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Florida Constitutional Law: Closing the Door to Opportunity: The Florida Supreme Court's Analysis of Uniformity in the Context of Article IX, Section 1

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FLORIDA CONSTITUTIONAL LAW: CLOSING THE DOOR TO OPPORTUNITY: THE FLORIDA SUPREME COURT'S ANALYSIS OF UNIFORMITY IN THE CONTEXT OF ARTICLE IX, SECTION 1

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

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The Florida legislature enacted the Opportunity Scholarship Program (OSP) in 2002 to improve the quality of education in Florida, allowing students at failing public schools to either attend another public school or use state funds to enroll at a private school.[1] Florida public school parents and several organizations challenged the constitutionality of the OSP,[2] and the trial court found the OSP facially unconstitutional under article IX, § 1 of the Florida Constitution.[3] On appeal, the Florida First District Court of Appeal reversed and remanded the trial court's decision, holding that the trial court erred in finding the OSP unconstitutional.[4] After a second

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* To my parents, family, and fiancé, thank you for all your encouragement, guidance, and love.

1. *See* Law of May 16, 2002, ch. 2002-387, § 103, 2002 Fla. Laws ch. 387 (codified as amended at FLA. STAT. § 1002.38 (2005)), *invalidated by* Bush v. Holmes (*Holmes III*), 919 So. 2d 392 (Fla. 2006). Specifically, the statute states in its most pertinent part, "[t]he 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." *Id.* Additionally, "[t]he 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 . . . ." *Id.*

2. *See* Bush v. Holmes (*Holmes III*), 919 So. 2d 392, 398-99 (Fla. 2006).

3. *See* Bush v. Holmes (*Holmes I*), 767 So. 2d 668, 673 (Fla. 1st DCA 2000). Article IX, § 1(a) states:

> 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 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. I, § 1(a). Petitioners also challenged the OSP under article I, § 3 and article IX, § 6 of the Florida Constitution, and under the Establishment Clause of the First Amendment to the United States Constitution. *See Holmes I*, 767 So. 2d at 671.

4. *Id.* at 677. The First District Court of Appeal stated that "[n]othing in that . . . provision" prevented the legislature from acting the way it did. *Id.* The court also declined to "consider the alternative constitutional arguments asserted by [A]ppellees." *Id.* The Florida Supreme Court denied a discretionary appeal. *Id.* While the case was pending on remand, the United States

appeal,[5] the First District Court of Appeal certified a question to the Florida Supreme Court: "Does the Florida Opportunity Scholarship Program, § 229.0537, Florida Statutes (1999), violate article I, § 3 of the Florida Constitution?"[6] On de novo review, the Florida Supreme Court found the OSP unconstitutional and HELD: The OSP violated article IX, § 1 of the Florida Constitution.[7]

Article IX, § 1 of the Florida Constitution declares that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ."[8] Historically, Florida

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Supreme Court held that the Ohio Pilot Project Scholarship Program, a program similar to the OSP, was constitutional under the Establishment Clause. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002). As a result, "[P]laintiffs voluntarily dismissed their challenges under the Establishment Clause . . . and under article IX, § 6 of the Florida Constitution," leaving only their claim under article I, § 3 of the Florida Constitution remaining. Bush v. Holmes (*Holmes II*), 886 So. 2d 340, 345 (Fla. 1st DCA 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

5. *Holmes II*, 886 So. 2d at 343. On remand, the trial court entered final summary judgment for the plaintiffs, finding that the OSP violated article I, § 3. *Id.* Defendants appealed. *Id.* at 340. A divided First District panel affirmed the trial court's decision. *Id.* at 343. The First District Court of Appeal then withdrew its panel opinion and reheard the issue en banc. *Id.* On rehearing, the First District affirmed the final summary judgment of the trial court and held that the OSP violated article I, § 3 of the Florida Constitution. *Id.*

6. *Id.* at 367.

