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Florida Constitutional Law: Circumscribing Legislative Authority in the Absence of a Clear Prohibition

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FLORIDA CONSTITUTIONAL LAW: CIRCUMSCRIBING LEGISLATIVE AUTHORITY IN THE ABSENCE OF A CLEAR PROHIBITION

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

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The Opportunity Scholarship Program (OSP),[1] a state-funded, parent-choice voucher system, was designed to provide private school scholarships to students enrolled in certain Florida public schools.[2] Upon its enactment in 1999, Respondents assailed the OSP as facially defective under both the state and federal constitutions.[3] The trial court found the program violative of article IX, § 1 of the Florida Constitution[4] insofar as the OSP utilized public school funds for the payment of private school

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* To my parents, Anne and Joe Marques, for their constant encouragement, and to Jen for her patience and support despite the miles between us.

1. 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).

2. *See* § 1002.38(2)(a), (3). To qualify for treatment under the OSP, a student must have attended or been assigned to attend during the prior year a public school that received a failing performance grade in the prior year and two of the past four years. § 1002.38(2)(a). Such a student may elect to enroll in a qualified private school program or a better performing public school in the same or an adjacent district. § 1002.38(2)(b)(3). Eligible private schools are "subject to the instruction, curriculum, and attendance criteria adopted by an appropriate nonpublic school accrediting body and [are] academically accountable to the parent for meeting the educational needs of the student." § 1002.38(4)(f).

3. *See* Bush v. Holmes (*Holmes I*), 767 So. 2d 668, 671 (Fla. 1st DCA 2000). Respondents, a group of parents and interest groups, alleged that the OSP violated article IX, § 1; article IX, § 6; and article I, § 3 of the Florida Constitution. *Id.* The parents also raised a challenge under the Establishment Clause of the First Amendment of the United States Constitution. *Id.* Article 1, § 3 of the Florida Constitution provides, in pertinent part: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." FLA. CONST. art. I, § 3. Article IX, § 6 provides: "The income derived from the state school fund shall, and the principle of the fund may, be appropriated, but only to the support and maintenance of free public schools." FLA. CONST. art. IX, § 6.

4. Article IX, § 1(a) provides, 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 . . . .

FLA. CONST. art. IX, § 1(a).

tuition.[5] Finding no language that prohibited such appropriation, the Florida First District Court of Appeal reversed.[6] Subsequent proceedings invalidated the OSP on separate grounds,[7] and a question was certified to the Florida Supreme Court.[8] Using maxims of statutory construction, the court interpreted article IX, § 1(a) to mandate that free education be provided solely through the state public school system.[9] Because the OSP effectively diverted public funds to private institutions, the court HELD, that the program frustrated public school uniformity, which is mandated by the state constitution.[10]

Article IX, § 1(a) of the Florida Constitution provides that "[i]t is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders," and requires that "[a]dequate provision . . . be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ."[11] When interpreting the validity of legislative action upon such constitutional mandates, Florida courts are bound to resolve "every doubt . . . in favor of . . . constitutionality."[12] As a result, legislation should not be invalidated unless it clearly contravenes the constitution.[13]

In *Taylor v. Dorsey*,[14] the Florida Supreme Court noted that Florida's constitution is a limitation on, not a grant of, state legislative power.[15] In light of this principle, the court considered whether legislation could be

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5. *See Holmes I*, 767 So. 2d at 672. Two other state voucher programs currently utilize public funds for private scholarships. *See* Matthew I. Pinzur & Carol Marbin Miller, *Vouchers' Future Put in Limbo*, MIAMI HERALD, Jan. 7, 2006, at 1B. The McKay Scholarships, which provide private-school vouchers for disabled students, and the Florida charter school system, are utilized by over 100,000 students and are publicly funded. *Id.*

6. *See Holmes I*, 767 So. 2d at 673, 675.

7. *See* Bush v. Holmes (*Holmes II*), 886 So. 2d 340, 344-47 (Fla. 1st DCA 2004)(en banc). While the case was pending on remand, the United States Supreme Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld a school voucher program against a challenge to the Establishment Clause of the First Amendment. *Holmes II*, 886 So. 2d at 345. As a result, Respondents dismissed actions brought under both the federal Establishment Clause and article IX, § 6 of the Florida Constitution. *Id.* The trial court subsequently ruled that the OSP violated the "no-aid" provision of article I, § 3, on the grounds that public funding of the voucher program provided prohibited benefits to sectarian schools. *Id.* at 344.

