

## MISSED OPPORTUNITIES: HOW THE COURTS STRUCK DOWN THE FLORIDA SCHOOL VOUCHER PROGRAM

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### INTRODUCTION

The future of American school voucher programs appeared promising after the Supreme Court held in *Zelman v. Simmons-Harris*<sup>1</sup> that a program enabling parents to use vouchers to send their children to parochial schools did not violate the federal Establishment Clause. The debate over vouchers has always been inextricably bound with the question about the proper relationship between religion and the state. The fact that over 85% of private primary and secondary schools possess a religious affiliation makes the implementation of a voucher program limited to secular institutions extremely difficult.<sup>2</sup> Voucher opponents did not let *Zelman* stop them, however, and they turned the debate into one over the interpretation of various related aspects of state constitutions.<sup>3</sup>

The recently completed litigation over the Opportunity Scholarships Program (OSP) in Florida is highly significant in that context. In 1999, Florida was the first state to adopt a statewide voucher program.<sup>4</sup> The premise of the OSP appeared simple: children who attended schools that received a grade of

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1. 536 U.S. 639 (2002).

2. Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 121 (2000) (citation omitted).

3. After the Supreme Court issued *Zelman*, both of the nation's largest teachers' unions, the National Education Association and the American Foundation of Teachers, declared that they would oppose vouchers through all possible means. Public education's administrators and school board groups joined these unions in battling school vouchers. See Richard Fossey & Robert LeBlanc, *Vouchers For Sectarian Schools After Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts Constitution?*, 193 ED. LAW REP. 343, 349 (2005).

4. Heytens, *supra* note 2, at 119.

“F” from the State two out of the previous four years would obtain the right to transfer to better public schools or to private schools that their parents chose, and public monies would help to cover tuition.<sup>5</sup> The program was under attack by state and national teachers’ unions and others from its inception;<sup>6</sup> in fact, various groups filed lawsuits<sup>7</sup> to stop the OSP the day after Florida created it.<sup>8</sup> The plaintiffs asserted that the OSP violated two provisions of the state constitution: Article IX, Section 1,<sup>9</sup> which establishes an obligation on Florida to provide a system of public schools, and Article I, Section 3,<sup>10</sup> which represents the clause prohibiting aid to religious institutions (also referred to as a “Blaine Amendment”).<sup>11</sup> The plaintiffs further initially sued under the Establishment Clause of the First Amendment of the United States Constitution.<sup>12</sup> While they dropped this last claim after the Supreme Court issued *Zelman*, they continued to litigate the claims arising under the state constitution.<sup>13</sup> This case would eventually become the first Blaine Amendment litigation before a state supreme court in the aftermath of *Locke v. Davey*,<sup>14</sup> and both school voucher advocates and opponents nationwide would closely watch

5. Institute for Justice, *Safeguarding Educational Freedom: Latest Legal Showdown for School Choice Heads to Florida Supreme Court*, <http://www.ij.org/schoolchoice/florida/backgrounder.html> (last visited Oct. 20, 2006).

6. See Institute for Justice, *supra* note 5.

7. The Florida Education Association, the Florida branch of the American Federation of Teachers, and the Florida PTA all joined in the suit. See Fossey & LeBlanc, *supra* note 3, at 352. The ACLU, NAACP, and People For the American Way were also involved in the litigation, claiming that the OSP was unconstitutional. See also Heytens, *supra* note 2, at 121.

8. Heytens, *supra* note 2, at 121.

9. *Id.* Article IX, section 1 of the Florida Constitution provides:  
Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

FLA. CONST. art. IX, § 1. This provision is referred to as the “uniformity clause.”

10. The section reads:

Religious Freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof 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.

FLA. CONST. art. I, § 3. This provision is referred to as the “no-aid provision.”

11. Heytens, *supra* note 2, at 118 n.4.

12. Institute for Justice, *supra* note 5. The First Amendment famously provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

13. Institute for Justice, *supra* note 5.

14. 540 U.S. 712 (2004).

it develop.<sup>15</sup> Significant disappointment ensued on the part of advocates when the Florida Supreme Court decided the case, *Bush v. Holmes*,<sup>16</sup> on the grounds of Article IX, Section 1 of the state constitution and failed to address the Blaine Amendment, which the Florida District Court of Appeal had used as grounds to strike down the OSP.<sup>17</sup> Most notably, this move to focus on the interpretation of state law alone ensured that the United States Supreme Court would not grant certiorari and that the OSP would definitely fall.<sup>18</sup>

This paper argues that both the Florida Supreme Court and the District Court of Appeal took incorrect interpretations of the state constitution, and that the OSP should be allowed to continue. The District Court of Appeal, through a tortured reading of the history of Florida's no-aid provision, failed to rule that the provision violates the Free Exercise Clause of the First Amendment of the United States Constitution by discriminating against religious schools. Alternatively, the court could have held that the no-aid provision does not apply to religious schools, and thus avoided a constitutional problem. Additionally, this paper will explain why the Florida Supreme Court misinterpreted the "uniformity clause" of the state constitution. Because other states may turn to the Florida decision for guidance, it is imperative to analyze and present its flaws before children nationwide lose their educational opportunities. Part I of this piece presents the background behind the originally proposed federal Blaine Amendment and describes how its downfall led a significant number of states to add Blaine-type no-aid sections to their constitutions. Part II analyzes the decision of the Florida District Court of Appeal to strike down the OSP under Florida's no-aid provision and establishes that the court should have either struck down the provision or held that it does not apply to the OSP. Part III examines the Florida Supreme Court's decision to uphold the decision below on a flawed understanding of separate state constitutional grounds and cautions against the consequences that this mistake could engender in other states.