7. *Holmes III*, 919 So. 2d at 400. The court also found that the OSP statute violated a requirement of the Florida Constitution that free education be provided through a system of free public schools, and that the OSP did not fall within an exception for "other public education programs." *Id.* at 411 (quoting FLA. CONST. art. IX, § 1(a)). The court declined to consider the constitutionality of the OSP under article I, § 3 of the Florida Constitution. *Id.* at 413.

8. FLA. CONST. art. IX, § 1(a). Section 1(a) states in pertinent part:

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

Id. In 1998, the Constitutional Revision Committee proposed an amendment to the 1968 version of article IX, § 1 in order to clarify the meaning of "adequacy" within the text. *See Holmes III*, 919 So. 2d at 403. The text of the 1968 article read, "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." *Id.* (quoting FLA. CONST. art. IX, § 1 (1968) (amended 1998)). The revisions added the following language, "[t]he 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." *Id.* (emphasis omitted). Instead of "[a]dequate provision shall be made by law for a *uniform* system of free public schools . . . ." the new language added, "[a]dequate provision shall be made by law for a *uniform, efficient, safe, secure, and high*

courts have struggled to define the terms "adequate" and "uniform" central to the scope of article IX, § 1 and, as a result, the court has vested the Florida Legislature with broad authority to provide for an adequate and uniform education system.[9]

In *School Board of Escambia County v. Florida*,[10] for example, the Florida Supreme Court examined the constitutional requirement for a uniform system as required by article IX, § 1 of the Florida Constitution.[11] In particular, the court considered whether the "uniformity" clause "prohibit[ed] a disparity in the number of school board members from district to district throughout the State."[12]

The court examined case law to determine the significance of the uniformity clause within article IX, § 1.[13] Recognizing the lack of authority on the subject,[14] the Florida Supreme Court crafted a simple and

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quality system of free public schools that allows students to obtain a high quality education . . . ." *Id.* This language addressed the essential components of adequacy that had been questioned by courts in a previous case. *See* Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406-07 (Fla. 1996). *See generally* Jon Mills & Timothy Mclendon, *Setting a Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329 (2000) (summarizing the case law interpreting the meaning of the education article).

9. *See, e.g.*, *Chiles*, 680 So. 2d at 406 (discussing case law on the definition of "uniform"); Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095, 1099 (Fla. 1978); Sch. Bd. of Escambia County v. State, 353 So. 2d 834, 836-37 (Fla. 1977) (discussing existing authority interpreting the uniform phrase).

10. 353 So. 2d 834.

11. *Id.* at 836.

12. *Id.* The 1976 Florida Legislature had passed a special act that, *inter alia*, increased the membership of the school board from five to seven members. *Id.* at 835.

13. *Id.* at 836-37.

14. *See id.* at 836. The court found only four cases "construing the significance of the phrase 'uniform system of free public schools,' as it appear[ed] in Article IX, § 1 of the Florida Constitution." *Id.* The four cases considered by the court were *State ex rel. Glover v. Holbrook*, 176 So. 99 (1937), finding that a special act establishing teachers' tenure of employment did not violate the uniform system requirement where the act limited the trustees in Orange County in employment matters, whereas similar officials in all other counties were not so limited; *State ex. rel. v. Henderson*, 188 So. 351 (Fla. 1939), concluding that the application of the homestead exemption to the school tax levied by a Special Tax School District was not an assessment for special benefits because the tax was levied to support the establishment and liberal maintenance of a "uniform system to promote education and good citizenship"; *State v. Bd. of Pub. Instruction of Pasco County*, 176 So. 2d 337 (Fla. 1965), upholding the constitutionality of a special act creating a special school taxing district within Pasco County, Florida, against an attack that it violated the provisions of the 1885 forerunner of article IX, § 1 of the Florida Constitution; and *Dist. Sch. Bd. of Lee County v. Askew*, 278 So. 2d 272 (Fla. 1973), stating that the Minimum Foundation Program meets the constitutional requirement of a uniform system of free public education by providing for a uniform expenditure per teaching unit throughout the State regardless of the tax base of the various counties.

