
RECENT CASES

STATE CONSTITUTIONAL LAW — EDUCATION CLAUSE — FLORIDA SUPREME COURT DECLARES STATE'S SCHOOL VOUCHER PROGRAM UNCONSTITUTIONAL. — *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

The legal battle over school choice has tended to miss the point. The first decade of litigation focused on deploying federal and state establishment clause arguments in an effort to prove vouchers unconstitutional — a strategy derailed by the Supreme Court in *Zelman v. Simmons-Harris*.¹ Religion, however, is a red herring in the voucher debate, diverting attention from equal educational opportunity and toward separation of church and state.² Recently, in *Bush v. Holmes*,³ the Florida Supreme Court considered a program that offered K–12 students scholarships to attend private schools as an alternative to their failing public ones and held that the scheme facially violated the education clause of the state constitution. Although *Holmes* ostensibly shifted the voucher question to one of education, the court was still unable to discuss the merits of vouchers frankly. As the court's adventurous reading and strained application of the Florida Constitution demonstrate, the issues raised by an inquiry into the constitutional adequacy of an education plan do not lend themselves to resolution through the plan's facial invalidation. Rather, the educational effect of a particular voucher program is an empirical question, and state courts would be more prudent to wait to consider such programs as applied.

In 1999, Florida enacted the first statewide, publicly funded school voucher program in the United States, the Opportunity Scholarship Program (OSP).⁴ The statute provided that the parents of a student attending a public school found to be failing for two years in a four-year period could use a state-funded scholarship either to send the child to a better public school or to pay tuition at a qualifying private

¹ 536 U.S. 639 (2002) (holding that an Ohio voucher program that allowed recipients to attend sectarian schools did not violate the Establishment Clause of the U.S. Constitution). However, some states' establishment clause equivalents could be interpreted as more permissive than the federal one and therefore serve as voucher battlegrounds in the future. See generally Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997) (categorizing the state religion clauses and analyzing their effects on school vouchers).

² As the Ohio Supreme Court pointed out, "[t]he primary beneficiaries of the School Voucher Program are children, not sectarian schools." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993)).

³ 919 So. 2d 392 (Fla. 2006).

⁴ See 1999 Fla. Laws 4275 (codified as amended at FLA. STAT. ANN. § 1002.38 (West 2004 & Supp. 2007)), *invalidated by Holmes*, 919 So. 2d 392.

school.⁵ The voucher was funded by a transfer of appropriated funds from the school district the student would have otherwise attended; the amount transferred was the lesser of the public school funds generated by the child or the private school's tuition.⁶

Parents of children in the Florida public schools, along with several interested organizations, filed complaints in the Circuit Court of Leon County, challenging the constitutionality of the OSP under both the Establishment Clause of the U.S. Constitution⁷ and various provisions of the Florida Constitution.⁸ The circuit judge ruled that the OSP violated the Florida Constitution.⁹ The First District Court of Appeal reversed, concluding that nothing in the constitution prohibited the "well-delineated use of public funds for private school education,"¹⁰ and remanded for further proceedings. The circuit court entered final summary judgment, holding the OSP violated the "no aid" provision of the Florida Constitution, which restricts direct public aid to religious schools.¹¹ The First District issued a decision en banc, affirming the circuit court's order.¹² The court held that given the historical context and the highly restrictive language of this provision, the drafters clearly intended to prohibit public funding of religious schools.¹³

In a 5–2 decision, the Florida Supreme Court affirmed, but on different grounds.¹⁴ Writing for the court, Chief Justice Pariente¹⁵ held that the OSP violated the education clause of the Florida Constitution, which declares it "a paramount duty of the state to make adequate provision for the education of all children residing within its borders" and requires the state to provide a "uniform, efficient, safe, secure, and

⁵ FLA. STAT. ANN. § 1002.38(1). The private school could have been religious or nonreligious. *Id.*

⁶ *Id.* § 1002.38(2)(b).

⁷ *Holmes*, 919 So. 2d at 398–99. In 2002, after the court of appeal sent the case back to the circuit court for further proceedings, the U.S. Supreme Court issued its decision in *Simmons-Harris*. The plaintiffs subsequently dropped their Establishment Clause claim but continued their challenge under the Florida Constitution. *Id.* at 399.