#### I. THE ORIGINAL BLAINE AMENDMENT AND ITS PROGENY

To make a determination as to the correctness of the Florida District Court of Appeal's decision to uphold the State's Blaine Amendment, it is useful to begin by examining the contexts in which Blaine Amendments generally and Florida's version in particular arose. The originally proposed federal Blaine Amendment took its name from Representative James Blaine of Maine, who

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15. See Institute for Justice, *supra* note 5.

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

17. See Institute for Justice, *supra* note 5.

18. The principle was established long ago that only questions of federal law are open to Supreme Court review, while state court judgments are final on questions of state law. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635–36 (1874).

sought to introduce a constitutional provision in 1875 that would prohibit the transfer of any public funds to schools run by religious sects.<sup>19</sup> Initially, Protestants had dominated the education that took place in the common schools of the nation, but as the number of Catholics in America grew, so did Catholics' potential power to control parts of the educational system.<sup>20</sup> Catholics also attempted to separately develop their own educational systems and began to lobby state legislatures for public funds to do so.<sup>21</sup> President Grant sought to capitalize on the existing anti-Catholic sentiment by vehemently opposing the funding of such "sectarian" schools.<sup>22</sup> It is that background that fueled Representative Blaine's proposal.<sup>23</sup>

The Amendment did not receive the needed two-thirds majority in Congress to pass.<sup>24</sup> Nonetheless, "Blaine would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate: employing constitutional language, invoking patriotic images, and repeatedly appealing to individual rights as a distraction from the real business at hand—undermining the viability of schools run by religious minorities."<sup>25</sup> While never becoming federal law, the proposal inspired a number of states to adopt individual versions thereof, if they had not already incorporated similar provisions previously.<sup>26</sup> By 1876, fourteen states had enacted Blaine-type legislation, and by 1890 twenty-nine states had adopted the equivalent of Blaine Amendments as part of their constitutions.<sup>27</sup> These Amendments have not been identical; they range in the number of restrictions they impose on the transfer of public funds to religious schools.<sup>28</sup>

One scholar places the Florida no-aid provision into the category of the most restrictive type of Blaine Amendment, which he defines as the kind that goes "far beyond the prohibition of direct aid to schools by preventing indirect aid as well."<sup>29</sup> Florida enacted the provision in 1885, and there is no record from the constitutional convention in which it was adopted.<sup>30</sup> The enactment,

19. See, e.g., Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556 (2003) (citations omitted).

20. *Id.* at 558–63.

21. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 669 (1998).

22. DeForrest, *supra* note 19, at 565–66.

23. *Id.*

24. *Id.* at 573.

25. Viteritti, *supra* note 21, at 671.

26. DeForrest, *supra* note 19, at 576.

27. Viteritti, *supra* note 21, at 673.

28. See DeForrest, *supra* note 19, at 576–88 (providing a nationwide overview of the restrictiveness of different states' Blaine Amendments).

29. *Id.* at 587.

30. See *Bush v. Holmes*, 886 So. 2d 340, 348 (Fla. Dist. Ct. App. 2004).

however, took place during the same time period in which other states were adopting Blaine Amendments.<sup>31</sup> It is against this charged backdrop that one must consider the decision of the Florida District Court of Appeal that struck down the OSP based on the State's prohibition against direct or indirect aid to sectarian institutions.

## II. THE FLORIDA DISTRICT COURT OF APPEAL AND THE NO-AID PROVISION

This Part will address why the District Court of Appeal erred in its refusal to either strike down the State's no-aid provision as unconstitutional under the Free Exercise Clause of the First Amendment of the United States Constitution, or alternatively, construe the provision in a constitutional way by determining that it does not apply to the OSP. The arguments presented here will show that Florida's no-aid provision represents a discriminatory Blaine Amendment if interpreted to disallow a program that lets parents use school vouchers at either religious or secular institutions of their choice.

The majority opinion of the District Court of Appeal makes it a point to state that "[w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars" and that "there is no evidence of religious bigotry relating to Florida's no-aid provision."<sup>32</sup> The court emphasizes, however, that "[e]ven if the no-aid provisions were 'born of bigotry,' such a history does not render the final sentence of article I, section 3, superfluous."<sup>33</sup> The only evidence that the court provides to argue that the relationship between the Blaine Amendments and anti-Catholic bigotry is indeed a "controversial issue among historians and legal scholars,"<sup>34</sup> rather than universally accepted consists of a citation to *one* article by Indiana University law student Barclay Thomas Johnson, whose limited claim is that the no-aid provision in the Indiana Constitution is unlikely to have been the result of such bigotry.<sup>35</sup> The scholarship on the history of Blaine Amendments is much clearer than the court presents, and the majority opinion also completely mischaracterizes the claims in Johnson's article.