broad definition of uniformity.[15] Specifically, the court stated that "a uniform system results when the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose."[16] Applying this analysis of "uniformity" to the composition of school boards, the court noted the importance of reflecting the diverse cultural composition of Florida and, therefore, found no compelling reason to have identical numbers of school board members.[17] As a result, the court held that the special act increasing the size of the school board did not violate the uniformity clause of article IX, § 1 of the Florida Constitution.[18]

Continuing the *Escambia* court's broad interpretation of language in the education article, the court in *Scavella v. School Board of Dade County*[19] considered the constitutionality of a cap on district funding for the education of an exceptional student[20] at a private school.[21] In *Scavella*, the court was concerned with the adequacy and quality of the facilities and programs available for exceptional students at certain public schools.[22]

The *Scavella* court noted that article IX, § 1 of the Florida Constitution required the Florida Legislature "to provide for 'a uniform system of [f]ree public schools.'"[23] However, rather than concentrating on the "uniform system" requirement, the court focused exclusively on the language of the clause determining that "Florida residents ha[d] [a] right to attend [the] public school system for free."[24] To preserve this right to a free, high-

15. *See Sch. Bd. of Escambia County*, 353 So. 2d at 838; *see also* Mills & Mclendon, *supra* note 8, at 355 (stating that Florida courts have concluded that uniformity does not require that the state provide equal service or spending to each student).

16. *Sch. Bd. of Escambia County*, 353 So. 2d at 838.

17. *Id.* The court reasoned that boards in excess of five members would facilitate diverse representation in urban areas. *Id.* The court noted, "just as there need not be uniformity of physical plant and curriculum from county to county because their requirements differ, there is no compelling reason for school boards of identical size from county to county." *Id.*

18. *Id.*

19. 363 So. 2d 1095 (Fla. 1978).

20. *See id.* at 1098 (defining "exceptional student" as a student with a physical handicap).

21. *See id.* at 1097. The statute at issue authorized public school funds to allow physically handicapped students to attend private schools when their public school district lacked the facilities, staff or resources to meet their special needs. *Id.* In particular, the court was concerned with whether the statutory funding cap deprived exceptional children "of [a]ny right, not just their right to be treated equally before the law." *Id.* at 1097-98. The paragraph that was the subject of the appeal read: "The district school board shall establish a maximum amount which can be paid by a district school board for an individual exceptional student contract with a nonpublic school, based on the maximum full-time equivalent earned by the student." *Id.* at 1097 (quoting FLA. STAT. § 230.23(4)(m)(7) (1977)).

22. *See id.* at 1098.

23. *Id.*

24. *Id.* The court reasoned:

> In compliance with [article IX, § 1], the legislature has established a system of

quality education, the *Scavella* court accepted the Florida Legislature's decision to establish a cap on payments to private schools for the education of exceptional students deprived of adequate public school facilities meeting their needs.[25]

Finally, in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*,[26] appellants sought a declaration that the state had failed to uphold the fundamental right to education by neglecting to allocate adequate resources for a uniform system of free public schools as provided for in the Florida Constitution.[27] The court spent considerable time opining upon the separation of powers doctrine as it applied to the education article, i.e., whether the legislative or judicial branch had the power to interpret or define the terms contained therein.[28]

After acknowledging that the term "adequate provision" had not been previously defined,[29] the court reiterated *Escambia*'s limited interpretation of "uniform system"[30] and found that the term "uniformity," as it is used in the constitution, did not mean that all education systems had to be identical.[31] In so doing, the court stressed that "Florida law now is clear

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> public schools which must provide "13 consecutive years of instruction . . . (and) such instruction for exceptional children as may be required by law." These schools are funded by governmental sources and nonresident tuition fees, not by the people utilizing them, except indirectly as taxpayers. The clear implication is that all Florida residents have the right to attend this public school system for free.

Id. (quoting FLA. STAT. § 228.051 (1977)) (citation omitted).

25. *See id.* at 1099. In these situations, the school board was authorized to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students . . . [through] the district school system, in cooperation with other district school systems, or through contractual arrangements with approved private or nonpublic schools . . . ." *Id.* at 1098 (quoting FLA. STAT. § 230.23(4)(m)(2) (1977)).