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

9. *See Holmes III*, 919 So. 2d 392, 406-07 (Fla. 2006).

10. *Id.* at 412-13. Reviewing de novo, the instant court sidestepped the question of the OSP's constitutionality under article I, § 3, finding that such a determination was unnecessary because the program violated article IX, § 1(a). *Id.* at 398-99.

11. FLA. CONST. art. IX, § 1(a).

12. Taylor v. Dorsey, 19 So. 2d 876, 882 (Fla. 1944) (en banc) (citing Holton v. State, 9 So. 716 (Fla. 1891), and Campbell v. Skinner, 43 So. 874 (Fla. 1907)).

13. *See id.* at 881 (quoting Chapman v. Reddick, 25 So. 673, 677 (Fla. 1899)).

14. 19 So. 2d 876 (Fla. 1944).

15. *Id.* at 881.

abrogated by the judiciary in the absence of an express or implied constitutional prohibition.[16] While acknowledging the utility of *expressio unius est exclusio alterius*,[17] the court found that this maxim should be used only sparingly in constitutional interpretation.[18] Where no prohibition is clearly evident, the court reasoned, expansive judicial deference to the legislature is appropriate.[19] Because the legislation in *Taylor* did not violate the primary purpose behind the constitutional provision in question, the court concluded that *expressio unius* was inapplicable.[20]

When presented an opportunity to disallow the public funding of private school programs via *expressio unius* in *Scavella v. School Board of Dade County*, Florida's highest court declined to do so.[21] The primary purpose behind § 1, according to *Scavella*, was the establishment of a right to free public school education for all state residents.[22] In *Scavella*, the court considered the constitutionality of a statutory cap on public funds used to subsidize the private schooling of special needs children.[23] The court noted that although no specific case law declared the existence of a right to free education, such is the "clear implication" of § 1.[24] Analyzing whether a cap might deprive students of this right, the court was compelled to construe the legislation "so as to prevent its being rendered unconstitutional."[25] Recognizing the legislature's authority to appropriate school funds, the court held that such a limitation was constitutional only to the extent that it did not violate any student's right to free education.[26]

Subsequent to its implicit approval of a public fund/private scholarship system in *Scavella,* the Florida Supreme Court was asked to quantify the

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16. *See id.*

17. "*Expressio unius est exclusio alterius*, or *expressio unius*, refers to a principle of construction" that means that "the expression of one thing implies the exclusion of another." *Holmes III*, 919 So. 2d 392, 407 (Fla. 2006).

18. *Taylor*, 19 So. 2d at 881.

19. *Id.* at 881-82. The court thus distinguished the application of *expressio unius* in *Weinberger v. Bd. of Pub. Instruction*, 112 So. 253 (Fla. 1927), as appropriate only where the legislative enactment directly contradicts the primary purpose behind the constitutional provision. *Taylor*, 19 So. 2d at 882.

20. *Taylor*, 19 So. 2d at 882.

21. Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095, 1097 (Fla. 1978).

22. *See id.* at 1098. The education article in force at the time *Scavella* was decided provided, in pertinent part, "for 'a uniform system of [f]ree public schools.'" *Id.* at 1098 (quoting FLA. CONST. art. IX, § 1 (1968) (amended 1998 and 2002). Thus, it differed from the present statute in that it did not require that public schools be "efficient, safe, secure, and high quality." FLA. CONST. art. IX, § 1. This formulation imposed a Category II duty on the legislature with respect to education. *See infra* note 34 and accompanying text.

23. *See Scavella*, 363 So. 2d at 1097.

24. *Id.* at 1098.

25. *Id.* (citing Bonvento v. Bd. of Pub. Instruction, 194 So. 2d 605 (Fla. 1967)).

26. *Id.* at 1098-99.

level of funding necessary to constitute "adequate provision" for education in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*.[27] The court stressed that determination of adequacy in the abstract was impossible without inquiry into whether legislative appropriations had fostered the required "uniform" system.[28] Creation of ultimate standards measuring uniformity, the court posited, was a task for the legislature.[29] In light of this deference, the court found that uniformity should not be construed restrictively, but rather as a framework within which legislative innovation is possible.[30] The court noted that absent judicially measurable standards, "the constitution has committed the determination of 'adequacy' to the legislature."[31] The court therefore declined the invitation to announce such standards itself.[32]

In light of amendments to the education article enacted post-*Chiles*,[33] the instant court observed that Florida residents had charged the legislature with a maximum duty.[34] According to the instant court, this fortified

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27. 680 So. 2d 400, 402 (Fla. 1996).