Scholars are in significant agreement that anti-Catholicism fueled the states' respective Blaine Amendments. Basing their claim on the work of numerous others, Richard Fossey and Robert LeBlanc refer to the Amendments as "steeped in a heritage of anti-Catholic bigotry"<sup>36</sup> and

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31. *Id.* at 348–49.

32. *Id.* at 351–52 n.9.

33. *Id.* at 352 (internal citation omitted).

34. *Id.* at 350.

35. Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173 (2001).

36. Fossey & LeBlanc, *supra* note 3, at 344.

emphasize Justice Thomas' plurality opinion in *Mitchell v. Helms*<sup>37</sup> and the scholarship of Joseph Viteritti,<sup>38</sup> "perhaps the foremost scholar regarding the Blaine Amendments,"<sup>39</sup> to that effect. Finally, the authors provide the following summary of the issue:

[T]he conclusion that [the Blaine Amendments] were driven by the Protestant/Catholic divide is unmistakable, despite the fact that none of the amendments refer specifically to Roman Catholics or Catholic Schools. This appears to be the scholarly consensus. It is also supported by the statistics regarding private school religious affiliation at the time, the Senate debate over the Federal Blaine Amendment, and the breakdown of social and political groups that supported and opposed the measure.<sup>40</sup>

Viteritti himself does not mince his words, either, when he writes that "Blaine amendment provisions, found in more than half the state constitutions, are a notable illustration of the kind of inverted logic that has influenced church-state relations for more than a century."<sup>41</sup> He adds that "[w]hile many strict separationists point to the Blaine amendment as a legal mechanism to protect religious freedom, an examination of Blaine's history shows that it was borne out of a spirit of religious bigotry and intolerance directed against Catholic immigrants during the nineteenth century."<sup>42</sup> In his book *Divided by God*, law and religion scholar Noah Feldman mentions the "[s]ound scholarship emphasizing the anti-Catholic history of the Blaine amendment."<sup>43</sup> One scholar notes that the enactment of state Blaine Amendments stemmed from "a high degree of hostility towards the teaching and practice of the Roman Catholic Church, and correspondingly there existed a strong desire to ensure that Catholics would be precluded from using the resources of the government to support their parochial schools and other religious institutions."<sup>44</sup> Further, an amicus brief co-written by Professor Richard Garnett in *Locke v. Davey* states that "the Blaine Amendments were designed to (and still do) impose special legal disadvantages on Catholics because their beliefs were feared or

37. *Id.* at 351 (citing *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000)) (stating that the refusal to aid religious schools had a "shameful pedigree" stemming from anti-Catholic prejudice and that the proposed federal Blaine Amendment "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic'").

38. *Id.* (citing Viteritti, *supra* note 21, at 675).

39. *Id.*

40. *Id.* (citing Heytens, *supra* note 2, at 138).

41. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 17–18 (1999).

42. *Id.* at 18.

43. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 211 (2005).

44. DeForrest, *supra* note 19, at 602.

hated by a sufficient majority.”<sup>45</sup> The proponents, some of them very renowned, of the theory linking the state Blaine Amendments to anti-Catholicism are thus numerous and speak with a consistent voice.

Not only would most scholars shudder at the idea that one student article to the contrary can suddenly make an established body of legal history controversial,<sup>46</sup> but Barclay Thomas Johnson’s student article does not even make the claims that the Florida District Court of Appeal imputes to it. The court states that “[o]ther commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions” and cites to Johnson’s article.<sup>47</sup> In particular, the court states that the article “indicat[es] that in 1850, less than six percent of Indiana inhabitants were immigrants and fewer still were Catholics” and that “[t]he Indiana aid provision was not ‘a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.’”<sup>48</sup> A closer look at Johnson’s piece, however, reveals an entirely different picture. While the author identifies non-discriminatory sources for Indiana’s no-aid provision, he states:

[W]ith respect to Indiana, it must be immediately understood and articulated that article I, section 6 [i.e. the State’s no-aid provision] *is not a Blaine amendment*. Indiana’s 1851 Constitution was enacted nearly a quarter-century before then Governor Rutherford B. Hayes of Ohio and Representative James G. Blaine began to publicly oppose the use of state funds to support Catholic schools in 1875.<sup>49</sup>

The court thus uses as evidence the history of a no-aid provision that is unrelated and was *not* in fact the type of provision that numerous states adopted in the aftermath of the failed introduction of the federal Blaine Amendment. The Johnson excerpt presented here is found within the same page numbers as the one that the court cites,<sup>50</sup> so it is quite unlikely that the court accidentally misunderstood the article as sending a different message. Rather, this indicates potential bad faith on the part of the court in a desperate

45. Brief of Amici Curiae the Becket Fund for Religious Liberty et al. in Support of Respondent at 29, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315).

46. This could theoretically happen, but it is rarely the case. Generally speaking, it takes more than one article and, as discussed *infra*, more evidence to call the situation controversial. To analogize, the fact that a few historians deny the entire Holocaust or significant aspects thereof does not inspire scholars to view the veracity of the Holocaust as controversial.

47. *Bush v. Holmes*, 886 So. 2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004).

