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Winter 2010

SCHOOL VOUCHERS AND THE ROAD TO ACADEMIC EXCELLENCE AFTER BUSH V. HOLMES

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SCHOOL VOUCHERS AND THE ROAD TO ACADEMIC EXCELLENCE AFTER *BUSH V. HOLMES*

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May 14, 2009

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INTRODUCTION

Providing for an educated populous has been a goal of government since as far back as organized society has been recorded. Ancient Rabbinic Law instructs fathers to teach their sons the Torah (which can be interpreted to imply that the father teach the children to read) and to teach the son a trade.[1] Fast forwarding a couple thousand years, during the United States' infancy, James Madison once said that:

> [k]nowledge will forever govern ignorance; and a people who mean to be their own governours must arm themselves with the power that knowledge gives. . . . Learned institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.[2]

In other words, our democratic society allows the collective population to govern themselves through their votes; by not educating the people who cast those votes, a democratic society cannot reasonably be expected to succeed.

Florida has one of the largest public school systems in the United States with nearly 3 million students in grades K-12.[3] From the state's inception, education has been a recognized priority of Florida's government.[4] This priority has never wavered and the benefits of a strong education system have remained, while the detriments of an uneducated population have only become more evident. According to the United States Department of Justice, the typical incarcerated person in the United States is

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[1] http://www.scribd.com/doc/2958111/jewish-education-in-ancient-times.
[2] *Bush v. Holmes* 919 So.2d 392, 405-06 Fla.,2006. Quoting Robert S. Peck, The Constitution and American Values, in The Blessings of Liberty: Bicentennial Lectures At The National Archives 133 (Robert S. Peck & Ralph S. Pollock eds., 1989).
[3] http://www.publicschoolreview.com/state_statistics/stateid/FL
[4] As a recognized priority, the Florida Constitution of 1838 specifically provided for certain funds to be allocated for education and for no other purpose, *see* Florida Const. Art. X 1838.

"*undereducated*, unemployed and living in poverty before their incarceration."[5] Additionally, the illiteracy rate of prisoners in the U.S. is nearly five times the illiteracy rate for the general U.S. population.[6] For these reasons, providing a high quality education for every child in the state of Florida continues to be an important state interest.

Despite the high priority placed on education in Florida, there are many aspects of Florida's public education system that fall short. When compared to other states, Florida's public schools rank towards the bottom in terms of performance.[7] In 1999, shortly after he took the office of Governor, Jeb Bush stated in an address to Congress that Florida's high school graduation rate was an astonishing fifty-two percent.[8] His address went on to state that fifty percent of Florida's fourth graders were not able to read at the fourth grade level and over one-third of Florida's ninth graders, or about 60,000 ninth graders, had a D or F average.[9] Contrasting with these facts, the Florida Constitution provides in Art. IX Sec. 1.:

> "The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education"

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[5] http://www.bard.edu/bpi/pdfs/crime_report.pdf

[6] http://www.bard.edu/bpi/pdfs/crime_report.pdf *citing* U.S. Department of Education, National Center for Education Statistics, (1992). 1992 National Adult Literacy Survey. Washington, DC: Center for Education Statistics.

[7] See http://nces.ed.gov/nationsreportcard/nde/statecomp/sortingSingleYear.asp (showing state by state comparison of reading scores among U.S. 8th graders and placing Florida's students towards the lower half).

[8] http://www.icasinc.org/1999/1999l/1999ljeb.html.

[9] *Id*.

This Constitutional provision, coupled with the dismal performance of Florida's public schools creates a substantial dilemma; many students are constitutionally entitled to something that they're not getting.

In response to this problem, the Florida Legislature launched a broad education reform package in 1999, referred to as the A+ Plan. As a part of this plan, the Legislature created the Opportunity Scholarship Program (OSP). The OSP gave students who were attending failing schools a chance to go to another school, one that may be public or private. However, critics quickly voiced their concerns that the OSP would use taxpayer monies to pay tuition to private schools, many of which may be religiously affiliated private schools.

In 2006, the courts shut down the OSP after ruling that the program was unconstitutional.[10] The result of this determination is that many schoolchildren in Florida are currently attending failing public schools when they would otherwise have had an opportunity to attend a school that has a record of academic success. This article will discuss the OSP and the constitutional challenges brought against it at the District Court and the State Supreme Court levels. Following this discussion will be a presentation of the possible avenues that may be taken by advocates of the OSP and similar programs that provide government assistance for children in failing schools to attend successful schools.