26. 680 So. 2d 400 (Fla. 1996).

27. *Id.* at 402.

28. *See id.* at 405-06.

29. *Id.* In agreement with the trial court, the majority noted that "[t]here is no textually demonstrable guidance in [a]rticle IX, section 1, by which the courts may decide, a priori, whether a given overall level of state funds is 'adequate' in the abstract." *Id.* at 406 (quoting the trial court opinion).

30. *Id.* (quoting Sch. Bd. of Escambia County v. State, 353 So. 2d 834, 838 (Fla. 1977)) (finding that the court previously defined "uniform system" as one where "the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose").

31. *See id.* (discussing Fla. Dep't. of Educ. v. Glasser, 622 So. 2d 944 (Fla. 1993)). The court specifically stated that uniformity was a complicated matter "'involving the special expertise of the Legislature, its staff, its advisers on public finance, and the Department of Education.'" *Id.* (quoting *Glasser*, 622 So. 2d at 951 (Kogan, J., concurring)). In addition, the court noted that "each time the education article has been challenged . . . some specific funding [program is at] issue." *Id.*; *see also* Mills & Mclendon, *supra* note 8, at 361-67 (discussing *Chiles* and its role in the constitutional revisions to the education article).

that the uniformity clause will not be construed as tightly restrictive, but merely as establishing a larger framework in which a broad degree of variation is possible."[32] Thus, the court concluded that the Florida Constitution vests the legislature with "enormous discretion" to provide for an adequate and uniform school system.[33]

Interestingly, the dissent in *Chiles* agreed that it would be "pure sophistry to suggest that" the purpose of including "uniform" in the education article was to make every provision of education the same.[34] Instead, Justice Anstead wrote, "The major purpose of the education article is to provide for education, not to merely provide for uniformity."[35] Justice Anstead also agreed with the majority that the legislature—not the courts—is the governmental body "vested with considerable leeway in carrying out [the state's education] mandate."[36]

Although *Escambia*, *Scavella*, and *Chiles* had already defined the terminology of article IX, § 1[37] at issue in the instant case, the instant majority failed to apply the court's own previous interpretations of these terms.[38] Instead, using principles of constitutional construction, the instant court determined that article IX, § 1 imposed several requirements that limited the scope of the legislature's discretionary authority regarding education.[39] The instant court established the principles by which uniformity would be measured[40] rather than deferring the determination of

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32. *Chiles*, 680 So. 2d at 406 (citing *Glasser*, 622 So. 2d at 950 (Kogan, J., concurring)). The court also reinforced Justice Kogan's concurring statement in *Glasser* that the uniformity clause is not a requirement "that each school district be a mirror image of every other one." *Id.* According to the court, such a goal would clearly be impractical. *Id.*

33. *Id.* at 408.

34. *Id.* at 411 (Anstead, J., dissenting in part).

35. *Id.* Notably, the dissent "reject[ed] the view that the education article contemplates an inadequate, but uniform, education system." *Id.* The dissent found that this view was of "great disservice" to those state citizens who insisted on the inclusion of an education article in the Florida Constitution. *Id.*

36. *Id.* at 410.

37. *See Chiles*, 680 So. 2d at 406-07 (discussing *Glasser* in declining to expand the definition of uniformity, deferring further definition to the legislature, and clarifying that according to Florida law, the uniformity clause will be interpreted as establishing a large framework in which much variation is possible); Scavella v. Sch. Bd. of Dade County, 363 So. 2d at 1095, 1098-99 (Fla. 1978) (explaining that article IX, § 1 confers a right to a free education, and allows the legislature to use private schools to educate exceptional students); Sch. Bd. of Escambia County v. State, 353 So. 2d 834, 838 (Fla. 1977) (defining uniformity).

38. *See Holmes III*, 919 So. 2d 392, 409-10 (Fla. 2006).

39. *Id.* at 406-07 ("Article IX, section 1(a) is a limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate."). *But see Chiles*, 680 So. 2d at 406; *Sch. Bd. of Escambia County*, 353 So. 2d at 838.