48. *Id.* (citing Johnson, *supra* note 35, at 200–03).

49. Johnson, *supra* note 35, at 200–01 (footnote omitted) (emphasis added).

50. *Id.* at 200–03; *Bush*, 886 So. 2d at 351 n.9.

attempt to find historical controversy over Blaine Amendments where none exists.<sup>51</sup>

Even if the court had made the limited claim that there is theoretically such a thing as a no-aid provision that is not motivated by discriminatory intent (e.g. Indiana's), the burden of proof rests on the shoulders of voucher opponents if there is any disagreement as to the intent behind Florida's no-aid provision; because the default historical assumption is that no-aid provisions that were passed in the years after the failed Blaine Amendment stemmed from anti-Catholic prejudice,<sup>52</sup> it is for voucher opponents to bring evidence disproving the historical assumption.

One commentator suggests that even if "Florida's Blaine Amendment was enacted with a discriminatory purpose, the Amendment was probably 'washed clean' when it was reviewed and changed in 1968."<sup>53</sup> He cites a newspaper article as evidence that contains the following passage:

If there was a taint, it was washed clean when the provision was reaffirmed in the Constitution of 1968 with a slight change that made it applicable to "any political subdivision or agency" of the state. The intent, openly debated in the Legislature, was to forbid vouchers for religious schools, whether issued by the state or by school boards. This did not single out Catholics, though their interest was the oldest. Legislators voting on the measure had to be aware that it could affect schools that were sprouting under the sponsorship of Protestant churches as the Supreme Court's public school desegregation decisions began belatedly to take effect.<sup>54</sup>

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51. Ironically, Johnson explains that even in Indiana's case the no-aid provision should not present an obstacle to a model school voucher program. Specifically, he states:

Finally, a model voucher program does not offend the Indiana Constitution because it is consistent with the historical purposes behind the changes made in the 1851 Constitution. Additionally, where state funds flow to religious institutions from neutral, generally applicable programs, the First Amendment's Establishment Clause is not violated if the funds are directed by independent, private decisions of third parties. In summary, a model voucher program in Indiana will survive scrutiny under both the Indiana and United States Constitutions.

Johnson, *supra* note 35, at 212.

52. One source notes the "closeness in time and the similarity to the original Blaine Amendment" of the Florida no-aid provision. J. Scott Slater, Comment, *Florida's "Blaine Amendment" and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581, 619 (2004). Slater notes that even some school voucher opponents have admitted that the provision "sounds like a Blaine [A]mendment—the time line would fit, and the language is similar." *Id.* at 619 n.304 (citing Jo Becker, *Voucher Debate Entwined with a Century-Old Fight*, ST. PETERSBURG TIMES, July 6, 1999, at 4B, available at [http://www.sptimes.com/News/70699/State/Voucher\\_debate\\_entwin.shtml](http://www.sptimes.com/News/70699/State/Voucher_debate_entwin.shtml)).

53. *Id.* at 619.

54. Martin Dyckman, *History of Religion Has a Place in Schools*, ST. PETERSBURG TIMES, July 18, 1999, at 3D.



This attractively simple analysis actually misses a number of factors and leads to an incorrect result. First, the burden is on school voucher opponents to show that the legislature transformed the intent behind the no-aid provision from the discriminatory one of the Blaine era to a neutral one. In a hypothetical case of re-enactment without any sort of legislative history and where no significant changes to a provision occur, one would presumably just assume that the intent behind the provision remains the same. In the litigation at bar, the legislature only made one small alteration that did not change the character of the provision when it added the words “any political subdivision or agency.”<sup>55</sup> Even if the legislature re-enacted the amendment without reference to Catholicism, two issues remain. The first is that whether the legislature explicitly addressed this or not, it is widely known that a great number of private schools are Catholic<sup>56</sup> and that no voucher program is likely to effectively function if these are excluded. Secondly, if anything, the new intent changed from one that discriminated solely against Catholicism to one that discriminates against *all* religions and favors secular institutions, which is equally problematic.<sup>57</sup>

A closer analysis of this last point must begin with the free exercise test that the Supreme Court established in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>58</sup> which requires that any law not facially neutral toward religion must be narrowly tailored to fulfill a compelling state interest.<sup>59</sup> The Florida Government’s brief to the state supreme court<sup>60</sup> powerfully argues why the District Court of Appeal erred in determining that the no-aid provision as applied to the OSP met the *Lukumi* test, which occurred through a mistaken analogy to the program upheld in *Locke v. Davey*.<sup>61</sup> The brief explains: “The [*Locke*] Court went to great lengths to emphasize that a scholarship program discriminating against persons pursuing a non-theological major would be a different case, as would a case involving a state Blaine Amendment or public

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55. FLA. CONST. art. I, § 3.

56. “[In 1885], as today, Catholics operated more religious schools than any other denomination.” Jo Becker, *Voucher Debate Entwined with a Century-Old Fight*, ST. PETERSBURG TIMES, July 6, 1999, at 4B, available at [http://www.sptimes.com/News/70699/State/Voucher\\_debate\\_entwin.shtml](http://www.sptimes.com/News/70699/State/Voucher_debate_entwin.shtml). And, as mentioned, 85% of private schools have a religious affiliation. See *supra* text accompanying note 2.