THE OPPORTUNITY SCHOLARSHIP PROGRAM (OSP):

The OSP provided that a student who was assigned to attend a failing public school could attend a higher performing public school or use a scholarship provided by

[10] *Bush v. Holmes*, 919 So.2d 392 Fla.,2006 *see also Bush v. Holmes*, 886 So.2d 340.

the state to attend a participating private school.[11] The intent of the program, in a nutshell, was to provide better opportunities for Florida's students to obtain a high quality education that would prepare them for college and/or the workforce.[12]

Under the provisions of the OSP, a student who has elected to receive the OSP scholarship and attend a private school may remain in the private school even if the public school that the student left makes a huge improvement and becomes successful. The only circumstance in which a student who has elected to attend a private school must return to a public school is if the private school ends at the eighth grade and the public school that the student is zoned for receives a grade of a C or better.[13]

The case that shut down the OSP was *Bush v. Holmes;* the issue before the Florida Supreme Court in that case was whether the state constitution prohibited spending public funds on private school tuition as an alternative to public school education, as the OSP, codified in section 1002.38, Florida Statutes (2005) allowed.[14] The Court determined that the scholarship program violated Article IX, Section 1(a) of the Florida State Constitution; specifically, the provision in that section that requires the state to make

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[11] See § 1002.38(2)(a), (3), Fla. Stat. (2005).

[12] In re-authorizing this program in 2002, the Legislature stated: FINDINGS AND INTENT.— The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a career education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing for 2 years in a 4-year period. The Legislature shall make available opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the
educational public purpose, as delineated in subsection (4) (1) *see* § 1002.38(1), Fla. Stat. (2005)..

[13] *Bush v. Holmes,* 919 So.2d 392 Fla.,2006.

[14] *Bush v. Holmes,* 919 So.2d 392, 397 Fla.,2006.

adequate provision for a "uniform, efficient, safe, secure, and high quality system of free public schools." Additionally, a lower court, upon its hearing of *Bush v. Holmes* held that the OSP's use of tuition vouchers at religious schools violated Florida's constitutional ban on any aid, whether direct or indirect, from government to religious institutions.[15] However, the Florida Supreme Court declined to opine on this issue. Hence, there is at least one, and likely two Constitutional quandaries surrounding Florida's OSP.

The OSP and No-aid Clause Violations

The Federal Establishment Clause provides simply that "Congress shall make no law respecting an establishment of religion."[16] Similarly, Article I, section 3, of the Florida Constitution provides the Florida Establishment clause which states:

> 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*.

The District Court in *Holmes* noted that the addition of the no-aid provision of Art. I, section 3 of the Florida Constitution makes the Florida provision more restrictive than the Federal Establishment Clause. As support for this, the District Court cited the U.S. Supreme Court case *Witters v. Washington Department of Services for the Blind*, 474 U.S. at 489, where the Court recognized that a Washington state constitutional

[15] See generally *Bush v. Holmes*, 886 So.2d 340.
[16] See U.S. Const. amend I.

provision similar to Florida's no-aid provision was "far stricter" than the Establishment Clause in Article I of the Federal Constitution.[17]

The state argued to the district court that despite the "no-aid" language, article I, section 3 of the Florida Constitution should be interpreted as synonymous with the Establishment Clause of the First Amendment of the U.S. Constitution.[18] The court applied the three Establishment Clause tests set forth in the U.S. Supreme Court case *Lemon v. Kurtzman*, collectively termed the "Lemon Test;" they are: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion,[19] finally, the statute must not foster 'an excessive government entanglement with religion.'"[20] The majority felt that because of the "no-aid" language, the *Lemon* Test, alone, was not adequate because the Florida version was more restrictive. Guided by their decision to read the Florida provision as more restrictive, the court applied a fourth prong to the *Lemon* Test. The fourth test required that in order to pass muster under Article I, section 3, the statute must also not authorize the use of public money, directly or indirectly, to the aid of a sectarian institution.[21] The court held that the OSP failed this test.

