explanation for their decision to voluntarily dismiss their claim under article IX, section 6 of the Florida constitution regarding proceeds from the state school fund. *See id.* at 399 n.1.

37. FLA. CONST. art. I, § 3.

38. *Holmes v. Bush*, No. CV99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

39. *Bush v. Holmes (Holmes II)*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004).

40. *Id.* at 357, 357–61.

41. *Southside Estates Baptist Church v. Bd. of Trustees*, 115 So. 2d 697, 701 (Fla. 1959). *See also* *Koerner v. Borck*, 100 So. 2d 398, 403 (Fla. 1958) (permitting church to use pond in county park to conduct baptisms); *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 263 (Fla. 1970) (upholding property tax exemption for retirement homes, including those operated by churches), *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 311 (Fla. 1971) (upholding use of revenue bonds to finance improvements to private colleges and universities, including religious schools).

42. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 28 (Fla. 1962).

federal Establishment Clause,<sup>43</sup> which is an odd result if Florida’s “no aid” provision was in fact designed to be “more restrictive” than the Establishment Clause.

Besides being unable to cite a single Florida case supporting its interpretation of article I, section 3 of the state constitution,<sup>44</sup> the court of appeals majority also provided no explanation for how its interpretation of that provision could be reconciled with the three dozen other public welfare programs in Florida that, just like Opportunity Scholarships, permit aid recipients to choose from a full range of religious and non-religious social and educational service providers.<sup>45</sup> Thus, for example, the State of Florida has for decades provided college scholarships to students attending such unabashedly religious institutions as Florida Christian College and Hobe Sound Bible, including students who are studying to be ministers.<sup>46</sup> If relieving churches of the expense of training their own clergy does not constitute impermissible “aid” to religion, it is difficult to see why a K–12 scholarship program that merely includes religious options would.<sup>47</sup>

The First District Court of Appeal certified its decision to the Florida Supreme Court as one involving a question of great public importance.<sup>48</sup> This time, the court accepted the case.

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43. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 347 U.S. 487 (1963).

44. *See Holmes II*, 886 So. 2d at 354–57.

45. *See id.* at 376–78 (Polston, J., dissenting) (arguing that the majority failed to distinguish between Opportunity Scholarships and other programs in which the state permissibly funds religiously affiliated institutions like hospitals and colleges).

46. *See* Reply Brief of Intervenors/Defendants/Appellants at 2–4, *Bush v. Holmes (Holmes III)*, 919 So. 2d 392 (Fla. 2006) (Nos. SC04-2323, SC04-2324, SC04-2325), [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/04/04-2323/Filed\\_03-22-2005\\_McShaneReply.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/04/04-2323/Filed_03-22-2005_McShaneReply.pdf) (listing religiously affiliated colleges whose students are eligible to receive various state scholarships and grants).

47. Remarkably, none of the interest groups that condemned Opportunity Scholarships for providing religion-neutral K–12 scholarships have challenged any of Florida’s religion-neutral college scholarship programs, despite the fact that recipients routinely use them to attend schools like Florida Christian College, whose purpose is “to educate men and women for Christian service . . . and to serve as a resource to the churches, especially in Florida.” Florida Christian College, *Our Mission*, <http://www.fcc.edu/about/default.asp> (last visited May 9, 2006). One might fairly question whether courts should take seriously the claims of those whose selective opposition to religion-neutral public aid programs is so transparently opportunistic.

48. *Holmes II*, 886 So. 2d at 344.

V. THROUGH THE LOOKING GLASS: THE FLORIDA SUPREME COURT STRIKES DOWN OPPORTUNITY SCHOLARSHIPS

On January 6, 2006, after more than six and a half years of litigation, the Florida Supreme Court ruled that the Opportunity Scholarship program violated the Florida constitution's requirement that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools."<sup>49</sup> The court's ruling was based on its conclusion that public schools are the "sole means" by which the state may provide for children's education,<sup>50</sup> which was in turn based on the court's belief that voucher programs "undermine" public education both by diverting resources away from public schools<sup>51</sup> and by "fund[ing] private schools that are not 'uniform' when compared with each other or the public system."<sup>52</sup> The majority's opinion in *Holmes III* is among the most incoherent, self-contradictory, and ends-oriented court decisions in recent memory.<sup>53</sup> It also serves as a stark reminder that notwithstanding the excessive and imprecise use of the term these days, there really is such a thing as "judicial activism," whereby judges simply enact their personal policy preferences into law.