40. *Holmes III*, 919 So. 2d 392 at 409-10 (explaining the standards by which to measure uniformity).

the scope of uniformity to the legislature, as *Chiles* and *Escambia* had done.

First, the instant court considered the duty article IX, § 1 places on the legislature.[41] Applying two standards of constitutional construction,[42] the instant court interpreted article IX, § 1 as both a mandate for the legislature to provide Floridians with an education system and a directive to achieve this mandate through a uniform and high quality system of free public schools.[43] According to the instant court, the term "uniform," referenced in the education article,[44] requires state-funded education to comply with the school accreditation, curriculum, teacher certification, and academic accountability standards outlined in the education statutes.[45] Together, these statutes comprise what the instant court terms a "criterion of uniformity."[46]

The instant court briefly addressed the program in *Scavella* in order to reject the argument that new uniformity requirements will affect comparable state education programs that allow students to utilize private schools for the provision of exceptional student curricula and services.[47] The instant court distinguished *Scavella*'s reasoning from the instant case facts because the statute in *Scavella* was challenged on different constitutional grounds.[48] Based on the inapplicability of *Scavella*'s reasoning, the instant court categorically rejected the idea that current programs utilizing private schools in a similar manner would be affected

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41. *Id.* at 406-08. The court stated that "the issue is what limits the Constitution imposes on the Legislature." *Id.* at 398.

42. *See id.* at 406-08. The court stated that the second and third sentences of article IX, § 1 should be read *in pari materia:* "[T]he provision should 'be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole.'" *Id.* at 407 (quoting Dep't of Envtl. Prot. v. Millender, 666 So. 2d 882, 886 (Fla. 1996)). The court also analyzed article IX, § 1 through a second type of constitutional interpretation, *expressio unius est exclusio alterius*, which means "'the expression of one thing implies the exclusion of another.'" *Id.* Through this second method, the instant court came to the same conclusion: By specifying a uniform, efficient, safe, secure and high-quality system of free public schools, the article excludes any other means of achieving the educational mandate. *Id.*

43. *Id.* at 405.

44. FLA. CONST. art. IX, § 1(a).

45. *See Holmes III*, 919 So. 2d at 409-10.

46. *See id.* (summarizing education statutes that make up the instant court's "criterion of uniformity").

47. *See id.* at 411-12; *see also* FLA. STAT. § 1002.39 (2005) (establishing the John M. Mckay Scholarships for Students with Disabilities Program); Matthew I. Pinzur & Carol Marbin Miller, *Vouchers' Future Put in Limbo*, MIAMI HERALD, Jan. 7, 2006, at 1B (discussing the state's other scholarship programs that may be affected by the instant decision).

48. *See Holmes III*, 919 So. 2d at 411-12. The complaint in *Scavella* challenged Florida Statute 230.23(4)(m)(7) under article I, § 2 of the Florida Constitution. *Id.* at 412; *supra* note 21 and accompanying text.

by the courts ruling because they are "structurally different from the OSP."[49] In conclusion the majority determined that the OSP violated the uniformity standards as well as the education mandate by failing to ensure that contracting private schools were subject to the same academic criterion as public schools.[50]

In a dissenting opinion, Justice Bell criticized the majority's interpretation of article IX, § 1.[51] The dissent warned that by distinguishing the OSP's provision for "routine" education from *Scavella*'s provision for "special" education, the majority forced the court into the dangerous position of individually categorizing education—traditionally a legislative power.[52] Moreover, based on the unambiguous text of article IX, § 1, Justice Bell concluded that there was no language that would limit the legislature's ability to use private schools.[53]

In the instant case, the majority disregarded relevant education jurisprudence established and relied on by the *Escambia*, *Scavella*, and *Chiles* courts.[54] Instead, using the *expressio unius est exclusio alterius* maxim, the instant court restricts article IX, § 1 by incorporating a new "uniformity criterion" into the existing education mandate,[55] thus requiring the legislature to provide a free, public, and uniform state education system.[56] By narrowly construing the state's education mandate in this manner, the instant court's decision threatens current scholarship programs utilizing the private school system,[57] such as the McKay Scholarship Program, and further limits the legislature's ability to repair the state's failing education system.