57. One scholar notes: “While Nineteenth Century Blaine provisions targeted specific sectarian religions, most modern court opinions interpreting state Blaine amendments, like the *Witters II* decision from Washington State, strike not just at particular faiths, but at all faiths.” DeForrest, *supra* note 19, at 616.

58. 508 U.S. 520 (1993).

59. *Id.* at 531–32.

60. Initial Brief of Governor John Ellis (Jeb) Bush et al. at 34–39, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Nos. SC04-2323/SC04-2324/SC04-2325), available at [http://www.ij.org/pdf\\_folder/school\\_choice/florida/gov-bush-doe.pdf](http://www.ij.org/pdf_folder/school_choice/florida/gov-bush-doe.pdf).

61. 540 U.S. 712 (2004).

forum.”<sup>62</sup> The Florida Government also emphasizes that “implicit in the Supreme Court’s opinion was the assumption that the Washington constitutional provision would have violated the Free Exercise Clause if it had reflected an animus toward religion.”<sup>63</sup> The brief concludes that the no-aid provision in this case

is a far cry from the restriction upheld in *Locke* and, by singling-out religious institutions for exclusion, the Florida constitutional provision as interpreted would necessarily reflect animus toward religion. The very fact that the Court in *Locke* emphasized the limited nature of the Washington restriction strongly suggests that it would not uphold a restriction as broad as that imposed by the majority’s interpretation of the Florida Constitution.<sup>64</sup>

Some express little doubt that the Florida legislature knew perfectly well what it was doing with regard to discrimination on the basis of religion when the legislature re-enacted the no-aid provision, with one member of the 1968 Constitutional Revision Commission publicly stating that he and others “specifically intended to prohibit vouchers from being used to support any religious schools.”<sup>65</sup> If the District Court of Appeal believed that this was indeed the legislature’s intent behind the re-enacted provision, it should have struck down the provision as unconstitutional under the Free Exercise Clause; if it believed the intent was of a different nature,<sup>66</sup> it should have held that the provision does not apply to the OSP. As mentioned earlier in this Part, the Government’s brief to the Florida Supreme Court shows how this case could have been distinguished from *Locke v. Davey*, respecting that precedent while correcting the constitutional violation at bar. Mark DeForrest argues that a state’s Blaine Amendment causes “significant Religion Clause concerns in that it singles out religious institutions like schools and hospitals and those who benefit from their services from being treated by the state in the same manner as similarly situated but secular private entities.”<sup>67</sup> He explains:

62. Initial Brief of Governor, *supra* note 60, at 35 (citations omitted).

63. *Id.* at 36. Indeed, the government elaborates that:

The expressed reason that the Court found no evidence of animus in the Washington constitutional clause was that it had been interpreted by the state to permit the use of scholarship funds by students “to attend pervasively religious schools, so long as they are accredited” and under the scholarship program “students are still eligible to take devotional theology courses.”

*Id.*

64. *Id.* at 38.

65. Becker, *supra* note 56.

66. The dissent in the Florida Supreme Court decision in *Holmes* suggests that possibility by mentioning that “[w]hen the Florida House of Representatives considered language for the 1968 constitution, it rejected a proposal to add a section to article IX that would have limited the Legislature’s use of education funds by preventing any state money from going to sectarian schools.” *Bush v. Holmes*, 919 So. 2d 392, 423 (Fla. 2006) (Bell, J., dissenting).

67. DeForrest, *supra* note 19, at 608.

This is particularly true when the differential treatment is based on a person or institution's very status as a religious believer or institution . . . [and thus,] if the government opens up its coffers to provide aid to secular private schools or their students, the principle of religious neutrality requires that they should also allow religionists and religious schools to participate in such aid programs.<sup>68</sup>

Professor Stephen Carter supports this viewpoint and posits that the government's refusal to do this would violate the Constitution given that it "would make religious schools more costly and would thus constitute a government-created disincentive to use them."<sup>69</sup>

In his dissent in *Locke*, Justice Scalia argues vividly that even if there is no improper discriminatory sentiment motivating legislators, the Supreme Court of the United States can strike down as unconstitutional a law for its discriminatory effects.<sup>70</sup> One of the examples he provides is that when the Court deemed

racial segregation unconstitutional, [it] did not ask whether the State had originally adopted the regime, not out of 'animus' against blacks, but because of a well-meaning but misguided belief that the races would be better off apart. It was sufficient to note the current effect of segregation on racial minorities.<sup>71</sup>

While Scalia found himself in the minority in the particular case of *Locke*, courts have long accepted the principle derived from *Everson v. Board of Education of Ewing*<sup>72</sup> that "when the State withholds [a generally available] benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."<sup>73</sup> All these arguments show effectively why the way the Florida District Court of Appeal construed the State's no-aid provision infringes upon the United States Constitution, whether the intent of the legislature was discriminatory at any point in time or not.

The court, however, had another possible solution besides striking down the clause: it could have adopted the view that the no-aid provision did not

68. *Id.* at 608–09 (footnote omitted).

69. *Id.* at 609 (quoting STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 200 (1993)).