The majority's opinion is riddled with fallacies that can be grouped into three general categories. First and foremost, the majority ignored the strong presumption of constitutionality to which the Opportunity Scholarship program was entitled and struck it down on the basis of a constitutional provision that the majority admitted was neither clear nor unambiguous.<sup>54</sup> Second, the majority's reasoning, if it may be called that, rests on factual assertions that are flatly contradicted by the record. Finally, the majority either disregarded or brushed aside several practices and precedents that cast considerable doubt on its interpretation of the Florida constitution's "uniformity." These shortcomings are considered in turn.

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49. FLA. CONST. art. IX, § 1(a).

50. *Bush v. Holmes (Holmes III)*, 919 So. 2d 392, 398 (Fla. 2006).

51. *Id.* at 408-09.

52. *Id.* at 398.

53. See, e.g., Editorial, *Rotten Apples*, WALL ST. J., May 4, 2006, at A14 (describing *Holmes III* as "one of the most absurd legal decisions in modern times").

54. *Id.* at 408.

*A. Ignoring the Presumption of Constitutionality*

It is a bedrock principle of Florida law that legislative enactments will be struck down only if they are “clearly contrary to some express or necessarily implied prohibition found in the Constitution.”<sup>55</sup> Any doubts in that regard are to be resolved in favor of constitutionality, provided that the statute may be given a fair construction consistent with the federal and state constitutions and with legislative intent.<sup>56</sup> Moreover, unlike the U.S. Constitution, Florida’s state constitution is a power-limiting document, not a power-granting one. In other words, the power of the legislature is “inherent,” and as long as it is acting in a field properly within its general authority, “[t]he legislative branch looks to the Constitution not for sources of power but for limitations upon power.”<sup>57</sup>

Although it paid lip service to those principles,<sup>58</sup> the majority simply ignored them in practice. Most notably, in explaining its decision to invoke the *expressio unius* and *in pari materia* canons of construction, the majority specifically stated that article IX, section 1 of the Florida constitution is “not clear and unambiguous regarding public funding of private schools.”<sup>59</sup> But of course, the whole point of having a presumption of constitutionality is that doubts are to be resolved in favor of constitutionality. Indeed, the Florida Supreme Court has repeatedly held that in order to overcome the presumption, legislation must be unconstitutional *beyond a reasonable doubt*.<sup>60</sup> It is difficult to understand how a provision that is admittedly neither “clear [nor] unambiguous” could possibly meet that standard, and the majority certainly made no attempt to explain it.

Chief Justice Pariente’s breezy treatment of the presumption of constitutionality in *Holmes III* stands in sharp contrast to her opinion in *Franklin v. State*, where she showed great deference to the legislature in upholding Florida’s Three-Strike Violent

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55. *Id.* at 414 (Polston, J., dissenting) (quoting *Chiles v. Phelps*, 714 So. 2d 453, 458 (Fla. 1998)).

56. *E.g.*, *Sunset Harbor Condo. Ass’n v. Robbins*, 914 So. 2d 925, 929 (Fla. 2005).

57. *Holmes III*, 919 So. 2d at 414 (Polston, J., dissenting) (quoting *Green v. Pearson*, 14 So. 2d 565, 567 (1943)).

58. *Id.* at 405 (majority opinion).

59. *Id.* at 408.

60. *Id.* at 414 (Polston, J., dissenting) (quoting *Taylor v. Dorsey*, 19 So. 2d 876, 882 (1944)).

Felony Offender Act.<sup>61</sup> The issue in *Franklin* was whether the Act violated the state constitution's single-subject provision,<sup>62</sup> either because it contained provisions that were unrelated to enhancing sentences for repeat criminal offenders or because the subject of the law was not "briefly expressed" in the Act's title,<sup>63</sup> which was nearly 1,000 words long.<sup>64</sup> Justice Pariente began her analysis by noting that if any doubt exists about whether an act violates Florida's single-subject requirement—or any other constitutional provision—"the presumption is in favor of constitutionality."<sup>65</sup> Taking that principle seriously, Justice Pariente concluded that provisions of the three-strikes act changing the definition of burglary to include railroad conveyances and requiring officials to transmit information regarding convictions of non-citizens to federal immigration officials were sufficiently related to the "single subject of sentencing."<sup>66</sup> Justice Pariente also found the Act's 1,000-word title sufficiently "brief" to pass constitutional muster,<sup>67</sup> particularly in light of the court's consistent deference "to the Legislature's choice to craft a title to an act with few words or many."<sup>68</sup>

In reaching the foregoing conclusions, Justice Pariente quoted with approval the following passage from an earlier Florida Supreme Court decision: "The general disposition of the courts [is] to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted."<sup>69</sup> As we shall see in the next section, this sentiment is remarkable given the extent to which Justice Pariente and the other four justices in the *Holmes III* majority abandoned it in striking down the Opportunity Scholarship program.

