

Lost Opportunity:
Bush v. Holmes and the Application
of State Constitutional Uniformity Clauses
to School Voucher Schemes

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June 1, 2006

I.	INTRODUCTION	2
II.	BACKGROUND	7
A.	The Opportunity Scholarship Program	7
B.	The Lawsuit	8
C.	The Decision	9
III.	A CRITIQUE	13
A.	Ground One: “A Mandate With a Restriction”	13
B.	Ground Two: Diversion of Funds	14
C.	Ground Three: Uniformity	18
IV.	A SUPERIOR MODEL	21
A.	Text	22
B.	Cases: Other States	23
C.	Cases: Florida	29
D.	History	36
E.	Application	47
V.	CONCLUSION	54

I. INTRODUCTION

Most legal challenges to school voucher programs have focused on the question whether a voucher program that permits the use of public funds in private religious schools constitutes an unconstitutional establishment of religion.¹ In the wake of the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*² that such programs do not violate the First Amendment, the question remains whether they will be found to violate state constitutional provisions governing the relationship between church and state. State constitutional challenges to voucher programs will not be limited to the issue of religious establishment, however.

Although most state constitutions do prohibit state aid to religious institutions, many also include provisions governing other aspects of public education. Of particular interest are provisions in the constitutions of fifteen states requiring some degree of uniformity among public schools.³ In the past, plaintiffs have used these "uniformity clauses" to justify challenges to state approaches to public school financing. But voucher opponents are putting them to a different use, claiming that in offering families a diverse array of educational options, voucher programs sacrifice the required uniformity.

A recent decision of the Florida Supreme Court illustrates the possibilities of this approach – and its perils. In *Bush v. Holmes*, decided in January 2006, the court heard a challenge to the Opportunity Scholarship Program (OSP), a school voucher program permitting

¹ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (a voucher program permitting parents to use vouchers in religious schools did not violate the federal Establishment Clause); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999) (state reimbursement of parochial school tuition violated the state establishment clause); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (a voucher program permitting students to use vouchers in religious schools did not violate the federal Establishment Clause).

² 536 U.S. 639 (2002).

³ Andrew Coulson, *War Against Vouchers*, at http://www.cato.org/pub_display.php?pub_id=5363 (last visited Feb. 10, 2006). See also Section IV.B, *infra*.

the use of vouchers in religious schools.⁴ The plaintiffs claimed that the OSP violated not only Florida's constitutional "no aid" clause, prohibiting state aid to religious institutions, but also its uniformity clause, requiring the state to maintain a "uniform, efficient, safe, secure, and high quality system of free public schools."⁵ In advance of the ruling, many observers expected the court to focus on the establishment question, which an intermediate appellate court had certified to it as one of "great public importance."⁶ Instead, the high court struck down the OSP as a violation of Florida's uniformity clause.⁷

Some voucher proponents accused the *Holmes* court of ducking the real issue. Said an attorney with the Institute for Justice, a nonprofit organization that helped litigate the case for the defendants: "[T]he opinion appears both nakedly political and specifically designed to avoid confronting the [religion] question."⁸ Such criticisms missed the point, however. The problem with *Holmes v. Bush* was not that the court passed on the religion question. It was that, having addressed itself to the question of uniformity, the court offered an unsatisfactory answer.

Whether a court measures a school voucher program against a ban on religious establishment or against a requirement for uniformity, the potential sticking point is the same: voucher programs provide public funds to private institutions whose purposes and practices may differ radically from those of public schools. In either case, the court must evaluate whatever differences exist between publicly funded schools against the constitution's insistence on

⁴ 919 So. 2d 392 (Fla. 2006) [hereinafter *Holmes III*].

⁵ FLA. CONST. art. IX, § 1 (2005).

⁶ *Bush v. Holmes*, 886 So. 2d 340 (Ct. App. Fla. 2004) [hereinafter *Holmes II*].

⁷ *Holmes III*, 919 So. 2d 392.

⁸ *Florida Supreme Court Strikes Down School Choice*, Institute for Justice, Jan. 5, 2006, at http://www.ij.org/schoolchoice/florida/1_5_06pr.html (last visited Feb. 15, 2006). See also Jacquelyn Horkan, *Justices Invalidate Scholarships for Children in Failing Schools*, FLA. CATHOLIC (2006), available at <http://www.thefloridacatholic.org/articles/2006/060120/060120-pt-noscholarships.htm> (last visited Mar. 30, 2006) (noting that "[t]he justices surprised many observers by declining to rule on whether the program violated Article I").

uniformity. But it cannot do so without first determining what “uniformity” means. The fatal flaw in *Bush v. Holmes* is that the court neglected this essential task.