70. Justice Scalia states that he does not understand "why the legislature's motive matters" and analogizes: "If a State deprives a citizen of trial by jury or passes an *ex post facto* law, we do not pause to investigate whether it was actually trying to accomplish the evil the Constitution prohibits. It is sufficient that the citizen's rights have been infringed." *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting). It is important to note that while Justice Scalia found himself in the minority in *Locke*, his arguments gain new strength in the much more extreme case at bar whose differences from *Locke* are explained in Part II, *supra*.

71. *Id.*

72. 330 U.S. 1, 16 (1947) (holding that New Jersey could not exclude religious individuals from a public welfare program).

73. *Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting).

apply in the context of the OSP. Arguing in its brief to the Florida Supreme Court on behalf of parents who benefited from the program, the Institute for Justice<sup>74</sup> (IJ) explained that Opportunity Scholarships award aid to families in search of better schooling for their children “and because any benefits to religious institutions are merely incidental to that goal—as they are in dozens of other public welfare programs in Florida that allow religious groups to participate—the program is perfectly consistent with the text, intent, and historical interpretation of [the no-aid provision].”<sup>75</sup> IJ points to the inconsistency in applying the no-aid provision to the OSP when the legislature had repeatedly enacted other programs that allowed religious institutions to provide services without any legal challenge.<sup>76</sup> Further, it had to be established beyond a reasonable doubt that the no-aid provision applied to the OSP, and IJ was able to submit as counter-evidence both the legislature’s aforementioned passage of many such programs and the entirely “inconsistent interpretation of virtually identical language by courts in other states.”<sup>77</sup> The Florida Supreme Court, however, declined the invitation to rectify the mistaken understanding of the District Court of Appeal. The Supreme Court neither struck down the no-aid provision for violating the United States Constitution nor construed it such that it would not apply to the OSP. Instead, it simply chose to evade the issue altogether.

### III. THE FLORIDA SUPREME COURT DECISION AND ITS IMPLICATIONS

The Florida Supreme Court states its reasoning for refusing to address questions related to the no-aid provision as follows: “Because we determine that the OSP is unconstitutional as in violation of article IX, section 1(a) [uniformity clause], we find it unnecessary to address whether the OSP is a violation of the ‘no aid’ provision in article 1, section 3 of the Constitution, as held by the First District.”<sup>78</sup> The Court claims that under the principle of *expressio unius est exclusio alterius*,<sup>79</sup> the state constitution prohibits the OSP because the program interferes with the uniformity clause of the state constitution that requires that the education of children “shall be made by law

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74. The Institute for Justice is a public interest law firm based in Arlington, Virginia.

75. Initial Brief of Intervenors/Defendants/Appellants Brenda McShane, et al. at 3, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Nos. SC04-2323 to SC-4-2325), available at [http://www.ij.org/pdf\\_folder/school\\_choice/florida/FL\\_SC\\_filing.pdf](http://www.ij.org/pdf_folder/school_choice/florida/FL_SC_filing.pdf).

76. *Id.* at 7. Specifically the brief of the Institute for Justice reasons as follows: “Of course, it would be astonishing to learn that the legislature has been passing—and the people of Florida consistently accepting—unconstitutional public welfare programs for decades, particularly under the watchful gaze of Appellees and others who share their keen interest in Florida church-state relations.” *Id.* at 8. Striking down the OSP thus now also puts other programs at risk. *Id.* at 8–9.

77. *Id.* at 12.

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

79. *Id.* at 407 (i.e., “the expression of one thing implies the exclusion of another”).

for a uniform, efficient, safe, secure and high quality system of free public schools.”<sup>80</sup> This state constitutional provision does not “establish a ‘floor’ of what the state can do to provide for the education of Florida’s children,” the Court explains, but rather “mandates that the state’s obligation is to provide for the education of Florida’s children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.”<sup>81</sup> The conclusion that the Court draws, however, is in no way as clear as the opinion in *Bush v. Holmes* appears to suggest. For one, a strict application of this interpretation could prove absurd and disastrous. The Court’s claim boils down to stating that the requirement to fund public education prohibits the State from funding any type of non-public education. What are the implications of this statement, for instance, for public libraries, which receive state money and often educate children outside a uniform system of public schools? What about public roads near private schools, which cost the State money and enable children to drive to said schools? One could name a number of other examples of state expenditures that educate children: public-information campaigns, grants to artists, writers, poets, and so on.

The Florida Supreme Court’s case is further weakened by the fact that it appears to base its entire understanding of *expressio unius* on a quote from a statement in the 1927 *Weinberger v. Board of Public Instruction*<sup>82</sup> decision that states: “Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.”<sup>83</sup> The context of this quotation, however, is crucial to understanding what the Court meant in *Weinberger* and makes the case entirely distinguishable from *Bush v. Holmes*. In *Weinberger*, the Court had to examine a clause from the Florida Constitution that concerned the issuance of bonds; specifically, the constitution “declare[d] that the Legislature may provide for Special Tax School Districts to issue bonds for the exclusive use of public free schools within any special tax school district”<sup>84</sup> under the condition that “[a]ny bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue. Each annual installment shall be not less than

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80. *Id.* (quoting FLA. CONST. art. IX, § 1).

81. *Id.* at 408.