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61. *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004).

62. *Id.* at 1067.

63. *Id.* at 1080–81.

64. *Id.* at 1083–84 (setting forth the text of the Act's title).

65. *Id.* at 1073.

66. *Id.* at 1082.

67. *Id.* at 1080.

68. *Id.* at 1074.

69. *Id.* at 1073 (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)) (emphasis added).

*B. Disregarding the Fact Record*

The majority offered two somewhat distinct reasons for striking down Opportunity Scholarships on uniformity grounds: (1) the private schools participating in the program were not “uniform” in comparison with public schools because they maintain different hiring standards for teachers and are not required to follow the state curriculum,<sup>70</sup> and (2) the program “diverts” money from the public school system and thus “undermines” it.<sup>71</sup> Of course, the second point presents what are fundamentally empirical questions: Does the Opportunity Scholarship program really cost the public schools money that they would otherwise have received, and, if so, are they harmed as a result? It is on this point that the sophistry of the majority’s decision is arguably the most pronounced.

As noted above, nothing in the Florida constitution specifically forbids the state from promoting K–12 education by spending money outside the formal bounds of the public school system. The only limitation arguably implied by the state constitution is that education-related outside expenditures cannot be so great as to actually prevent the state from fulfilling its “paramount duty” to make “adequate provision” for the education of all Florida children.<sup>72</sup> Given that the Opportunity Scholarship program operated continuously for over six years while the court battle wore on, there was plenty of time to determine as a matter of empirical fact—rather than ideology-driven speculation—whether the program actually “undermined” the public schools.

And of course, the answer is not just “no,” but a resounding “no.” Four different studies showed that student achievement in public schools faced with voucher competition improved, and no studies have ever shown the contrary. The first of those studies was performed by noted education researcher Jay P. Greene and summarized in an affidavit presented to the trial court at the summary judgment phase.<sup>73</sup> After performing an exhaustive analysis of student test scores and controlling for relevant variables, Professor Greene found that schools at risk of

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70. *Bush v. Holmes (Holmes III)*, 919 So. 2d 392, 409–10 (Fla. 2006).

71. *Id.* at 398, 409.

72. FLA. CONST. art. IX, § 1(a).

73. Affidavit of Jay P. Greene, *Bush v. Holmes*, No. CV 99-3370 (Fla. Cir. Ct. Aug. 5, 2002) (file-stamped copy available from the Institute for Justice).

losing students to the Opportunity Scholarship program showed improvements in test scores that were twice as great as similarly situated schools that were not exposed to voucher competition.<sup>74</sup>

Professor Greene along with Marcus Winters also studied the program in 2004 and once again found a direct relationship between the academic performance of public schools and their exposure to competition from Opportunity Scholarships.<sup>75</sup> These conclusions were confirmed in two further studies, one by researcher Rajashri Chakrabarti<sup>76</sup> and the other by noted Harvard education researcher Paul Peterson and his associate Martin West.<sup>77</sup> The results of the Greene-Winters study and the Chakrabarti study were presented to the Florida Supreme Court as compelling evidence that the program had done no harm to Florida's public schools.<sup>78</sup>

The majority's analysis of the "diversion" issue was equally unpersuasive. It is certainly true that for every child who chose to accept an Opportunity Scholarship to attend a private school, the state redirected a certain amount of funding from the public to the private school system. But the court gave little credence to the fact that every departing child represented one less student to be educated in the public school system and thus—in a rational world, anyway—a cost savings to the public schools.<sup>79</sup> Perhaps more importantly, the amount of money that the legislature chooses to spend on public schools every year is almost entirely within its discretion, the only lower limit being its constitutional obligation to make "adequate provision" for the

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74. *Id.* ¶ 7.

75. See Brief of Black Alliance for Educational Options et al. as Amici Curiae Supporting Appellants at 10–11, *Bush v. Holmes (Holmes III)*, 919 So. 2d 392 (Fla. 2006) (Nos. 04-2323, 04-2324, 04-2325), [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/04/04-2323/Filed\\_01-24-2005\\_AmicusBlackAlliance.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/04/04-2323/Filed_01-24-2005_AmicusBlackAlliance.pdf) (citing Jay P. Green & Marcus A. Winters, *Competition Passes the Test*, EDUCATION NEXT, Summer 2004).