28. *Id.* at 406-07. Section 1(a), at the time *Chiles* was decided, was unchanged from the time of *Scavella*. *See supra* note 22 and accompanying text. The court determined that in order to be considered "adequate," the school system must also be "uniform." *Chiles*, 680 So. 2d at 406-07. The court noted that, unlike adequacy, several attempts to define uniformity had been made in prior cases. *Id.* at 406; *see, e.g.*, Sch. Bd. of Escambia County v. State, 353 So. 2d 834, 838 (Fla. 1977) ("[A] uniform system results when the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose."); State *ex. rel.* Clark v. Henderson, 188 So. 351, 352 (Fla. 1939) ("[A] uniform system . . . . shall be established upon principles that are of uniform operation throughout the State and . . . such system shall be liberally maintained.").

29. *Chiles*, 680 So. 2d at 406 (citing Florida Dep't of Educ. v. Glasser, 622 So. 2d 944 (Fla. 1993), in which the court declined to more specifically define uniformity, and holding that the legislature should provide meaning to the phrase). The court also noted that the education mandate was never expected to result in total equality across public school districts, because "[s]uch a goal is clearly impossible on a practical level, and the constitution should not be read to require an impossibility." *Id.*

30. *Id.*

31. *Id.* at 408.

32. *See id.*

33. In 1998, Florida citizens responded to the decision in *Chiles* by amending article IX, § 1(a) to reflect its present language. *Holmes III*, 919 So. 2d 392, 403 (Fla. 2006). In 2002, citizens again amended the education article, approving one measure that set a maximum limit on class sizes and another that mandated the provision of "a high quality pre-kindergarten learning opportunity." *Id.* at 404-05 (quoting FLA. CONST. art. IX, § 1(b)-(c)).

34. *Id.* at 404-06. The court in *Chiles* summarized a category system developed by scholars to "measure the level of duty imposed on the . . . legislature" by the state education clause. *Chiles*, 680 So. 2d at 405 n.7.

> [A] Category I clause merely requires that a system of "free public schools" be provided. A Category II clause imposes some minimum standard of quality that the State must provide. A Category III clause requires "stronger and more specific education mandate[s] and purpose preambles." And, a Category IV clause

mandate also redefined the allowable legislative means of providing adequate, uniform, and high quality public education.[35] Specifically, the instant court construed § 1(a) to require that the education of Florida's children be addressed solely through the vehicle of free public schools in order for it to meet the uniformity requirement.[36] Because the OSP funded private institutions not subject to the same statutory requirements as the public school system,[37] the instant court concluded that the program fostered an inherent lack of uniformity.[38]

The instant court reasoned that failure to reference another system by which the legislature could deliver on its mandate was clearly indicative of the people's intent.[39] Such a constitutional omission, the instant court explained, served to limit state funding of education to the public school system alone.[40] Without acknowledging the lack of an express constitutional prohibition, the instant court interpreted the use of the words "'free public schools'" as impliedly forbidding diversion of public funds to the private educational system.[41] In so doing, the instant court distinguished the legislation at issue in *Taylor*, reasoning that the comprehensive § 1(a) served a broader purpose and was therefore more amenable to interpretation via *expressio unius*.[42]

On the basis of disparate issues, the instant court dismissed comparisons between the OSP and the special needs program addressed in *Scavella*.[43] To accomplish this, the instant court noted that in *Scavella*, the public funding itself did not face a constitutional challenge.[44] In addition, the instant court drew a line between "special" and "routine" students, stressing the inability of the former to receive an adequate education

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imposes a maximum duty on the State to provide for education.

Id. (quoting Barbara J. Staros, *School Finance Litigation in Florida: A Historical Analysis*, 23 STETSON L. REV. 497, 498-99 (1994)). The instant court, after analysis of the current § 1(a), found that it imposed a Category IV duty upon the legislature. *Holmes III*, 919 So. 2d at 404.

35. *See id.* at 406-07.

36. *See id.* at 407.

37. *See id.* at 409-10. Private schools are recognized and catalogued, but not regulated or accredited, by the legislature. *See id.* at 409. As a result, private schools are not subject to state public school standards for curricula and teacher qualifications. *See id.* at 409-10. For example, public school teachers are required to obtain certification by the state and undergo a background check. *See id.* at 410. Furthermore, the curriculum in public schools must conform to the "Sunshine State Standards," which prescribe academic achievement. *Id.*

38. *Id.*

39. *See id.* at 403-04.