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49. *See Holmes III*, 919 So. 2d at 412 (comparing the program for exceptional students at issue in *Scavella* to the OSP and determining that the two programs were structurally different).

50. *See id.*

51. *Id.* at 423 (Bell, J., dissenting).

52. *Id.* at 423 n.23.

53. *Id.* at 414-15.

54. *See supra* note 9 and accompanying text.

55. *See Holmes III*, 919 So. 2d at 407; *supra* note 46 and accompanying text (discussing the uniformity criterion).

56. *See Holmes III*, 919 So. 2d at 405. The instant court's discussion of *Escambia* and *Chiles* is extremely limited even though both cases focused on determining the meaning of the language in article IX, § 1. *Id.* at 402-05. The majority used *Chiles* to introduce a four-category system for analyzing state educational laws to categorize Florida's current education article. *Id.* at 404 (quoting Barbara J. Staros, *School Finance Litigation in Florida: A Historical Analysis*, 23 STETSON L. REV. 497, 498-99 (1994)). In addition, the court called attention to the *Chiles* court's role in spurring a constitutional revision of article IX, § 1. *Id.* at 403-04. The instant court failed to mention the *Chiles* court's scrutiny of "adequacy." *See* Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406-07 (Fla. 1996). The instant court referred to *Escambia* in its discussion of separation of powers. *See Holmes III*, 919 So. 2d at 405. The instant court used *Scavella* to summarily distinguish special programs from that of the OSP. *See id.* at 411-12.

57. *See* Pinzur & Miller, *supra* note 47.

Historically, the Florida Supreme Court has liberally construed article IX, § 1, refusing to determine the parameters of "adequacy" and broadly defining "uniform."[58] By failing to consider *Escambia* and *Chiles*, the instant court transformed the meaning of article IX, § 1 entirely.[59] For the first time,[60] the court found that article IX, § 1 "specif[ied] that a system of free public schools is the means for complying with the mandate to provide for the education of Florida's children, . . . [and required] that this system be 'uniform.'"[61] Thus, when the instant court additionally required all state-funded education programs to adhere to strict uniformity standards,[62] it abandoned sixty-eight years of state education jurisprudence that had deliberately limited the duty of the legislature under the education mandate to the provision of free and public education.[63] In fact, since the original version of the education article was drafted in 1838, the court had never specified a criterion for uniformity in education legislation.[64]

After determining that article IX, § 1 required state-funded education to be "uniform," the instant court created new standards by which uniformity would be enforced.[65] In this regard, the instant court failed to defer to the legislature, the branch of government formerly charged with defining "uniform."[66] Instead, the court's newly-crafted definition was

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58. *See supra* note 9 and accompanying text; *Chiles*, 680 So. 2d at 405-07; Sch. Bd. of Escambia County *v. State*, 353 So. 2d 834, 836-39 (Fla. 1997). The intent of the 1998 revisions to the education article has been described as follows:

> The term "uniform," retained in . . . § 1, has a long history in Florida, and the meaning is unchanged by Revision 6. The stated intention of Revision 6 was to define "adequacy." As revised, the Florida Constitution now requires the education system to be "uniformly adequate" and meet the new standards uniformly. . . . The intention of the [Constitution Revision Commission], moreover, was not to modify Florida's already satisfactory uniformity requirement.

Mills & Mclendon, *supra* note 8, at 371-73 (footnotes omitted).

59. *See Holmes III*, 919 So. 2d at 408 (explaining that article IX, § 1 is both a mandate and a specification of how to fulfill the mandate).

60. *See id.* at 402-05 (summarizing the history of the education article).

61. *Id.* at 409.

62. *See id.* at 409-10 (discussing the uniformity criterion).

63. *See supra* note 9 and accompanying text; *see also* Mills & Mclendon, *supra* note 8, at 355 (stating that Florida courts have concluded that uniformity does not require the state to deliver equal service or spending to each student).