76. See *id.* at 13 (citing Rajashri Chakrabarti, *Closing the Gap*, EDUCATION NEXT, Summer 2004).

77. Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments 11–12* (Mar. 23, 2005) (unpublished paper presented before the Annual Conference of the Royal Economic Society, University of Nottingham), available at [http://www.ksg.harvard.edu/pepg/PDF/Papers/West\\_Peterson\\_ChoiceThreats.pdf](http://www.ksg.harvard.edu/pepg/PDF/Papers/West_Peterson_ChoiceThreats.pdf).

78. Brief of Black Alliance for Educational Options, *supra* note 75, at 10–13.

79. See *Bush v. Holmes (Holmes III)*, 919 So. 2d 392, 409 (Fla. 2006) ("Even if the tuition paid to the private school is less than the amount transferred from the school district's funds and therefore does not result in a dollar-for-dollar reduction, as the dissent asserts, it is of no significance to the constitutionality of public funding of private schools as a means to making adequate provision for the education of children.").

education of all children within the state.<sup>80</sup> Therefore, if the legislature can choose to cut public school funding by, say, ten percent and to spend that money where it sees fit, such as law enforcement or disaster relief, then plainly the legislature can make a much smaller cut and spend the savings on education delivered through other means than the public school system, as long as it continues to make adequate provision for the public schools.

Against this backdrop, the majority’s “diversion” analysis, which focused only on one side of the expenditures-savings equation and disregarded the legislature’s general authority to fund public education at virtually any level it sees fit, seems laughably simplistic—or cynical. This impression is only confirmed by the fact that the majority was well aware that the very “F” schools that were losing students to the Opportunity Scholarship program (and thus suffering a supposed “diversion” of funds to that program) received on average \$800 more in per-pupil funding than “A” schools.<sup>81</sup> But like all of the other inconvenient empirical evidence that stood between it and the policy result it wished to reach,<sup>82</sup> the majority simply ignored that fact in favor of unsupported and demonstrably false speculation.

It says much about the *Holmes III* decision that while the majority professed great concern about whether Opportunity Scholarships “undermined” the public school system by “diverting” funds from it, in the end they really did not care whether that was actually happening.<sup>83</sup> The reality is that far from undermining Florida’s public schools, the program did precisely what Governor Bush and the legislature intended:<sup>84</sup> It improved public schools by exposing them to competition and meaningful accountability.<sup>85</sup> That is hardly a surprise because

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80. FLA. CONST. art. IX, § 1(a).

81. *Holmes III*, 919 So. 2d at 424 (Bell, J., dissenting).

82. For example, per-pupil spending in Florida’s public schools actually *rose* by 5.3% during the first three years of the program’s existence and has continued rising since then. SUSAN AUD, MILTON & ROSE D. FRIEDMAN FOUND. ET AL., FLORIDA’S PUBLIC EDUCATION SPENDING 11 (2006), available at <http://www.friedmanfoundation.org/FloridaStudy.pdf>.

83. See *supra* notes 70–71 and accompanying text.

84. *Holmes III*, 919 So. 2d at 424 (Bell, J., dissenting) (citing the legislative history of the Opportunity Scholarship program, including specifically the legislature’s intent to “improve the public school system by increasing accountability in education”).

85. See *supra* notes 73–76 and accompanying text.

most studies of voucher programs elsewhere have consistently shown that they improve public schools while few studies have ever shown that they cause any harm.<sup>86</sup> In matters of education policy, however, it sometimes will not do to trouble the opposition with mere facts.

### C. Rejecting Practice and Precedent

In striking down the Opportunity Scholarship program, the *Holmes III* majority gave short shrift to historical and current practices in Florida as well as precedents from other states that directly contradicted its interpretation of Florida's uniformity clause. The majority's perfunctory treatment of contrary practice and precedent leaves the distinct impression that instead of guiding or informing the majority's analysis, those practices and precedents were nothing more than minor bumps in the road as the majority reasoned its way backwards from a preordained outcome.