Although the meaning of uniformity is neither obvious nor settled, clues exist as to its meaning. Courts in other states have offered a variety of possible definitions, some arguing that uniformity means equal funding, others that it denotes equality of opportunity, and still others that it refers to the “character of instruction.” These decisions, interpreting other uniformity clauses, do not indicate how the Florida court should have interpreted Florida’s constitutional language – but they do illustrate the range of possibilities. More importantly, there is a small body of case law construing Florida’s own uniformity clause. These cases suggest that the purpose of the clause is to ensure that all of Florida’s children have an equal opportunity to become enlightened citizens. The history of Florida’s uniformity clause supports this interpretation, as well.

Unfortunately, the *Holmes* court did not consult these potential sources of guidance. Instead, without articulating its reasoning, it opted for a simplistic, literal reading of the constitutional language, construing “uniformity” to require consistency among two of the most basic programmatic elements of schooling: curriculum and teacher training. Because the private schools funded under Florida’s voucher program differed from public schools in these two respects, the court struck the program down.

A more sophisticated approach in the *Holmes* case would have produced a different vision of uniformity; it also would have produced a different outcome. The statute does not appear to violate the uniformity clause, properly understood, on its face. Moreover, although available empirical data on the OSP focus exclusively on how the program affected academic achievement, the evidence from research on school choice programs in other states suggests that

such programs may enhance, rather than diminishing, students' opportunities to become enlightened citizens. This Article does not insist that the *Holmes* court should have upheld the OSP over all state constitutional challenges. It might, for example, have found the OSP in violation of the "no aid" clause, as the court below had suggested. But a proper construction of the uniformity clause, and a look at the available evidence, indicate that the court's decision to strike the program down as violating the constitutional requirement for uniformity was a mistake.

Some voucher advocates have worried that *Holmes* is a bellwether – that, following the Florida court's decision, courts in other states with uniformity clauses will strike down not only voucher programs, but also other forms of school choice, including charter schools.⁹ The potential significance of *Holmes* does appear to extend beyond Florida; of the fourteen other states with uniformity clauses, several offer school choice in one form or another, and these programs appear vulnerable to challenges like the one brought by the plaintiffs in *Holmes*.¹⁰ But if and when such challenges arise, the courts hearing them should look to *Holmes* as an example of what *not* to do.

Instead of assuming simplistic, literal definitions of uniformity, as the *Holmes* court did, the courts in future cases should begin by acknowledging frankly the necessity of determining the meaning of uniformity. Next, drawing on case law and historical evidence, they should fashion definitions of uniformity that accurately reflect the purposes for which their states'

⁹ See, e.g., Coulson, *supra* note 3.

¹⁰ See, e.g., Carrie Lips, *Arizona School Choice Plan Provides Model*, at <http://www.cato.org/research/education/articles/arizona.html> (last visited Apr. 17, 2006) (describing Arizona's program of tax credits for families donating to a private school tuition fund); *Colorado*, Heritage Foundation, at <http://www.heritage.org/research/education/schoolchoice/Colorado.cfm> (last visited Apr. 17, 2006) (describing school choice programs in Colorado); *Milwaukee Parental Choice Program*, at http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=1 (last visited Apr. 17, 2006) (describing Milwaukee's voucher program).

uniformity clauses were adopted. Finally, in applying these definitions to the challenged programs, they should take account of relevant empirical data. This Article does not generalize about the outcomes courts in other states might reach, if they followed this approach. Nor does it express a normative judgment about what outcome state courts *should* reach, as a general matter, when applying uniformity clauses to school choice programs. But it contends that the approach outlined here will produce outcomes more solidly grounded in historical, doctrinal, and empirical reality than the outcome reached by the Florida Supreme Court in *Holmes*.

In sum: This Article presents *Holmes* as a cautionary tale, and suggests a superior approach for courts hearing future uniformity clause challenges to voucher programs and other school choice schemes. Part II provides background, including a description of the Opportunity Scholarship Program, the procedural history of the *Holmes* case, and an account of the Florida Supreme Court's decision. Part III offers a critique of the three principal grounds offered for the *Holmes* court's decision. In concluding that the OSP violated the uniformity clause, this Part argues, the court committed three errors: It failed to acknowledge the necessity of choosing a definition of uniformity; it failed to consult potentially useful sources of guidance in making its choice; and it chose a definition that reflects neither its own prior decisions nor Florida's constitutional history. Part IV traces the path the *Holmes* court *should* have taken. It examines the language of the uniformity clause, and finds that it offers little guidance; it considers the variety of ways in which courts in other states have interpreted their uniformity clauses, and concludes that the term "uniform" has no settled or self-evident meaning in the context of public schools; it reviews the Florida cases construing uniformity, as well as historical evidence, in order to fashion a more defensible definition of uniformity; and it applies that definition to the statute itself and to relevant empirical data, finding that there was insufficient evidence to

conclude that the OSP violated the uniformity clause. Part V concludes by arguing that courts hearing future uniformity clause challenges to voucher programs and other school choice schemes should eschew the *Holmes* court’s approach in favor of the one modeled in this Article.