82. 112 So. 253 (Fla. 1927).

83. *Bush*, 919 So. 2d at 407 (quoting *Weinberger*, 112 So. at 256). The Court also briefly refers to *S&J Transp., Inc. v. Gordon*, 176 So. 2d 69 (Fla. 1965), mentioning that “where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways.” *Id.*

84. *Weinberger*, 112 So. at 254.

three per cent. of the total amount of the issue.”<sup>85</sup> The Court determined that the board had issued bonds whose dates of maturity did not fulfill the terms of the “express command”<sup>86</sup> of the constitution. Thus, in *Weinberger*, the relevant constitutional clause created a specific legislative power with particular conditions under which the power had to be exercised, and the legislature instead issued bonds whose nature directly clashed with the conditions. The language that refers to “[a]ny bonds”<sup>87</sup> could not be clearer—all bonds have to conform to those conditions. In *Holmes*, however, the State exercises a *general* power over educational matters, and any restrictions on that power must be explicitly listed in the state constitution.<sup>88</sup> The relevant provisions in *Holmes* contain no prohibitions;<sup>89</sup> in fact, they contain no language whatsoever that even comes close to *Weinberger*’s “[a]ny bonds.”

The gravity of consistently applying in Florida’s future jurisprudence the Court’s interpretation of *expressio unius* from *Holmes* becomes even clearer if one takes an intratextual look at the state constitution. For instance, Article II, Section 7(a) reads as follows:

It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.<sup>90</sup>

Adopting the reasoning the Florida Supreme Court employs in *Bush v. Holmes* would entail prohibiting the State from taking *any other measures* to

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85. *Id.*

86. *Id.*

87. *Id.*

88. *See, e.g.*, 78 C.J.S. SCHOOLS AND SCHOOL DISTRICTS § 6 (2005) (footnotes omitted) (stating that “[t]he state in legislating concerning education is exercising its broad sovereign power, and, subject only to any requirements or restrictions prescribed by the constitution, the legislature has a large discretion as to the manner of accomplishing its purpose”). *See also* Chiles v. Phelps, 714 So. 2d 453, 458 (Fla. 1998) (stating that “[t]he Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid”).

89. The *Holmes* dissent agrees with this view:

In *Weinberger* and the other cases relied upon by the trial court, . . . the *expressio unius* principle found its way into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision.

In contrast, in this case, 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. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Bell, J., dissenting) (quoting *Bush v. Holmes*, 767 So. 2d 668, 674 (Fla. Dist. Ct. App. 2001)).

90. FLA. CONST. art. II, § 7(a).

“protect . . . scenic beauty.”<sup>91</sup> Moving a highway and creating a new park would be unconstitutional because that possibility is not amongst the ones explicitly listed in the second sentence of Article II, Section 7(a).<sup>92</sup> This result is blatantly absurd and re-emphasizes that the *Weinberger* court could not have possibly wanted to apply *expressio unius* as broadly as the *Holmes* majority claims, but rather only would have embraced the idea that where the state constitution requires the performance of *specific* act X, Florida may not perform a *specific* act of non-X.

The majority makes a number of other arguments against the validity of the OSP under the state constitution, but none of them withstand scrutiny. The court claims that “because voucher payments reduce funding for the public education system, the OSP by its very nature undermines the system of ‘high quality’ free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida”<sup>93</sup> and that “[t]he systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a).”<sup>94</sup> Yet, whether funding school vouchers prevents the State from fulfilling its obligation to maintain public schools is not really a constitutional question, but rather one of *policy*. Legislative bodies must constantly use their judgment as to how they should apportion the State budget, and it represents a dangerous precedent for the Florida Supreme Court to intervene here.<sup>95</sup> As Justice Bell points out in his dissent in the case, courts should “declare laws unconstitutional only as a matter of imperative and unavoidable necessity.”<sup>96</sup> One wishes the *Holmes* majority had taken that to heart in this case.

To conclude the analysis of the Florida Supreme Court’s decision, it is instructive to examine a decision that actually provides a concrete instance in which a state supreme court correctly interpreted the uniformity clause of the state constitution. The Wisconsin Constitution, paralleling the language of the Florida one, mandates:

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91. *Id.*

92. *See id.*

93. *Bush*, 919 So. 2d at 409.

94. *Id.*

95. The court has a role in deciding the question whether the State does fulfill its constitutional obligation to provide a “uniform, efficient, safe, secure, and high quality system of free public schools.” *See* FLA. CONST. art. IX, § 1. If, however, the court holds that the State does not meet its mandate, then 1) that constitutes a statement separate from the role of voucher programs in leading to the problem (i.e., the cause of a legislative failure in fulfilling constitutional tasks is irrelevant), and 2) the question of *remedy* quite possibly should remain in the hands of the legislature. The legislature could decide to take any number of measures to fix a constitutional failure, one of them being to raise taxes to increase funding to public schools rather than abolish the voucher program.

96. *Bush*, 919 So. 2d at 413 (Bell, J., dissenting).