At the beginning of its opinion, the majority states unequivocally that under the Florida constitution, "free public schools" are the "sole means" by which the state may provide for the education of Florida's children.<sup>87</sup> Unfortunately for the majority's Manichean vision, it turns out that Florida has a long history of educating various groups of children in non-public schools, a practice that the Florida Supreme Court itself recognized and approved over two decades before the *Holmes III* decision in *Scavella v. School Board of Dade County*.<sup>88</sup> The issue in that case was whether parents of certain "exceptional students" who were being educated in private schools at state expense—again, that is children being educated in *private schools at state expense*—were denied "any right" under the Florida constitution by virtue of a state law that imposed a cap of less than the full cost of tuition at those schools.<sup>89</sup> Taking seriously its obligation to "construe this statute as not interfering with the right to a free education so as to prevent its being rendered

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86. Brief of Black Alliance for Educational Options, *supra* note 75, at 14 (citing CLIVE R. BELFIELD & HENRY M. LEVIN, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC., THE EFFECTS OF COMPETITION ON EDUCATIONAL OUTCOMES: A REVIEW OF U.S. EVIDENCE (2002), available at [http://www.ncspe.org/publications\\_files/688\\_OP35V2.pdf](http://www.ncspe.org/publications_files/688_OP35V2.pdf)).

87. *Holmes III*, 919 So. 2d at 398.

88. 363 So. 2d 1095 (Fla. 1978).

89. *Id.* at 1097–98.

unconstitutional,”<sup>90</sup> the court rejected the plaintiffs’ challenge under article IX, section 1 of the Florida constitution.<sup>91</sup> The court never even suggested that using public money to educate “exceptional students” in private schools might violate that provision’s uniformity clause, which is more than a little remarkable in light of the *Holmes III* majority’s subsequent determination that paying to educate (ostensibly) “nonexceptional” students in private schools violates the same provision beyond any reasonable doubt. The *Holmes III* majority attempts to explain this anomaly—and simultaneously put to rest any concern that its decision might interfere with the ability of public schools to continue fobbing “exceptional” (read: “exceptionally challenging”) students off onto private schools—by noting that the program at issue in *Scavella* was limited to situations where the public school lacked “the special facilities or instructional personnel to provide an adequate educational opportunity’ for certain exceptional students.”<sup>92</sup>

Of course, that is a rather blatant rationalization. The idea that public schools might exempt themselves from a genuine constitutional duty to educate “all children”<sup>93</sup> simply by failing to hire the necessary personnel or procure the necessary facilities is absurd. As the dissent explains:

It is nonsensical to hold that article IX allows the Legislature to fund education outside the public school system when the public school system fails to uphold its constitutional duty in regard to disabled students but prohibits it when that school system fails to uphold the duty in regard to disadvantaged students. The majority’s distinction between “special” and “routine” in determining when the Legislature can provide education through a nonpublic school is untenable. As I said before, this is more of a policy distinction than a legal one, and absent an express or necessarily implied mandate to the contrary, our constitutional form of government leaves such policy distinctions to the legislative branch.<sup>94</sup>

The dissent also pointed to historical records which showed that, until at least 1917, Florida provided public funds to

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90. *Id.* at 1098.

91. *Id.* at 1099.

92. *Holmes III*, 919 So. 2d 411 (quoting *Scavella*, 363 So. 2d at 1098).

93. FLA. CONST. art. I, § 1(a) (emphasis added).

94. *Holmes III*, 919 So. 2d at 423 n.23 (Bell, J., dissenting).

educate children—particularly African-American children—at private schools.<sup>95</sup> That history is more than a little inconvenient, since the majority’s own chronology shows that Florida’s uniformity provision dates back to the state constitution of 1868.<sup>96</sup> Not to be frustrated from its policymaking goals by mere history or logical consistency, however, the majority simply drops a footnote in which it dismisses the very practice at issue in *Holmes III* as being of “merely historical interest” since the practice ended long before the adoption of the current 1998 constitution.<sup>97</sup> Exactly how and why the uniformity clause that appears in both constitutions morphed from *permitting* to *prohibiting* the private education of children at public expense, the majority leaves to the imagination.

Also dismissed in a footnote is the fact that the only other state supreme court to interpret a constitutional uniformity clause in the context of a school voucher program rejected precisely the interpretation embraced by the *Holmes III* majority.<sup>98</sup> *Davis v. Grover*<sup>99</sup> was the first court challenge to a modern voucher program and resulted in a resounding defeat for school choice opponents seeking to derail Milwaukee’s school voucher program. Similar to Florida, the Wisconsin constitution directs the legislature to “provide by law for the establishment of district schools, *which shall be as nearly uniform as practicable*; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.”<sup>100</sup> Interpreting Wisconsin’s uniformity provision simply and persuasively, the *Davis* court explained that Milwaukee’s voucher program “in no way deprives any student the opportunity to attend a public school with a uniform character of education.”<sup>101</sup> Contrary to the *Holmes III* majority’s strained and convoluted reasoning, *Davis* explained that the uniformity clause “was intended to assure certain minimal educational opportunities for the children of Wisconsin.”<sup>102</sup> In establishing a voucher

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95. *Id.* at 421–23, 423 n.24.