The OSP and the Art. IX Constitutional Violations

Although the district court held that the OSP violated the "no-aid" provision, the Florida Supreme Court never addressed this issue. Rather, the Court found the OSP

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[17] *Bush v. Holmes*, 886 So.2d 340, 359-60., *citing Witters v. Washington Department of Services for the Blind*, 474 U.S. at 489.
[18] *Bush v. Holmes*, 886 So2d 340, 357-58.
[19] *Bush v. Holmes*, 886 So.2d 340, 358 *citing Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968).
[20] *Walz*, [397 U.S.] at 674, 90 S.Ct. at 1414." Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111.
[21] *Bush v. Holmes*, 886 So.2d 340 at 358, *citing Silver Rose Entertainment, Inc. v. Clay County*, 646 So.2d 246, 251, Fla.App. 1 Dist.,1994

unconstitutional for violation of article IX, section 1(a) of the Florida Constitution, which states that: "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." Justice Pariente, writing the majority opinion reasoned that the OSP:

> diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. This diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system.

Chief Justice Pariente wrote in her majority opinion in *Holmes* that there are two parts to Art. IX Section 1(a) of the Florida Constitution; the first part, has been cited often and was cited as part of the legislative intent in both the 1999 and 2002 versions of legislation that created the OSP.[22] This first part reads: "The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the opportunity to obtain a high-quality education."[23] However, the Chief Justice and the majority found crucial that in neither the 1999 or the 2002 legislation was the second part of article IX, section 1(a) mentioned; the second part charges the legislature to provide "uniform, efficient, safe, secure, and high quality system of *free public schools*" (emphasis added).[24]

The Florida Supreme Court's article IX, section 1(a) analysis in *Holmes* gave great importance to reading these two parts together. The Court cited the 1927 Florida Supreme Court case of *Weinberger v. Bd. of Pub. Instruction*, 93 Fla. 470, 112 So. 253,

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[22] *Bush v. Holmes*, 919 So.2d 392, 406 Fla.,2006.
[23] *Id*.
[24] *Id*.

256 (1927) where the Court said that when the Constitution provides a specific means of accomplishing something, it impliedly forbids using a substantially different means to meet the same goal; even though there isn't an express prohibition on the means used, the courts should read the Constitutional provision as prohibiting it.[25] For this reason, the *Holmes* Court held that art. IX, section 1(a) "mandates that a system of *free public schools* is the manner in which the State is to provide a free education to the children of Florida" and that "providing a free education ... by paying tuition ... to attend private schools is a 'a substantially different manner' of providing a publicly funded education than. . . . the one prescribed by the Constitution."[26]

It is important to also note that not all courts have applied this so called *expression unius est exclusion alteriu.* In 1945 the Florida Supreme Court rejected this notion because the statute at issue in that case didn't conflict with the primary purpose of the constitutional provision.[27] The majority in the *Holmes* case felt that the application was proper in *Holmes* because the broad Constitutional mandate in *Holmes* was distinguishable from the narrow mandate in the 1945 case. However, this distinction is open for debate and may be a key area of vulnerability should a similar case ever make it to the Florida Supreme Court.

In using the *expression unius* interpretation the Court took into account several of the provisions in the second part of article IX, section 1(a): "uniformity," "high quality," and "free." The Court found that the uniformity provision was not met through the OSP. It noted that there are numerous nonpublic school accrediting bodies that have "widely

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[25] *Bush v. Holmes*, 919 So.2d at 407. This concept is known as "*expression unius est exclusion alterius*."
[26] *Holmes v. Bush*, No. CV99-3370 at 10, 2000 WL 526364 (2nd Cir. Ct. order filed March 14, 2000).
[27] See *Taylor v. Dorsey*, 155 Fla. 305, 19 So.2d 876, 882 (1944).

variant quality standards and programs requirements."[28] Further, there were many concerns with private schools differing from public schools in their hiring criteria of teachers, separate curriculum, and accountability to the Florida Department of Education.[29]

WHAT NOW? AVENUES TO FILL THE VOID LEFT BY *BUSH V. HOLMES*

Following *Bush v. Holmes*, there are three avenues available to advocates of government assistance for children in failing schools to attend other schools. First, there may be a constitutional alternative method for providing vouchers. Second, the *Bush v. Holmes* holding can be revisited and overturned, thus allowing the Florida Opportunity Scholarship to continue. Finally, the Florida Constitution may be amended to specifically provide for school vouchers, such as the ones used in the Florida Opportunity Scholarship Program, thus rendering such vouchers constitutional under the Florida Constitution. The following is an exploration of all three of these methods to determine if any would help advocates of the OSP to reinstate what was such an important answer to such a prominent problem.

Was *Bush v. Holmes* Wrongly Decided?