40. *See id.* at 407.

41. *See id.* (quoting article IX, § 1(a) (emphasis omitted)).

42. *Id.* at 407-08.

43. *Id.* at 411-12.

44. *Id.* at 412.

without assistance due to the inferior resources of the public school system.[45] In making this distinction, the instant court attempted to allay fears that its decision would have repercussions on other publicly-funded special needs programs.[46]

By interpreting § 1(a) to circumscribe legislative authority, the instant court diverged from established Florida constitutional doctrine.[47] To justify such action, the instant court opined that by strengthening the constitutional mandate, Florida citizens fundamentally altered § 1(a)'s primary purpose, thereby negating any implicit approval of scholarship programs akin to the OSP under previous versions of the education article.[48] The true intent of the people, the instant court reasoned, is thus ultimately frustrated by the OSP's failure to conform to public school standards.[49]

The instant court stressed that the public's demand for adequate, uniform, high quality free schooling encumbers the legislature with a "paramount duty."[50] It then drew the incongruous conclusion that despite their great passion for this *express* mandate, the people intended to hamper the legislature's ability to meet it by *implying* that a singular method be used to the exclusion of all others.[51] In addition, the instant court failed to acknowledge the inherent feasibility of the inverse implication: that the public, by declining to expressly prohibit the use of public funds for private schooling, tacitly approved of such method of delivery.[52] This

45. *See id.* at 411-12, 422 n.23 (Bell, J., dissenting).

46. *See id.* at 412 (majority opinion); *supra* note 5 and accompanying text.

47. *See* Taylor v. Dorsey, 19 So. 2d 876, 881-82 (Fla. 1944). Florida case law is littered with decisions articulating the balance of powers interplay between the people, the legislature, the courts and the state constitution. *See, e.g.*, Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992) ("If a legislative enactment violates no constitutional provision or principle it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction.") (quoting Van Pelt v. Hilliard, 78 So. 693, 694-95 (Fla. 1918)); Greater Loretta Improvement Ass'n v. State *ex rel.* Boone, 234 So. 2d 665, 670 ("The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary."); Rivera-Cruz v. Gray, 104 So. 2d 501, 506 (Fla. 1958) (Terrell, C.J., concurring specially) ("The Constitution is the people's document. They may bind the legislature within the confines of democratic polity, but the legislature can limit the people only in the manner authorized by the Constitution."); State v. Bd. Of Pub. Instruction for Dade County, 170 So. 602, 606 (Fla. 1936) ("The power of the Legislature is inherent, though it may be limited by the Constitution. The Legislature, therefore, looks to the Constitution for limitations on its power, and if not found to exist, its discretion reasonably exercised is the sole brake on the enactment of legislation.").

48. *See Holmes III*, 919 So. 2d at 403-04, 406-08.

49. *See id.* at 412; *supra* note 37 and accompanying text.

50. *See Holmes III*, 919 So. 2d at 404.

51. *See id.* at 406-07.

52. *See id.* at 415-16 (Bell, J., dissenting).

inaction is telling, as Florida citizens enacted two education amendments in the OSP's wake, thus unavailing themselves of ample opportunity to decry public funding of vouchers.[53]

Through dissection of the amendment passed in response to *Chiles*, the instant court recast § 1(a)'s primary purpose.[54] The instant court reasoned that the addition of the adjectives "'efficient, safe, secure, and high quality'" amplified the purpose announced in *Scavella* by providing standards for the assessment of "adequacy."[55] The instant court therefore justified its refusal to follow *Taylor*, and in turn, its use of *expressio unius*, on the grounds that the OSP frustrates this higher standard.[56] However, absent an assertion that the OSP also violates the current § 1(a) requirements of efficiency, safety, security and quality, statutory algebra nets a mandate which requires "[a]dequate provision . . . for a uniform . . . system of free public schools."[57] With only uniformity at issue, there is no functional difference between the education mandate governing the funding program approved in *Scavella* and the one purportedly violated by the OSP in the instant case.[58] Thus, despite § 1(a)'s updated language, its primary purpose as it pertains to the instant case has not changed from *Scavella*, thus rendering *expressio unius* inapplicable.[59]

The instant court's interpretation of § 1(a) as a maximum-duty mandate is therefore relevant only to the extent that the legislature is demonstrably failing to meet the prescribed standards.[60] No evidence presented in the instant case supports the conclusion that the diversion of funds from the public school system will render it inadequate.[61] In addition, the instant

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53. *See id.* at 416 n.18; *supra* note 33 and accompanying text. In addition, another election year passed in 2004, five full years after enactment, without Florida citizens taking any action to curtail the operation of the OSP.

