State-funded scholarship programs: then and now

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In 1999 Florida passed the Opportunity Scholarship Program (OSP), the nation's first statewide school voucher program. Florida also became the first to have a statewide voucher program struck down in 2006 under *Bush v. Holmes*. More than a decade later, Gov. Ron DeSantis announced a new state-funded program called the "Equal Opportunity Scholarship," reanimating debates about the constitutionality of vouchers in the Sunshine State.

Back-to-back Florida Supreme Court victories for "voucher" supporters suggest the *Holmes* ruling began to unravel well before DeSantis appointed three new justices. In fact, significant legal criticism of the ruling at the time suggest that *Holmes* may not have stood up to scrutiny under any court willing to rule based on legal precedent, constitutional history and empirical evidence.

The *Harvard Law Review* called the *Holmes* ruling an "adventurous reading and strained application" of Florida's constitution.

James Dycus, writing in the *Yale Law Review*, argued, "the court's cramped, simplistic definition of uniformity, unmoored from all possible sources of guidance, is impossible to justify on any terms," and concluded that the case was a national example of "what *not* to do."

Irina Manta, writing in the *St. Louis University Law Journal*, believed the court produced "a decision that blatantly misunderstands basic principles of statutory construction and oversteps the boundaries of the judiciary's role in policy matters."

Jason Marques, writing for the *Florida Law Review*, concluded there was no evidence to rule the program unconstitutional, and that the "case was arguably decided on the basis of policy rather than precedent."

Clark Neily, then a lawyer representing voucher recipients, concurred in harsher words when he described the ruling as "among the most incoherent, self-contradictory and ends-oriented court decisions in recent memory."

A History

The OSP was created under Gov. Jeb Bush in 1999 to give students attending, or assigned to, public schools rated "F" in two years out of a four-year period, the opportunity to transfer to another public school or to take a voucher to attend a private school. Almost immediately, a coalition of groups, led by the state's teachers union, sued to stop the program.

Plaintiffs opposing the scholarship program argued the voucher violated three sections in the Florida Constitution and one within the U.S. Constitution.

Within the Florida Constitution, opponents targeted:

Article I, section 3, which states,

"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."

Article IX, section 1, which states,

"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 Article IX, Section 6, which states,

"The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools."

Regarding the U.S. Constitution, opponents argued the ability to take a voucher to a private religious school violated the "Establishment Clause."

According to Richard Garnet and Christopher Pearsall, writing in *Education & the Law*, "In the trial court, the judge initially found – without hearing any evidence – that the Opportunity Scholarship Program violated Article IX, Section 1 of the Florida Constitution."

The trial court reasoned the constitution made public education the "sole means" of delivering education in Florida. The District Court of Appeal reversed this decision stating, "Article IX does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system."

By the time the case made its way to the Florida Supreme Court in 2005, the program had been ruled unconstitutional under "No Aid" to religious institutions clause of the state constitution. Plaintiffs had lost, or dropped, all other arguments regarding the constitutionality of the OSP.

But the latest ruling was potentially threatened by the highest court in the land.

Under the landmark decision *Zelman v. Simmons-Harris (2002)*, the U.S. Supreme Court ruled vouchers were constitutional so long as the program was educational and parents had a diverse array of religious and non-religious educational options.

A "No Aid" ruling by the Florida Supreme Court might allow defenders of the OSP to appeal to the U.S. Supreme Court by arguing that Florida's "No Aid" clause violated the First Amendment of the U.S. Constitution.

Instead, the Florida Supreme Court evaded the "No Aid" arguments altogether and focused on the previously rejected Article IX Section 1 arguments. According to Manta, "this move to focus on the interpretation of state law alone ensured that the United States Supreme Court would not grant certiorari and that the OSP would definitely fall."

Weakness Within Holmes

The Supreme Court gave three reasons why OSP violated Article IX, Section 1:

1. The mandate to provide a free, uniform public-school system was also a restriction that prohibited any other educational alternative
2. Diversion of public funds to OSP "undermines the system of 'high quality' free public schools."
3. Private schools were not "uniform" because "the private school's curriculum and teachers are not subject to the same standards as those in force in public schools."

The courts three arguments fall apart under examination.

"There is no language of exclusion in the text," wrote Justice Bell for the dissent. "Nothing in either the second or third sentence of article IX, section 1 requires that public schools be the sole means by which the State fulfills its duty to provide education of children."

Garnett and Pearsall agreed, "It's hard to see… how the creation of the OSP is an action taken 'in lieu of' establishing and maintaining a public school system."

Regarding the OSP's impact and how it "undermines," public schools, the Supreme Court failed to examine actual evidence. Instead, "the majority conduced that a theoretical diversion constituted an inevitable injury – a tenuous claim," wrote the *Harvard Law Review*.

James Dycus didn't pull punches when he described the Supreme Court's legal framing of the "uniformity" clause as "indefensibly simplistic."

"In crafting its own definition," Dycus wrote of the Supreme Court, "it ignored its own precedents on the subject, as well as relevant historical evidence."

According to Dycus, Florida's case law suggests "uniformity" is defined as "an equal opportunity to become enlightened citizens," and that no case until *Holmes* viewed uniformity as lock-step adherence to identical regulations.

Legacy of Holmes

Ultimately, *Holmes* only eliminated educational options for 733 students, 94 percent of whom were black or Hispanic. It failed to upend charter schools, the Florida Tax Credit Scholarship, or McKay Scholarships, which combined serve more than 420,000 students today. Importantly, it failed to influence other state supreme courts.

The *Holmes* court was widely and quickly criticized at the time for good reason. The court discovered a prohibition where none existed, declared vouchers harmed public schools without demanding or even examining evidence, and it invented its own definition of "uniformity" that was neither supported by its own precedent or Florida history.

A decade ago Clark Neily predicted the flaws in *Holmes* would cause it to "quickly fade into the jurisprudential oblivion it so richly deserves."

Neily, who now serves as the Vice President for Criminal Justice at the Cato Institute, remains just as hopeful that *Holmes* will be overturned, but noted in a phone interview that Gov.

DeSantis's proposed "education savings account" program is fundamentally different from a voucher. "It's entirely possible for the court to uphold the new program without explicitly overturning *Holmes*," said Neily.

Whether or not Holmes is overturned, a new court gives us a fresh opportunity to honestly and empirically explore how school choice fits within the state's paramount duty to fund a system of free public schools.