A discussion of whether the *Bush v. Holmes* case was improperly decided would be incomplete without also giving attention to the First District's holding that the OSP

[28] *Bush v. Holmes*, 919 So.2d at 410 *citing* Florida Department of Education, Private School Accreditation, http://www.floridaschoolchoice.org/Information/Private_Schools/ accreditation.asp.
[29] *Id*.

violated Article I, section 3 of the Florida Constitution. Even if the Florida Supreme Court, or the U.S. Supreme Court, holds in a future case that programs like the OSP do not violate Article IX section 1(a), the issue of Article I, section 3 will still be relevant.

Unfortunately, any discussion of an overturn of the *Holmes* decision would also be incomplete without some discussion of the politics involved. A lengthy dissent was written in *Holmes* by Justice Bell, joined by Justice Cantero, the only two Republican Governor appointees on the Court at the time. The current Republican Governor has had the opportunity to reshape the Court; so if the Court decides to hear a case similar to *Holmes* in the near future, there is a good chance that the outcome could be influenced by the re-staffing of the Court.

Challenging the District Court's Article I Holding in *Bush v. Holmes*

As mentioned *supra*, an airtight argument to overturn the Florida Supreme Court's holding in *Holmes* would accomplish little without also overcoming the holding of the District Court which the Supreme Court declined to reach. Judge Polston's *Holmes* dissent at the district court level began the analysis of Constitutionality with the presumption that the OSP *was* Constitutional, citing to case law that requires a presumption of Constitutionality when reviewing a creation of the legislature.[30] According to Judge Polston,[31] the DCA's majority discriminated against religion and incorrectly interpreted Article I, sec. 3, to apply in a more restrictive manner than the Federal Constitution's Establishment clause.

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[30] *Bush v. Holmes*, 886 So.2d 340, 376, *citing Dep't of Ins. v. Keys Title & Abstract Co.*, 741 So.2d 599, 601 (Fla. 1st DCA 1999).

[31] It is important to note that Judge Polston (here serving as a 1st District Court of Appeal judge) has recently been appointed to serve as a justice on the Florida Supreme Court; should this issue rise to the Florida Supreme Court, this dissent gives a clear indication of which way he will lean.

The district court applied a spin-off of the well established "Lemon Test" in order to arrive at their conclusion. The Lemon Test was established in 1971 as a means of testing a statute for constitutionality under the Federal Establishment Clause.[32] The Lemon test lays out the following three steps: 1) that the statute has a secular legislative purpose, 2) that the statute's principal or primary effect neither advances nor inhibits religion,[33] and 3) that the statute does not foster an excessive government entanglement with religion.[34] The impetus for the district court's more restrictive holding runs back to a decision from the first district in 1994. That year, the First District Court Appeal added a fourth prong to the Lemon Test that was used in a situation where an Article I, section 3 issue was in question of Constitutional compliance.[35] However, Judge Polston correctly noted in his *Holmes* dissent that in that 1994 case the issue was merely whether a county ordinance recognized a religion through restricting the purchase of alcohol on Christmas day; this was strictly an establishment clause issue. Therefore, the so-called fourth prong test was never applied to the *no-aid provision of Article I.*[36]

The First District took a bold step in determining that the no-aid provision is more restrictive than the Federal Establishment Clause and applying this fourth prong test. Because the Supreme Court never took up the Article I issue, the issue of whether the no aid provision in the Florida Constitution is more restrictive than the Federal Establishment Clause is one that is still arguable; in a challenge to the *Holmes* decision this could be a pivotal determination by the Supreme Court. In the absence of the

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[32] *Lemon v. Kurtzman*, 403 U.S. at 612-13, 91 S.Ct. at 2111.
[33] *Bush v. Holmes*, 886 So.2d 340, 358 *citing Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968).
[34] Walz, [397 U.S.] at 674, 90 S.Ct. at 1414." Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111.
[35] See Silver Rose Entertainment, Inc. v. Clay County, 646 So.2d 246, 251, Fla.App. 1 Dist.,1994.
[36] *Bush v. Holmes*, 886 So.2d 340, 386.

disputed fourth prong test, the OSP passes the *Lemon* test because the statute 1) has a secular purpose, 2) its *primary* effect does not advance nor inhibit religion, and 3) the OSP doesn't create "an excessive government entanglement with religion."[37] However, because the no-aid provision does provide more substantive language than the Federal Establishment Clause, then *perhaps* Article I, section 3 *is* more restrictive.