54. *See Holmes III*, 919 So. 2d 403-04.

55. *Compare id.* at 404, *with* Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095, 1098 (Fla. 1978). The instant court categorized the current mandate as imposing a Category IV duty. *See Holmes III*, 919 So. 2d at 404.

56. *See id.* at 407-08.

57. *See* FLA. CONST. art. IX, § 1(a); *supra* note 22 and accompanying text.

58. *See Scavella*, 363 So. 2d at 1098-99 (finding that while the statutory cap in question limited the special needs program's funding, no evidence existed to show, "nor [did] the complaint allege, that the maximum set by the school board is insufficient to provide appellants" with a free education, as was their right); *supra* note 22 and accompanying text.

59. *See Scavella*, 363 So. 2d at 1098; Taylor v. Dorsey, 19 So. 2d 876, 882 (Fla. 1944).

60. *See Holmes III*, 919 So. 2d at 423-24 (Bell, J., dissenting).

61. *See id.* In the strictest sense, the diverted funds do not diminish the public school fund at all, and thus could not reasonably be found to cause public school inadequacy by draining the money available in that system. *See* Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1, 61 (2005) (indicating that OSP funds are technically generated from general revenue or other income streams which do not intermingle with the school fund itself). It is also unlikely that

case advanced no specific facts to support the conclusion that nonuniformity, and thereby inadequacy, is rampant amongst private schools funded by the OSP.[62] Had such a finding been made, the instant court would certainly have been within its power to declare the OSP unconstitutional *as applied* to those students receiving scholarships to attend an "inadequate" private school.[63] As the case stands, the instant court simply surmised that inadequacy is manifested by statutory differences in regulations and uniformity between public and private schools.[64] Because the OSP does not call for a remedy for such inequity, the instant court *assumed* the program failed to meet the uniformity mandate set forth in § 1(a).[65] Such an assumption, however, is nearly identical to that which the *Chiles* court refused to entertain.[66] The instant court's blanket declaration that the OSP violated uniformity in the abstract is thus inconsistent, as *Chiles* concluded that the determination of uniformity[67] is a matter of policy for the legislature.[68]

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the issues of adequacy or diminution of funds were briefed by the parties, considering that the case was certified to the Florida Supreme Court on separate grounds. *See supra* note 7 and accompanying text. The Governor's office itself, which tasked an aide to redraft the OSP in anticipation of an adverse decision, was preparing to "counter a ruling striking vouchers on church-state issues," not one based on legislative constraint. S.V. Date, *Governor's Power Can't Save Vouchers*, PALM BEACH POST, Jan. 7, 2006, at 7A.

62. *See Holmes III*, 919 So. 2d at 423-24 (Bell, J., dissenting). Again, the inverse implication could easily be true: that qualified private schools vastly outperform the public school system across the board. *See, e.g.*, ANTHONY S. BRYK, VALERIE E. LEE & PETER B. HOLLAND, CATHOLIC SCHOOLS AND THE COMMON GOOD (1993) (finding that Catholic schools have a positive effect on achievement, especially in the case of disadvantaged students previously enrolled in the public school system).

63. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 340 (N.Y. 2003) (holding that "New York City schoolchildren [were] not receiving [their] constitutionally-mandated opportunity for a sound basic education," thus rendering the state school funding program unconstitutional).

64. *See supra* note 37 and accompanying text.

65. *See Holmes III*, 919 So. 2d at 409-10. Note that this defect could have been avoided by more stringent requirements for participating private institutions, such as requiring private schools to conform to Sunshine State Standards, as suggested by Florida Senator Jim King. *See* Date, *supra* note 61.

66. *See* Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996). The *Chiles* court not only shied away from making such assumptions about adequacy (or lack thereof) in the abstract, but specifically called for a uniformity standard to be governed by the legislature. *See id.*; *supra* note 28 and accompanying text. No evidence is presented that nonpublic school accrediting bodies, as required by the OSP, will fail to ensure proper uniformity, other than the instant court's anecdotal contention that such bodies "have 'widely variant quality standards and program requirements.'" *Holmes III*, 919 So. 2d at 410 (quoting Florida Dep't of Educ., Private School Accreditation, http://www.floridaschoolchoice.org/Information/Private_Schools/accreditation.asp (last visited Jan. 3, 2005); *see supra* note 2 and accompanying text.