96. *Id.* at 404 (majority opinion).

97. *Id.* at 412 n.14.

98. *Id.* at 407 n.10.

99. 480 N.W.2d 460 (Wis. 1992).

100. WIS. CONST. art. X, § 3 (emphasis added); *cf.* FLA. CONST. art. IX, § 1(a) (“Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.”).

101. *Davis*, 480 N.W.2d at 474.

102. *Id.*

program that supplemented, rather than supplanted, the public school system—just like the Opportunity Scholarship program does in Florida—“[t]he legislature has fulfilled its constitutional duty to provide for the basic education of our children. Their experimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system.”<sup>103</sup>

The *Holmes III* majority’s response to this commonsense interpretation of a textually similar uniformity provision was to dismiss it in a footnote by simply noting that the Wisconsin constitution “does not contain language analogous to the statement in article IX, section 1(a) that it is a ‘paramount duty of the state to make adequate provision for the education of all children residing within its borders.’”<sup>104</sup> And here we have the distilled essence of the *Holmes III* majority’s reasoning in all its glory: Faced with a directly-on-point decision from the highest court of another state and the absence of contrary precedent anywhere else in the country, the Florida Supreme Court responds with a crashing non sequitur. It suggests that public education is somehow less “paramount” in Wisconsin than in Florida, while simultaneously failing to establish that what was true in Wisconsin—namely, that the challenged voucher program had not prevented any child from attending a public school with a “uniform character of education”—was untrue in Florida.<sup>105</sup>

Finally, there is the inconvenient fact of the Florida Supreme Court’s failure to accept review of a unanimous decision by a panel of the First District Court of Appeal in 2000, holding that the Opportunity Scholarship program did not violate Florida’s uniformity clause.<sup>106</sup> In seeking to persuade the Florida Supreme Court to accept the panel’s decision for review, school choice opponents presented the very same arguments ultimately accepted by the *Holmes III* majority when it struck down the Opportunity Scholarship program in January 2006.<sup>107</sup> If it is clear

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103. *Id.*

104. *Bush v. Holmes (Holmes III)*, 919 So. 2d 392, 407 (Fla. 2006).

105. *Id.* at 407 n.10.

106. *Bush v. Holmes*, 767 So. 2d 668 (Fla. Ct. App. 2000), *review denied*, 790 So. 2d 1104 (Fla. 2001) (unpublished table decision).

107. See Petitioners’ Corrected Brief on Jurisdiction, *Bush v. Holmes*, 790 So. 2d 1104 (Fla. 2001) (No. SC00-2295) (copy on file with the Institute for Justice) (arguing that

“beyond a reasonable doubt” that the Opportunity Scholarship program violates Florida’s uniformity clause—as the *Holmes III* majority implicitly concludes—then it is difficult to understand why that was not immediately apparent to the justices making up the *Holmes III* majority when they were first presented with those arguments in 2000. Did the unconstitutionality of the Opportunity Scholarship program somehow become more obvious during the subsequent four years of litigation, none of which focused on the uniformity issue? Despite the utter lack of attention to that issue in subsequent discovery or court proceedings, were new arguments developed or evidence uncovered during the ensuing four years of litigation that more clearly established the true meaning of the uniformity clause or the Opportunity Scholarship program’s supposed inconsistency with it? The *Holmes III* majority identified none, and in fact, there were none. The fact is that there were no significant developments regarding uniformity between the time the court first confronted the issue in 2000 and the time the court ruled on it in 2006.<sup>108</sup>

As suggested above, the *Holmes III* majority’s perfunctory treatment of practice and precedent strongly suggests a court much more interested in reaching a *particular* result than a correct one. As explained in the next section, it is precisely that feature of the *Holmes III* decision that seems likely to limit its impact in the dozen or so states with uniformity provisions similar to Florida’s.