Challenging *Bush v. Holmes* on Article IX Section 1(a) Grounds

Perhaps the most vulnerable area of the Supreme Court's *Holmes* opinion is the Court's use of the statutory interpretation tool referred to as *expression unius est exclusion alterius.* Without this interpretation, which persuaded the majority that there was only one method prescribed by the Constitution to provide for public education, school vouchers could receive much more amiable treatment from the courts. The dissent, authored by Justice Bell, did not apply the canon and found no support for the majority's finding that the OSP prevented the state from fulfilling the constitutional mandate to provide for a uniform system of free public schools.[38] Article IX mandates that a free system of uniform public schools is provided for. By providing for free educational options in the small number of schools that are inadequate, the dissent found no problem with the OSP. The cause of the Court's disagreement is how the "uniform" provision is to be read. The Republican appointed justices both were of the opinion that if the framers of the Constitution intended to require that there should be only one method for providing public education, then the provision in Article IX would clearly say so. On the other hand, the Democrat appointed counterparts, through the use of the statutory interpretation tools, were of the opinion that there is only one method of

[37] *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.
[38] *Bush v. Holmes*, 919 So.2d 392, 413, Fla.,2006 (J. Bell dissenting).

providing public education in Florida and it must be uniform, thus, abolishing the OSP because it places students in different types of schools.

Justice Bell's disapproval of the majority's statutory interpretation tools is based on Florida Supreme Court precedent that held "[w]hen the language of the statute is clear and unambiguous and conveys a definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."[39]

A reasonable analysis that adequately considers these factors could resemble the following: 1) Article IX mandates that every child is afforded free, uniform, high quality, public schools; 2) however, some schools in the state are not high quality and cannot be expected to become high quality before current students reach age 18; 3) the OSP provides students at the low quality schools an opportunity to attend a free school that is of comparable quality to other "high quality" schools in the state. Therefore, the OSP serves the Constitution's intent. However, the majority of the *Holmes* Court would disagree with the third step in this analysis. Reasonable minds could read the statute and decide either way; however, it is well settled that creations of the legislature should be examined on constitutional grounds with a presumption towards constitutional compliance[40] and therefore, if reasonable minds could find either way then perhaps the Florida Supreme Court should be overturned on this issue.

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[39] *Bush v. Holmes*, 919 So.2d 392, 420, Fla.,2006, (J. Bell dissenting) *citing Holly v. Auld*, 450 So.2d 217,219 (Fla.1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).
[40] *Bush v. Holmes*, 919 So.2d 392, 413, Fla.,2006 (J. Bell dissenting) *citing State v. Jefferson*, 758 So.2d 661, 664 (Fla.2000) ("[w]henever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result").

Constitutional Alternatives to the OSP:

The state of Florida has a number of programs that allow school children to receive vouchers to attend private, oftentimes even religious, schools. These programs include the McKay Scholarship Program (MSP),[41] the voluntary prekindergarten program, and the Corporate Tax Credit program. Of these programs the Corporate Tax Credit program provides a benefit most similar to the OSP because it is aimed at K-12 students who are unhappy with the performance of their current school.

The following is a discussion of the Corporate Tax Credit Program and then a discussion of a severed version of the OSP and whether either could adequately replace the OSP.

The Corporate Tax Credit Scholarship Program (CTC program)

Currently, tax credit vouchers are funded by corporations that get dollar-for-dollar tax credits for donations to state-approved scholarship organizations. The Florida Legislature created the program, termed the Corporate Tax Credit Scholarship Program (CTC), via Section 220.187, Florida Statutes, in 2001.[42] This program hasn't suffered nearly the scrutiny that the OSP vouchers did; however, if challenged, the CTC program may be subjected to the same constitutional concerns as the OSP. To date, no Florida case has ever challenged this program on constitutional grounds.[43]

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[41] McKay Scholarships are available to parents of children with physical, mental, and learning disabilities. Parents can use these scholarships to enroll their children in a private school of their choice, including religious schools. The program provided over 19,850 Florida students with special needs the opportunity to attend a participating private school during the 2007-08 school year. http://www.floridaschoolchoice.org/information/mckay/

[42] *See* DOE website http://www.floridaschoolchoice.org/Information/CTC/.

[43] A Westlaw search of Florida state and federal cases for "Corporate Tax Credit Scholarship Program" and several variations of this phrase produced nothing.