67. Such a determination would include, for example, whether qualified private schools

The instant court's treatment of *Scavella* is similarly questionable insofar as the instant decision differentiates between exceptional and ordinary education—a distinction § 1(a) does not make.[69] In drawing such a line, the instant court suggests that "all children" means all children *except* exceptional children,[70] in the same opinion that interprets "system of free public schools" to prohibit, by implication, a legislative program which provides free private school education with the use of public funds.[71] The instant court's declaration that special needs voucher programs will be unaffected thus rings hollow given the court's construction of the constitutional text.[72] Further, the instant court ignores *Scavella*'s maxim of statutory interpretation by failing to construe the OSP in such a way as to prevent rendering it unconstitutional.[73] Though this might have been easily accomplished by analogizing special needs students with those disadvantaged by their enrollment in substandard schools, the instant court chose instead to treat the groups as distinct.[74]

Sidestepping its charge to liberally interpret the OSP, the instant court failed to resolve any doubt in favor of the program's constitutionality.[75] In

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would be compared individually to the specific failing public school from which the student transferred, the statewide school system as a whole, or evaluated as a separate system entirely.

68. *See Chiles*, 680 So. 2d at 408; *see also* City of Jacksonville v. Bowden, 64 So. 769, 772 (Fla. 1914) (" The courts have no veto power, and do not assume to regulate state policy; [rather], they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.") (citations omitted).

69. *See Holmes III*, 919 So. 2d at 422 n.23 (Bell, J., dissenting).

> It is nonsensical to hold that article IX allows the Legislature to fund education outside the public school system when the public school system fails to uphold its constitutional duty in regard to disabled students but prohibits it when that school system fails to uphold the duty in regard to disadvantaged students.

Id.

70. *See id.* However, "all children" presumably includes disabled children. *Id.*

71. *See id.* at 406-08 (majority opinion).

72. *See id.* at 412. Both the McKay Scholarships and the charter school program, which receive some level of public state funding, arguably divert public school resources to private schools. *See supra* note 5. The exceptional students are also, despite the instant court's distinction, obtaining a free education through a vehicle other than the public school system. *See* Scavella v. Sch. Bd. of Dade County, 363 So. 2d 1095, 1099 (Fla. 1978).

73. *See Scavella*, 363 So. 2d at 1099.

74. *See Holmes III*, 919 So. 2d at 422 n.23 (Bell, J., dissenting).

75. *See id.* at 405 (majority opinion); *see also* Ball v. Branch, 16 So. 2d 524, 525 (Fla. 1944) (emphasizing "that if there is any reasonable theory upon which [the] validity [of legislation] can be upheld it is the duty of the courts to resolve that theory in favor of its validity"). For example, the instant court gave no weight to doubts about whether lack of uniformity actually existed, whether the constitution actually prohibited the diversion of private funds, or whether the court's own implicit approval of special needs-based voucher systems was inconsistent with its overall holding. *Holmes III*, 919 So. 2d at 400-12.

the absence of any clear prohibition against its enactment, precedent called for the instant court to defer to the legislature's policy determinations[76] regarding public funding of school vouchers. Furthermore, without any evidence that the OSP frustrated the people's mandate, the instant case was arguably decided on the basis of policy rather than precedent.[77]

An example of the constitutional system working to perfection is embodied by *Chiles*[78] and its progeny. In *Chiles*, the public school system was challenged on the basis of adequacy, and the court found that it should defer to the legislature in the absence of express constitutional standards.[79] In response, the citizens of Florida passed an amendment which specifically defined its expectations regarding the quality of public schools.[80] In the instant case, without a showing that any inherent nonuniformity between public and private education is damaging to the adequacy of Florida's public schools, validity of the legislature's actions should fall on the shoulders of the citizens.[81] As the people failed to voice opposition through the constitution, the words of the legislature should have been definitive.[82] The court's own jurisprudence demanded as much.

76. *See* Taylor v. Dorsey, 19 So. 2d 876, 881 (Fla. 1944).

77. *See Holmes III*, 919 So. 2d at 422 n.23 (Bell, J., dissenting); *see also* Ball, 16 So. 2d at 525 ("Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual social or economic theories or what they deem to be sound public policy.").

78. *See* Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996).

79. *See id.* at 406-07.

80. *See Holmes III*, 919 So. 2d at 403.

81. *See id.* at 422 n.23 (Bell, J., dissenting).

82. *See, e.g.*, Taylor v. Dorsey, 19 So. 2d 876, 881-82 (Fla. 1944) (deferring to the legislature).