⁸ *Id.* at 399.

⁹ *Id.*

¹⁰ *Bush v. Holmes*, 767 So. 2d 668, 675 (Fla. Dist. Ct. App. 2000).

¹¹ *See Holmes*, 919 So. 2d at 399. The "no aid" provision of the Florida Constitution states that "[n]o 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 sectarian institution." FLA. CONST. art. I, § 3.

¹² *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004) (en banc). The court originally issued a panel opinion affirming the circuit court's order, which it subsequently withdrew. *Holmes*, 919 So. 2d at 399.

¹³ *Holmes*, 886 So. 2d at 351.

¹⁴ The court declined to address the question of whether the OSP also violated the "no aid" provision. *Holmes*, 919 So. 2d at 398.

¹⁵ Chief Justice Pariente was joined by Justices Wells, Anstead, Lewis, and Quince.

high quality system of free public schools.”¹⁶ Reading the constitutional provision as a whole and applying the canon of construction *expressio unius est exclusio alterius*,¹⁷ the court found that the education clause establishes both a mandate for the state to provide for its children’s education and a restriction on the state’s method of executing that mandate. The state’s duty to provide a high-quality system of education may not be delegated to private providers — it can be satisfied only through a system of free public schools.¹⁸

Given this construction of the education clause, the court articulated two reasons why the OSP violated the mandate. First, the OSP “undermines” the public school system by diverting funds that were previously earmarked for public schools to private ones.¹⁹ Second, the OSP violates the requirement that the school system be “uniform.”²⁰ Private schools subsidized by the OSP are not bound by the same standards that govern public schools; for example, private schools do not conform to the state requirements regarding curricular content or teacher qualifications.²¹ Finally, the court distinguished two other state programs not at issue, a preschool program for four-year-olds and a scholarship program for students with disabilities, indicating that funding of those programs would not violate the education clause.²²

Justice Bell dissented.²³ Asserting that principles of state constitutional jurisprudence bestow a presumption of constitutionality upon the OSP, he insisted that the program did not violate the education clause.²⁴ He found no support in the clause’s text or history for the majority’s contention that the system of public schools was the exclusive means by which the state could fulfill its mandate to provide adequate education.²⁵ Therefore, the majority was not justified in reading article IX, section 1 to restrict the legislature from applying public funds to enlist private schools to help the state fulfill its constitutional duty to educate the children of Florida.²⁶ Justice Bell also objected to

¹⁶ *Holmes*, 919 So. 2d at 405 (emphases omitted) (quoting FLA. CONST. art. IX, § 1(a) (internal quotation marks omitted)).

¹⁷ Or, “the expression of one thing implies the exclusion of another.” *Id.* at 407 (internal quotation marks omitted).

¹⁸ *See id.* at 406–08.

¹⁹ *Id.* at 408–09.

²⁰ *Id.* at 409–10.

²¹ *Id.*

²² The court distinguished the program for disabled students from the OSP because it gives parents money to enroll disabled children in private schools only if the public schools cannot provide the *special* services needed by those children. *Id.* at 411–12. Another provision of the Florida Constitution, article IX, section 1(b), expressly *authorizes* the preschool program. *Id.* at 412.

²³ Justice Cantero joined Justice Bell’s dissent.

²⁴ *Holmes*, 919 So. 2d at 414 (Bell, J., dissenting).

²⁵ *See id.* at 414–20.

²⁶ *Id.* at 423.

the majority's reasoning that the OSP undermines public schools by diverting funds.²⁷ He considered the question to be an empirical one and pointed to the lack of evidence that the scope of the OSP was large enough to affect financially the adequate provision of education by the public school system.²⁸ Finally, the dissent disagreed with the majority's distinction between the OSP and the scholarship program for disabled students, calling it "nonsensical" to hold that the education clause allows outsourcing educational duties to private schools "when the public school system fails to uphold its constitutional duty in regard to disabled students but prohibits it when that school system fails to uphold the duty in regard to disadvantaged students."²⁹