The legislature shall 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; and no sectarian instruction shall be allowed therein . . . .<sup>97</sup>

In its landmark decision in *Jackson v. Benson*,<sup>98</sup> the Wisconsin Supreme Court held that the state's uniformity clause did not prohibit the existence of a school voucher program that was substantively similar to the Florida OSP.<sup>99</sup> After clarifying that the acceptance of state monies does not transform private schools into public ones (in which case the recipient schools could not be sectarian in nature according to the state constitution),<sup>100</sup> the court disposed of the idea "that the district schools [must] be the only system of state-supported education."<sup>101</sup> Following its prior school voucher decision in *Davis v. Grover*,<sup>102</sup> the court explicitly concluded that the uniformity clause

clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education.<sup>103</sup>

Additionally, unlike the Florida Supreme Court, the Wisconsin Supreme Court denied that the creation of a school voucher program prevents students from attending a uniform system of public schools in any way.<sup>104</sup> Had the Florida Supreme Court followed similar reasoning, it would not have produced a decision that blatantly misunderstands basic principles of statutory construction and oversteps the boundaries of the judiciary's role in policy matters. Accordingly, the state courts that are currently examining local school voucher programs will hopefully let precedents such as Wisconsin's inspire their decision-making rather than follow the Florida model.

While the Institute for Justice and other organizations "are exploring all options to save the scholarships of students who rely on them for the only good education they have ever known, as well as to protect Florida's other school choice programs for disabled and low-income students,"<sup>105</sup> *Bush v. Holmes* struck a hard blow to the voucher movement. Appealing the case to the United

97. WIS. CONST. art. X, § 3.

98. 578 N.W.2d 602 (Wis. 1998).

99. *Id.* at 607.

100. *Id.* at 627.

101. *Id.*

102. 480 N.W.2d 460 (Wis. 1992).

103. *Jackson*, 578 N.W.2d at 628 (quoting *Davis*, 480 N.W.2d at 474).

104. *Id.*

105. Institute for Justice, *Holmes v. Bush: Institute for Justice and Parents Defend Florida's Groundbreaking Statewide School Choice Program*, <http://www.ij.org/schoolchoice/florida/index.html> (last visited Oct. 20, 2006).



States Supreme Court is close to impossible. By focusing on the uniformity clause alone rather than the no-aid provision, the Florida Supreme Court ensured that the case would center on the interpretation of state law alone rather than have First Amendment implications.<sup>106</sup> It is unclear how much the desire to remove any possibility for appeal was itself an important motivating factor in the majority's decision to ignore the Blaine Amendment issue.

Unfortunately, the *Holmes* decision also may not remain limited to Florida, as other states are currently examining their positions toward school choice. If continues to litigate similar issues in several states, and defenders of school choice worry about the possibility that courts in these other states could in fact use Florida's *Holmes* line of decisions to bar the use of vouchers in religious schools, which would entail the destruction of those school choice programs altogether.<sup>107</sup> As one commentator pointed out, "the most effective, definitive, and proper way to overcome the unnecessarily broad implications of Florida's Blaine Amendment would be to return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power it seeks."<sup>108</sup> Not all hope is lost for vouchers in Florida and the programs potentially endangered in other states, yet it will take great effort on the part of legislators, attorneys, and grassroots organizers to safeguard children's access to better schooling opportunities.

#### CONCLUSION

After a seven-year odyssey through the courts, Florida's Opportunity Scholarship Program has encountered more legal mistakes on the way than its defenders probably ever imagined. What the Florida District Court of Appeal should have done was either to strike down the state constitution's no-aid provision for violating the First Amendment of the United States Constitution or to hold that the provision does not apply to the OSP. Instead, in a decision riddled with historical and legal errors, the court struck down the OSP itself by

106. As mentioned, state court judgments are considered final on issues of state law. See *supra* text accompanying note 18.

107. School voucher programs are currently under attack in both Arizona and Maine. Most recently, the federal district court in Arizona upheld the constitutionality of the local school voucher program against a claim that the program violated the federal Establishment Clause. *Winn v. Hibbs*, 361 F. Supp. 2d 1117 (D. Ariz. 2005). In Maine, the Supreme Judicial Court upheld the constitutionality of a state statute's exclusion of religious schools from public funding, concluding that the statute violated neither the free exercise of religion nor equal protection under the federal Constitution. *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006). On July 25, 2006, the Institute for Justice petitioned the United States Supreme Court for a writ of certiorari in the *Anderson* case to overturn the decision. See Institute for Justice, *Parents Ask U.S. Supreme Court to End Religious Discrimination & Vindicate Full School Choice*, [http://www.ij.org/schoolchoice/maine2/7\\_25\\_06pr.html](http://www.ij.org/schoolchoice/maine2/7_25_06pr.html).

108. Slater, *supra* note 52, at 619. The author gives a number of specific suggestions as to potential wordings for changes in the relevant legislative text. *Id.* at 620–21.

holding that it interfered with the state constitution. The Florida Supreme Court's task was to overturn the District Court of Appeal's erroneous understanding. Rather than doing so, it employed a distorted view of its *expressio unius* and other jurisprudence to hold that the OSP violated the uniformity clause of Florida's Constitution; the Court never discussed the First Amendment issues at all, thus also preventing an appeal to the United States Supreme Court. The question remains open whether Florida's legislature or courts in other states will step in to defend school choice where the Florida court system completely failed.