#### VI. CONCLUSION: PARTING THOUGHTS ON THE FLORIDA SUPREME COURT’S DEPARTURE INTO JUDICIAL POLICYMAKING

The greatest concern in Florida in the wake of the Florida Supreme Court’s foray into educational policymaking is whether school choice opponents will use the *Holmes III* decision to attack any of Florida’s much larger school choice programs, all of which may now be vulnerable to legal challenge. Outside of Florida, the question is not whether but to what extent school choice opponents will use *Holmes III* to persuade credulous

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there is “no principled reason for delay” in considering school choice opponents’ uniformity and “no aid” arguments).

108. There was, however, a potentially significant development with respect to other claims in the *Holmes III* suit. Specifically, when the U.S. Supreme Court upheld Cleveland’s voucher program in *Zelman*, it became clear that the Opportunity Scholarship program would have to be struck down on state constitutional grounds.

legislators in the dozen or so other states whose constitutions contain “uniformity” language that school choice is a dead letter.

At the time of this writing, the situation in Florida is extremely fluid. During the spring of 2006, a pitched battle was waged in the Florida legislature to approve a proposed amendment<sup>109</sup> to the Florida constitution that would at least reverse the *Holmes III* decision and perhaps go even further in making clear the legislature’s authority to establish whatever type of school choice program it sees fit—not simply programs for children in failing schools, for families of limited financial means, and for children with disabilities, which is the present status quo. That effort failed by one vote, and the regular legislative session ended on May 5, 2006.<sup>110</sup> Although it is conceivable that Governor Bush could call the legislature back into special session,<sup>111</sup> that appears unlikely, and therefore efforts to amend the Florida constitution to explicitly permit school vouchers appears to be over, at least for now.

Assuming there is no constitutional amendment, it remains unknown whether school choice opponents will launch a fresh attack on Florida’s remaining school choice programs. Many of them have made clear their belief that those programs are likewise vulnerable to constitutional challenge.<sup>112</sup> The real

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109. H.J.R. 1573 CS, 2006 Leg., Reg. Sess. (Fla. 2006).

110. Bill Kaczor, *Voucher Legislation Dies as Session Draws to Close*, FLA. SUN-SENTINEL, May 6, 2006, at 14A.

111. Dara Kam, *Voucher Revival Try Snarls Senate; Skirmishes Flare in Accusations, Frustration*, PALM BEACH POST, May 4, 2006, at 14A.

112. See Marilyn Brown, *Vouch for Schools*, TAMPA TRIB., Mar. 28, 2004, at 1 (reporting plaintiffs lawyer Ron Meyer as stating that if the Florida Supreme Court upholds the lower court ruling that struck down Opportunity Scholarships, it “could impact the other scholarship programs”); S.V. Date, *State Court’s Voucher Ruling Could Ripple Through Elections*, PALM BEACH POST, June 4, 2005, at 1A (reporting Ron Meyer as stating that he likely would have challenged the McKay program had he known how long the Opportunity Scholarship litigation would take and that the McKay and prekindergarten programs “both suffer from the same constitutional infirmity” as Opportunity Scholarships); *Florida Ruling Could Impact State’s Special Ed Voucher Program*, THE SPECIAL EDUCATOR, Aug. 27, 2002 (noting that Howard Simon, Executive Director of the American Civil Liberties Union in Florida, “will consider” challenging the McKay Scholarship program if the Florida Supreme Court strikes down Opportunity Scholarships); Joe Follick, *Pro-Voucher Politicians Worry About Lack of Action on Issue*, SARASOTA HERALD-TRIB., Mar. 28, 2006, at BS6 (quoting an ACLU official as stating that “on the church-state issue” the prekindergarten program is “worse” than the Opportunity Scholarships); Joni James, *Legislature Crafts Plan to Keep School Vouchers*, ST. PETERSBURG TIMES, Jan. 7, 2006, at 16A (“Teacher-union attorney Ron Meyer of Tallahassee believes the [Corporate Income Tax program] might be just as vulnerable under the Constitution.”); Kimberly Miller, *Ruling Also Could Threaten McKay Scholarships*,

mystery is why they have not yet challenged any of the other school choice programs in the nearly three months since the Florida Supreme Court handed down its *Holmes III* ruling. That decision not only paves the way to make “uniformity” challenges to other K–12 school choice programs in Florida, but it also leaves undisturbed the court of appeals decision holding that the Opportunity Scholarship program violates the religious establishment provision of Florida’s constitution.<sup>113</sup> While Florida law is not completely clear on this point, a non-frivolous argument can be made that the court of appeals decision is still good law. Accordingly, state-funded school choice programs that permit recipients to select religious options in the same way that Opportunity Scholarships did—McKay Scholarships for Students with Disabilities, the prekindergarten program, and perhaps even Bright Futures Scholarships for college students—are all vulnerable to legal challenge. Given their rhetoric on the subject,<sup>114</sup> school choice opponents’ failure to act is all the more strange in light of the fact that the number of students attending schools under the Opportunity Scholarship program (733 students)<sup>115</sup> is trifling compared to the number of students at stake in the McKay program (over 16,000 students)<sup>116</sup> and in the voluntary prekindergarten program (over 80,000 students).<sup>117</sup>