The Florida Supreme Court's strained constitutional analysis has left some commentators, like the dissenters, dissatisfied.³⁰ But beyond questions of constitutional construction, *Holmes* is dissatisfying for purporting to evaluate vouchers under a state education clause, but failing to reach the substantive question of the educational equities at the core of such a program. Circumscribed by the facial nature of the challenge, the court was unable to discuss the effects of the OSP on the state's ability to provide adequate education. It was this inability to discuss the problem empirically that led to the court's stretch of constitutional language, rendering it vulnerable to charges of judicial activism. The *Holmes* opinion should caution other state courts to remember that their role in education is supervisory. Courts should intervene in legislative judgments only when they can evaluate school choice programs on their merits through as-applied challenges.

The *Holmes* court's first mistake was in reading the education clause to impose a restriction on means of education outside the mandated "system of free public schools" not present in the plain language of the text. The dissent, in contrast, properly framed the inquiry: the OSP could be unconstitutional only if it "prevent[ed] the Legislature from fulfilling its duty to make adequate provision by law for the public school system."³¹ Under this analysis, vouchers are perfectly constitutional as a *supplement* to an already adequately functioning school system.³² The dissent discussed the program in depth and emphasized that the purpose behind the OSP was to improve the public education system by increasing accountability.³³ It further asserted that "there is absolutely no evidence that the Legislature has either failed to make

²⁷ See *id.* at 423–25.

²⁸ *Id.* at 424.

²⁹ *Id.* at 422 n.23.

³⁰ See, e.g., Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 TEX. REV. L. & POL. 401 (2006).

³¹ *Holmes*, 919 So. 2d at 423 (Bell, J., dissenting).

³² *Id.* at 424.

³³ *Id.*

adequate provision for a statewide system of free public schools or that this system is not available to every child in Florida”³⁴ — an assertion that went unchallenged by the majority. Certainly, the relevant policy question for the Florida Legislature was whether the OSP would provide a positive supplement to a thriving, high-quality public school system. The constitutional question, however, was whether the OSP affirmatively interferes with the quality of the public school system. The dissent, at the very least, recognized the general purpose of the education clause and engaged it on a substantive level.

The majority made a half-hearted attempt to address the impact of the OSP on the public schools, reasoning that the OSP’s utilization of public school funds “undermines” the public school system — a claim it was unable to support empirically. The court attempted to establish a bright-line rule by declaring that the “systematic diversion of public funds to private schools *on either a small or large scale*” violated the constitution and by pointing to the fact that the potential scale of programs like the OSP is unlimited.³⁵ As the dissent observed, however, the court neither explained nor offered any evidence why the OSP’s *potentially* “unlimited” scope rendered it facially unconstitutional.³⁶ Instead, the majority concluded that a theoretical diversion constituted an inevitable injury — a tenuous claim. The dissent also remarked on another problem: nowhere did the majority address the claim that, far from undermining public schools, vouchers actually might improve public schools by fostering competition.

The majority, in attempting to address vouchers in a facial challenge, thus found the strength of its reasoning undermined by the reality that whether voucher programs help or hurt public schools is a complicated empirical question. An as-applied challenge, in contrast, would provide ample opportunity to assess the empirical details, and perhaps allow the court to address more directly the heart of its concerns: the adequacy of education provided to the state’s children.³⁷

A voucher program has yet to be confronted in an as-applied challenge, but one could imagine the type of showing a plaintiff would need to make. First, as the dissent acknowledged, if the scope of a

³⁴ *Id.* at 423–24.

³⁵ *Id.* at 409 (majority opinion) (emphasis added).

³⁶ The court might have reasoned that even a small-scale diversion of funds negatively affects public schools by imposing on them a disproportionate loss due to economies of scale. For example, a building with nine hundred students costs as much to heat as one with one thousand students. *See, e.g.,* Dan Goldhaber et al., *How School Choice Affects Students Who Do Not Choose*, in *GETTING CHOICE RIGHT* 101, 106–07 (Julian R. Betts & Tom Loveless eds., 2005). But this claim would be an empirical one better addressed in an as-applied challenge, as discussed below.