At the First District Court of Appeals, when reviewing the *Bush v. Holmes* case for the final time before it reached the Florida Supreme Court, the court discussed tax exemptions for religious organizations and stated that "the distinction between a benefit arising from a tax exemption and a payment from the state is one without a difference." Granted, the context in which the court stated this can be distinguished from the CTC program, this statement gives light to the idea that any time money that would otherwise wind up in Florida's public schools instead finds its way to a private school voucher, there may be a *Holmes*-style constitutional concern. This concern is only exasperated by tough economic times that have trimmed public school funding drastically.[44]

The *Holmes* Court noted that the Constitution prohibits the state from using public monies to fund a private alternative to the public school system.[45] This, the Court said, was exactly what the OSP did.[46] Further, such a program would not supplement the public education system but rather divert funds that would otherwise be allocated to provide for free public schools, which is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.[47] Lending more credence to the Court's finding is Article IX, section 6 which says that income and interest from the State School Fund may be appropriated "only to the support and maintenance of free public schools."[48]

The CTC program illustrates a wholly different type of funding for education. In the event that the CTC program is challenged in a manner similar to the OSP, the CTC

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[44] http://www2.tbo.com/content/2009/mar/01/na-budget-gunfight-expected-in-session/news-metro/. Recognizing that property tax revenues, which serve as a major source of funding for Florida's schools, are anticipated to decline.
[45] *Bush v. Holmes*, 919 So.2d at 408.
[46] *Id*.
[47] *Id* at 408-09.
[48] See Bush v. Holmes, 919 So.2d at 410-11 quoting Art. IX, sec. 6 FL Const.

enjoys a much better chance of survival under the same constitutional scrutiny. The distinguishing characteristic between the CTC and the OSP is that in the CTC the monies that are put towards the scholarships are never actually a part of the government's general revenues; that is, through a tax credit scheme, the revenue bypasses government/public education revenues altogether. This distinction may not be accepted by all, and in current economic times, it doesn't seem too far-fetched for the CTC program to face both Article I section 3 and Article IX section 1(a) scrutiny.

The Article IX concern would likely be the tougher issue for the CTC program; advocates of the program will need to convince critics that the program is not reducing funds to public schools in order to ease the *Holmes* concerns, that the CTC:

> diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. [The] diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system.

The CTC will also be subjected to Article I, section 3 ("no aid provision") analysis. The three-step *Lemon* Test was not what the district court struck down the OSP for and based on this, it's safe to assume that the *Lemon* test will likely not result in the demise of the CTC. It was the fourth-step test that the DCA used that served as the fatal blow to the OSP under the court's Article I, section 3 analysis. Because of this, the fourth test applied in *Holmes* should be the primary concern for proponents of the CTC

facing Article I pressure.[49] That test requires that the statute (CTC) does not authorize the use of public revenues, directly or indirectly, to aid a sectarian institution. Leaving out the severability of sectarian schools approach, the first part of this test merits dissection. That part prohibits the use of "public revenue;" this, read alone, would not apply to the CTC because the CTC does not use "public revenue." However, the next provision is the area most likely to cause conniptions in the courts. The "directly or indirectly" language may be argued to mean that "public funds," whether directly public or indirectly public. However, proponents of the CTC may raise a rational argument that "public revenue" is a term that is much easier to pin point than a beneficiary of financial aid, and thus the "directly or indirectly" language was likely intended to refine only the *use* of public revenues, not the actual defining of what is to be considered "public revenues."

Under the above rationale, the CTC could be deemed in compliance with both Article IX and Article I of the Florida Constitution.

However, the issue remains of whether the CTC operates as a substitute for the OSP. The short answer to this is that in the CTC's current form it does not. The CTC serves a much smaller population than the OSP did, however, it may have the potential to expand based on the popularity of the program among donors.

[49] The relevant part of Art. 1, sec. 3 reads: "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."

An OSP Exclusively Designed for non-Sectarian Schools

Another potentially constitutional alternative to the OSP involves the issue of severability, an issue that was never raised in *Holmes*.[50] At the very least, non-sectarian private schools should be allowed an opportunity to argue, in a case separate from religiously affiliated schools, that the funds they receive through the OSP serve a legitimate state purpose while remaining in compliance with the Florida Constitution.

The District Court recognized a 1947 Florida Supreme Court case that laid out provisions for severability:

> The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.[51]

In the case of the OSP the second "*Cramp* Test," or purpose requirement, seems to be the easiest to meet by severing the religiously affiliated schools from the OSP. The purpose of the OSP is to educate students, removing the religious element does nothing to prevent the purpose of the act from being reached. Likewise, the third and fourth steps are likely met; it seems that the legislature, recognizing the importance of education would have likely passed a severed version of the OSP and doing so would not have left an invalid act.