There may not be just one explanation for the failure of school choice opponents to challenge other programs (yet), but hypocrisy and calculating cynicism are surely leading candidates. Those leading the charge against school choice—state and national teachers unions—bear the mark of hypocrisy largely because they really do not care how much or how little the government funds religious activities as a general proposition. Their concern with religious establishment provisions literally

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PALM BEACH POST, Jan. 6, 2006, at 18A (“Attorney Ron Meyer, who argued the voucher case for the plaintiffs, said the ruling sets a precedent for the [McKay Scholarship] program to be deemed unconstitutional. Howard Simon, executive director of the American Civil Liberties Union in Florida, whose organization was also a plaintiff in the case, agreed. ‘It is naïve to think that this ruling doesn’t speak to all state educational programs in which government funds are being diverted from public schools to private schools.’”); Jerome R. Stockfisch & Marilyn Brown, *Court Rejects School Vouchers*, TAMPA TRIB., Jan. 6, 2006, at 1 (quoting plaintiff Linda Lerner, who is a Pinellas School Board member, as saying, “My next question: What about the McKay scholarships?”).

113. *Bush v. Holmes (Holmes II)*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004).

114. *See supra* note 112.

115. OPPORTUNITY SCHOLARSHIP PROGRAM, *see supra* note 15.

116. MCKAY SCHOLARSHIP PROGRAM, *see supra* note 15.

117. Stockfisch & Brown, *see supra* note 23.

begins and ends at the K–12 schoolhouse doors. Calculating cynicism relates to the likely *timing* of the school choice opponents' future activities. As noted above, the Florida legislature has been considering a constitutional amendment to reverse the *Holmes III* decision and to clear the way for school choice in Florida.<sup>118</sup> Though nearly shut now, the window for that effort will close completely with the state election cycle in November 2006, which is when the constitutional amendment would go on the ballot and be voted on by the people. It seems likely that school choice opponents may be holding their fire until after that window closes so as to avoid lending impetus to the amendment efforts by reminding parents of children in other programs that their scholarships are at risk and that they had better get behind the amendment effort if they want to keep those programs alive. In the meantime, hundreds of thousands—perhaps millions—of dollars of state money will be spent on programs that the teachers unions, the American Civil Liberties Union, People for the American Way, and others supposedly consider to be blatantly unconstitutional. And yet they continue to stand by and do nothing to halt the flow of public dollars to those programs. It is almost enough to cause one to question their sincerity.

The final question that remains unresolved at this writing is the extent to which courts in other states with uniformity provisions in their constitutions will be inclined to embrace the Florida Supreme Court's shoddy construction of that term. As discussed above, Wisconsin, the only other state supreme court to consider such an argument, rejected it out of hand;<sup>119</sup> but now that Florida has paved the way, it is certainly possible that judges in other states will accept the invitation to engage in creative legal writing in order to advance the cause of the educational status quo. Besides Florida and Wisconsin, there are thirteen states whose constitutions contain uniformity provisions similar to Florida's.<sup>120</sup> Not all of these states are likely candidates for school choice programs, but in the states that are, there is every reason to believe that opponents will trumpet the Florida

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118. *See supra* note 109.

119. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

120. ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; IDAHO CONST. art. IX, § 1; IND. CONST. art. 8, § 1; MINN. CONST. art. XIII, § 1; NEV. CONST. art. 11, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OR. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 3; WASH. CONST. art. IX, § 2; WYO. CONST. art. 7, § 1.

Supreme Court's reasoning as an absolute deal-killer for such programs. The challenge for school choice proponents will be to explain to those legislators that the persuasiveness of non-binding judicial opinions depends significantly on the quality of the decision itself—the power of its logic, the strength of its reasoning, the quality of its scholarship, and its fidelity to the constitutional text and the record before it. Against that measure, the Florida Supreme Court's decision in *Holmes III* should quickly fade into the jurisprudential oblivion it so richly deserves.