³⁷ An as-applied challenge would also have the advantage of not implicating charter schools, scholarships for students with disabilities, or other educational programs that may be unconstitutional by analogy to *Holmes* but nevertheless benefit the public school system.

voucher program grew to the point at which a significant percentage of financial resources were being drained from the public schools, preventing the schools' proper functioning, the program would violate the constitution. The OSP would likely not be struck down under this rationale, as it was extremely limited in scope.³⁸ In the 2005–2006 school year, the program helped merely 734 students out of thousands “trapped” in failing public schools.³⁹ If the OSP had been greater in magnitude, it might have diverted enough funds from the public schools to “undermine” the state’s duty to provide for public education. Ironically, a constitutionally viable voucher program would rescue only a small number of public school children, leaving many with an inadequate education as defined by the legislature and the state Department of Education. Moreover, such a small “market” of vouchered students would have little chance of spurring public school improvement by competition, a rationale frequently touted by voucher proponents. Thus, because voucher programs must be tightly circumscribed from a state constitutional standpoint but fairly large to be effective as a policy measure, vouchers may not be a viable choice at all.

Diversion of funds is not the only potential harm a voucher program could cause a public school system; the related problem of diversion of “valuable” students could also undermine the adequacy of public schools and thus be a legitimate consideration for an as-applied challenge. Whereas states, through their education clauses, have the duty to provide for *all* children, voucher programs necessarily segregate students into two groups: those who take vouchers and those who do not. Students using vouchers are more likely to have parents who are more educated, higher earning, and more academically involved⁴⁰ — all factors positively correlated with student success.⁴¹ Voucher programs generally do not guarantee participants full tuition, transportation costs, or admission to their private school of choice — all factors that might further prevent already disadvantaged parents from utiliz-

³⁸ *Holmes*, 919 So. 2d at 424 (Bell, J., dissenting).

³⁹ OFFICE OF INDEP. EDUC. & PARENTAL CHOICE, FLA. DEP’T OF EDUC. OPPORTUNITY SCHOLARSHIP PROGRAM 1 (2006), available at http://www.floridaschoolchoice.org/Information/OSP/files/Fast_Facts_OSP.pdf.

⁴⁰ See, e.g., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE 15–16 (1992) (“[T]he results suggest that choice is of greatest benefit to the educationally advantaged.”); Valerie Martinez et al., *Public School Choice in San Antonio: Who Chooses and with What Effects?*, in WHO CHOOSES? WHO LOSES? 50, 56–60 (Bruce Fuller & Richard F. Elmore eds., 1996) (demonstrating that the driving forces motivating use of a public school choice plan in San Antonio are the mother’s education, high parental educational expectations, and the student’s past academic performance).

⁴¹ See DOUGLAS E. MITCHELL & ED COLLOM, THE DETERMINANTS OF STUDENT ACHIEVEMENT AT THE ACADEMY FOR EXCELLENCE 13–15 (2001); Edward F. Vacha & T.F. McLaughlin, *The Social, Structural, Family, School, and Personal Characteristics of At Risk Students: Policy Recommendations for School Personnel*, 174 J. EDUC. 9 (1992).

ing a voucher. Parents who affirmatively seek out vouchers for their children are likely more engaged in their children's education and also more capable of providing for it.⁴² Thus, a voucher program may remove from the public school system high-achieving students with ample resources who can succeed at a relatively low cost to the school system. School quality is positively correlated with the presence of these types of students, and thus may diminish as those students exit the public school system through a voucher program. This "skimming" effect could impair educational adequacy. Further, the children left behind will be distinctly underprivileged in ways that will keep them in failing public schools being drained not only of funds, but also of their best students.

Finally, a court could find in an as-applied challenge that a voucher program harmed the public school system, and hence caused a constitutional violation, if it disincentivized the state from making direct improvements to the public schools. In the instant case, students would become eligible for the program only when a public school repeatedly failed to meet the legislature's standards for a high-quality education.⁴³ Thus, the need for vouchers implicates the state's duty, inasmuch as a state declaration that schools are failing amounts to a declaration of the inadequacy of education offered by the public education system.⁴⁴ Unconstitutional or not, the OSP in and of itself does not satisfy the "paramount" duty of the State of Florida to provide for the education of its children. In an as-applied challenge, the court may have been constitutionally empowered to determine that the legislature, in enacting a voucher program, had abdicated its duty to uphold the education clause. By offering mere choice, a program like the OSP burdens children and their parents with a responsibility that

⁴² See JAMES G. DWYER, *VOUCHERS WITHIN REASON* 7 (2002) (arguing that voucher programs are geared toward parental satisfaction per se, rather than being centered on the educational interest of and justice for all children).