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[50] *Bush v. Holmes*, 886 So.2d 340, 374.
[51] *Bush v. Holmes*, 886 So.2d 340, 374-75 *citing Cramp v. Bd. of Public Instruction of Orange County*, 137 So.2d 828 (Fla.1962)(Wolf, J. writing separately).

The first of the points laid out in *Cramp* raises the biggest concern for the OSP. This test would validate the OSP on Article I, Section 3 grounds, because the religious schools can be removed and the education component is still provided. However, there would still be a considerable Article IX concern. Based on the current precedent set by the *Holmes* decision, diverting public funds to pay tuition at private schools, religious or not, would violate Article IX by failing to provide for a uniform system of public schools. Thus, although severability would overcome the Article I concerns, the OSP is not likely to find a constitutional alternative by merely removing the religiously affiliated schools from its list of beneficiaries due to the lingering Article IX conflict. However, the *Cramp* test would pass scrutiny if *all private* schools were severed and only high quality *public* schools were provided as an alternative.

The Case for a Constitutional Amendment Allowing School Vouchers

As at third avenue to provide the types of school vouchers that were used in the OSP, a constitutional amendment could be added to the Florida Constitution that would allow such a program. The district court seemed to encourage such an amendment in the conclusion portion of their holding.[52]

The Process of Amending the Florida Constitution:

Article XI of the Florida Constitution provides four methods for amending the Florida Constitution. These methods are: 1) through a joint resolution of the legislature, 2) by an action of the Constitution Revision Commission, 3) through Citizens' Initiative

[52] *Bush v. Holmes*, 886 So.2d 340, 366 *stating* "[C]ourts do not have the authority to ignore the clear language of the Constitution, even for a popular program with a worthy purpose. If Floridians wish to remove or lessen the restrictions of the no-aid provision, they can do so by constitutional amendment."

Petition, 4) through a Constitution Convention, and 5) through an action of the Taxation and Budget Reform Commission, which has only limited power of issues pertinent to the state budget. Regardless of which method is used to amend the Florida Constitution, the proposed amendment must be put to the voters of the state in a general election.[53] Historically, once an amendment is placed on the ballot it is overwhelming likely to be voted in the affirmative and officially become a Constitutional amendment.[54]

In order to amend the Constitution through a legislative proposal there must be a joint resolution by 3/5's of both houses of the legislature. The Governor may not veto the joint resolution if there is 3/5's vote; once the proposal has passed both houses it goes straight to the Secretary of State to be put on the ballot for the general election.[55] In 2006 there was such a resolution for school vouchers,[56] however, after passing several legislative committees the resolution failed.[57] Although this method has recently been tried and failed to create an amendment for school vouchers, this method may prove fruitful if tried again; providing for more educational options may be seen as a strong political move for many members of the legislature and on the eve of the 2010 elections the time could be ripe for such an occurrence.

The Constitutional Revision Commission ("CRC") is comprised of 37 members prescribed by the Constitution and they meet to consider amendments to the Constitution. The downside for the case at hand is that this body only convenes every 20 years and is

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[53] *See* FL CONST. Art. XI, sec. 5.
[54] The Florida Secretary of State website listing of passed/defeated amendments that were put to the ballot shows overwhelming more passed amendments than defeated ones; see http://election.dos.state.fl.us/initiatives/initiativelist.asp.
[55] In this scenario, the single subject rule doesn't apply (see Article XI section 1 which says that the legislature has the authority to NOT be subject to only a single subject) BUT the accuracy requirement DOES apply (see FL Stat 101.161)
[56] H.J.R. 1573 CS, 2006 Leg., Reg. Sess. (Fla. 2006).
[57] http://www.myfloridahouse.gov/sections/Bills/billsdetail.aspx?BillId=33832.

not scheduled to meet again until 30 days prior to the 2017 regular session.[58] For this reason, the CRC is not a desirable method for addressing the present school vouchers issue.

The Citizens Initiative Petition method is perhaps the second most likely to succeed of all the Constitutional amendment methods, next to the legislative resolution method. The reason this method is not the best method is because of the onerous requirements for amending the Constitution in this manner. The guidelines for this method are laid out in Article XI section 3. The process requires that the amendment is filed with the Secretary of State and that the copy filed is signed by "a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen."[59] Acquiring these signatures is not an easy task, particularly for a provision that may fail in the general election and moot the entire effort.