64. *See Holmes III*, 919 So. 2d at 402-05 (summarizing the history of the educational article).

65. *See id.* at 409-10 (analyzing the OSP according to the education statutes).

66. *See id.* at 413-14 (Bell, J., dissenting); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406-08 (Fla. 1996); Sch. Bd. of Escambia County v. State, 353 So. 2d 834, 838-39 (Fla. 1977).

based on statutes regulating public and private education—specifically those statutes regulating state oversight of education, school accreditation, teacher certification, and state curriculum guidelines.[67] Using these statutes as a benchmark for the "uniformity" now required, the instant court struck down the OSP because private schools failed to adhere to these new standards of uniformity.[68]

By narrowly tailoring article IX, § 1 of the Florida Constitution in this manner, it is unlikely that *Scavella* would be found constitutional under the rubric established by the instant court.[69] As stated previously, *Scavella* upheld a statute providing for a program of private instruction, "as prescribed by the state board as acceptable."[70] Although it was found to be a reasonable use of legislative authority in 1978,[71] such a broadly-worded statute would not survive scrutiny today under the instant court's restrictive reading of article IX.[72] Even the OSP's comprehensive list of requirements for private school qualification could not withstand the instant majority's strict uniformity criterion.[73] In fact, the majority points out that eligible private schools have "'widely variant quality standards and program requirements'" in such areas as state curriculum, teacher certification, and accreditation requirements.[74] If the OSP was unable to meet these "uniformity" restrictions, it is unclear whether other state education programs utilizing private schools would survive them.

To be fair by distinguishing *Scavella*, the instant court attempts to protect these scholarship programs[75] from the effects of its restrictive reading of "uniformity."[76] However, the only guidance the court offers regarding the future constitutionality of *Scavella* is that such programs "are structurally different from the OSP."[77] The court's failure to explain

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67. *See Holmes III*, 919 So. 2d at 409-10.

68. *See id.*

69. *See generally* Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095 (Fla. 1978) (upholding a private instruction program using less stringent requirements as compared to the instant case).

70. *Id.* at 1098 (quoting FLA. STAT. § 230.23(4)(m) (1977)).

71. *See id.* at 1099.

72. *See Holmes III*, 919 So. 2d at 409-10 (finding that the OSP violates article IX, § 1 by failing to ensure that the contracting private schools abide by the uniformity requirements).

73. *Id.* at 409.

74. *Id.* at 410 (quoting Florida Dep't of Educ., Private School Accreditation, http://www.floridaschoolchoice.org/Information/Private_Schools/accreditation.asp (last visited May 29, 2006)).

75. *See* FLA. STAT. § 1002.39 (2005) (establishing the John M. Mckay Scholarship for Students with Disabilities); Pinzur & Miller, *supra* note 47.

76. *See Holmes III*, 919 So. 2d at 411-12.

77. *See id.* at 412.

how the programs are structurally different is noteworthy—such an analysis would have forced the court to explain how *Scavella* and similar programs could achieve the new uniformity standards now required by the court.[78] As it now stands, the majority's ruling forces future courts to differentiate those programs that are uniform from those that are not—thereby usurping the legislature's authority.[79]

As a result of its decision, the instant court has called into question the security of all publicly-funded private school scholarship programs. The majority's decision has transformed article IX, § 1 from a free public education mandate into a requirement that publicly-funded private school scholarship programs meet the same "uniformity" requirements as their public school brethren.[80] By failing to adequately distinguish *Scavella*,[81] the court leaves important scholarship programs, like the McKay program, vulnerable to future challenges.

78. *See id.* at 409-10 (discussing uniformity standards). *But see id.* at 411-12 (mentioning *Scavella*, but failing to explain how the court's uniformity standards will affect programs like that in *Scavella*).

79. *See id.* at 423 n.23 (Bell, J., dissenting).

80. *See id.* at 409-10 (majority opinion).

81. *See id.* at 411-12 (discussing how *Scavella* is irrelevant to the instant court's opinion, and summarily denying that programs like that in *Scavella* will be affected by the instant court's decision).