⁴³ The majority acknowledged this in a footnote. *Holmes*, 919 So. 2d at 409 n.12. The concurring opinion in the circuit court emphasized that it could not be "immaterial that the only circumstances in which [the OSP] (presupposing 'failing' schools) operates are antithetical to and forbidden by article IX, section 1." *Bush v. Holmes*, 886 So. 2d 340, 370 (Fla. Dist. Ct. App. 2004) (en banc) (Benton, J., concurring); cf. Douglas A. Edwards, Comment, *Cleveland and Milwaukee's Free Market Solution for the "Pedantic Heap[s] of Sophistry and Nonsense" That Plague Public Education: Mistakes on Two Lakes?*, 30 AKRON L. REV. 687, 710 (1997) ("'Survival of the fittest' is positive in the general marketplace, but in the 'education market,' public school failure may contravene state constitutions.").

⁴⁴ See Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State To Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, 378 (2000); see also Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2003 (1996) ("Even if a competitive education market ultimately weeds out deficient schools, until those schools go out of business, students will be deprived of an adequate education.").

should be on the state.⁴⁵ Unless a program dramatically improves the public school system through competition, granting a formal right of (financial) access cannot serve in lieu of a large-scale, system-wide remedy.⁴⁶ In fact, as one scholar notes, “[o]ne might infer that the legislature deems it appropriate to compel a child to remain in a failing school if that is what the child’s parents want or if the child’s parents are indifferent.”⁴⁷ A court could thus find that a program similar to the OSP produced tangible injury by sufficiently deterring a legislature from making affirmative changes to the public school system itself.⁴⁸

The *Holmes* decision will likely inspire challenges to voucher programs in other states. All fifty states have education clause equivalents in their constitutions guaranteeing children the right to some education,⁴⁹ and many are beginning to experiment with school choice. Although most states’ education clauses are less demanding than Florida’s, many would still provide grounds for adequacy challenges in state courts.⁵⁰ State courts should grapple directly with the actual impact of vouchers on the education system, rather than act preemptively in reliance on tenuous constitutional technicalities. The *Holmes* opinion demonstrates the difficulty of identifying something intrinsically bad about educational vouchers. Rather, the main voucher opposition comes down to programmatic details — how many students, which schools they will attend, how much aid — and empirical questions — which students will choose vouchers, whether competition will improve the public school system, how diversion of funds will affect public schools’ ability to provide services. Ultimately, the vouchers debate is properly about what will work to improve the education system. State courts exceed their power by attempting to predict prematurely how legislative judgments about educational programs will play out.

⁴⁵ Cf. *Green v. County Sch. Bd.*, 391 U.S. 430, 441–42 (1968). In *Green*, the U.S. Supreme Court held that a “freedom of choice” plan was insufficient to achieve the desegregation required by *Brown v. Board of Education*, 347 U.S. 485 (1954). *Green*, 391 U.S. at 441. The Court stressed: “Freedom of choice’ is not a sacred talisman; it is only a means to a constitutionally required end.” *Id.* at 440 (quoting *Bowman v. County Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967)).

⁴⁶ *Green*, 391 U.S. at 437.

⁴⁷ DWYER, *supra* note 42, at 21.

⁴⁸ See Note, *supra* note 44, at 2014 (“Constitutional education clauses, as interpreted by receptive state courts, require states to guarantee adequate educational services for all students, not just equal opportunity to attend adequate schools.”).

⁴⁹ See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105–06 (1995).

⁵⁰ To date, other such challenges have been rejected. See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (determining that the Ohio School Voucher Program did not violate the state’s obligation to establish a “thorough and efficient” system of common schools); *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998) (holding that a Wisconsin school choice program did not violate the state constitution’s school uniformity provision).