The Constitutional Convention method is provided for in Art. XI, section 4 and it is the most burdensome and most unrealistic method for amending the Constitution. In this section the Constitution vests in the people of Florida the right to call a Constitutional Convention. The method for doing so is similar to the citizens' initiative because it requires filing with the Secretary of State a petition signed by a significant portion of the state's population.[60] If this step succeeds, then the legislature has an

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[58] FL CONST. Art. XI, sec. 2.
[59] See FL Const. Art. XI, sec. 3.
[60] See Art. XI, sec. 4 requiring petition for calling a Constitutional Convention to be "signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to fifteen per cent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors."

opportunity to veto the decision of the people to call the convention, however, if the legislature, at the next general session votes to also hold a Constitutional Convention, then at the next general election a member from each representative district of the state is elected to be a member of the Convention. Once the Convention is formed they may consider proposals to amend the Constitution. Because this process is lengthy and complicated, it has a high probability of failure and, even if it were successful, it would take years to complete. For this reason the Constitutional Convention is not a desirable method for addressing the school vouchers issue.

If the Taxation and Budget Reform Commission ("Commission") proposes to amend the Constitution with respect to non budget issues then further restrictions may be applied. A recent Florida Supreme Court holding struck down the Commission's ability to amend the Constitution with respect to Article I, section 3.[61] In that case, the Court reviewed a proposed amendment to article I, section 3 which would have changed that section as follows:

> SECTION 3. 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. An individual or entity may not be barred from participating in any public program because of religion. ~~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.~~

In a 9-0 decision the Court held that the Taxation and Budget Reform Commission exceeded its authority by proposing this amendment.[62] The Court reached

[61] *See Ford v. Browning*, 992 So.2d 132 (FL 2008).
[62] *Ford v. Browning*, 992 So.2d 132,141.

this conclusion by correctly recognizing that "the [Commission's] authority to propose constitutional amendments directly to the voters is constitutionally limited to two scenarios: if the proposal addresses taxation, or the process by which the State's budget is procedurally composed and considered by the Legislature.[63] For this reason, the Commission is also not a viable method of addressing the school vouchers issue.

CONCLUSION

School choice has for years been, and will likely continue to be, an ongoing debate among educators and lawmakers. Further, the concept of school vouchers is one that is not likely to disappear from that debate. This is an issue that stirs compassion and emotion; nearly every court and public figure that has opined on the subject has disclaimed any negative comments with the assurance of their concern for schoolchildren's education.

One interesting study from the Chicago Public School System has shown significant results that may make the whole debate moot. University of Chicago Economist Steven Levitt studied a 1980 program in Chicago's public schools where students at sub-par urban high schools could apply to attend newer, *better*, high schools in the area.[64] The scenario created almost a perfect environment for a school choice study; the sample size was large (Chicago's public school system was the third largest in the nation at the time) and the students who were admitted to the "better" high schools were chosen completely at random, through a lottery system that didn't take into account

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[63] *Ford v. Browning*, 992 So.2d 132,140.
[64] Levitt, Steven D. and Dubner, Stephen J., Freakonomics: a rogue economist explores the hidden side of everything, 1st ed. At p. 157-59 Harper Collins Copyright 2005.

any information about the student.[65] The study found that there was a significant increase in the graduation rates among the students who applied and entered into the lottery, however… and this is the kicker, there was no difference in the graduation rates between the students who won the lottery and moved on to the new schools and those who lost the lottery and were left behind in the failing schools.[66] The conclusion, that those students and parents who took the initiative to apply for the lottery program tended to be smarter, or at least more academically motivated, to begin with and those students succeeded regardless of the school they attended.[67]

No responsible parent, educator, or lawmaker, is going to set aside and do nothing while citing this study and claiming "it doesn't matter," nor should they; however, this sheds light to the idea that parental involvement and academic motivation are the more powerful issues and should not go without their own, independent, consideration.

The future of the OSP and the CTC program are important to many of Florida's schoolchildren and parents. Until Florida schools, as a whole, are raised to a standard that meets the "adequate provisions for education" guarantee in the Florida Constitution, it seems vital that some action is taken to ensure that students at failing schools have the opportunity to succeed at an institution that is doing likewise.

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[65] *Id.*
[66] *Id.*
[67] *Id.*