II. BACKGROUND

A. *The Opportunity Scholarship Program*

Florida Governor Jeb Bush signed the Opportunity Scholarship Program (OSP) into law in 1999 as part of that state’s “A+ Education Plan.”¹¹ The program permitted students in failing public schools to transfer into better-performing public schools or into private schools.¹² Students had to apply to participate in the program, which never became very large; in 2004-2005, its penultimate year, it enrolled only 763 students.¹³ The OSP served primarily minority students; of the students participating in 2004, fifty-seven percent were African American, and thirty-eight percent were Hispanic.¹⁴ Most participants enrolled in private schools with some sectarian orientation; of these, most were Catholic schools.

Voucher funds were paid to parents, who were required to endorse their children’s scholarship checks directly to the school of their choice. The amount of the voucher varied; the statute defined the maximum amount as “the base student allocation in the Florida Education Finance Program multiplied by the appropriate cost factor for the educational program that would have been provided for the student in the district school to which he or she was assigned,

¹¹ *Opportunity Scholarship Program*, Fla. Dep’t of Educ., at <https://www.floridaschoolchoice.org/Information/OSP/> (last visited Mar. 15, 2006).

¹² *Id.* A school was judged to be failing if it received at least two “F” ratings under the state’s rating system over a four-year period.

¹³ *Id.*

¹⁴ *Holmes III*, 919 So. 2d 392, Brief of Black Alliance for Educational Options, at 3.

multiplied by the district cost differential.”¹⁵ An additional constraint on the voucher amount was that it was not permitted to exceed the normal tuition at the private school the student attended.¹⁶

Once enrolled in the voucher program, a student could stay in the program until she graduated from high school, even if the school she had left behind later improved its performance and ceased to be a failing school. There was one exception to this rule: If an OSP student completed eighth grade, and her local public high school was not a failing school, she was expected to transfer back into the public system upon entering ninth grade.¹⁷

Both secular and sectarian private schools could participate in the OSP, as long as they met statutory criteria. Among other requirements, these included: 1) fiscal soundness; 2) compliance with federal antidiscrimination law; 3) compliance with state laws governing private schools, including all applicable health and safety codes; 4) admission of students at random and without regard to religion; 5) agreement not to compel religious belief or practice by students; 6) acceptance of state vouchers as full payment of tuition and fees; and 7) successful completion of a private school accreditation process.¹⁸

B. The Lawsuit

One day after Governor Bush signed the OSP into law, a group of students, parents, and school employees sued to shut it down. They claimed that the OSP violated the Establishment Clause of the First Amendment to the U.S. Constitution, as well as three provisions of the

¹⁵ FLA. STAT. § 1002.38(6) (2005).

¹⁶ *Holmes III*, 919 So. 2d at 424 (Bell, J., dissenting) (citing *Cost and Fiscal Impact*, School Choice Wisconsin, at http://www.schoolchoiceinfo.org/facts/index.cfm?ftp_id=7&fl_id=3 (last visited Mar. 15, 2006)).

¹⁷ *Id.* at 401.

¹⁸ FLA. STAT. § 1002.38(4) (2005).

Florida Constitution: 1) Article I, Section 3, the “no aid” clause, prohibiting the state from aiding religious institutions; 2) Article IX, Section 1, requiring the state to provide for a “uniform, efficient, safe, secure, and high quality system of free public schools”; and 3) Article IX, Section 6, requiring that the State School Fund be used only to support public schools.¹⁹

Over more than six years, the case seesawed confusingly between the plaintiffs’ claims. The trial court first struck down the OSP as violating the state constitution’s education article; this decision was overturned by an intermediate appellate court.²⁰ While the case was pending on remand, the U.S. Supreme Court decided *Zelman*,²¹ and the plaintiffs withdrew their First Amendment claim. On remand, the trial court found that the OSP violated the Florida constitution’s “no aid” provision, and the intermediate appellate court, sitting en banc, affirmed.²² Finally, the Florida Supreme Court found that the OSP violated the education article, just as the trial court had done six years before, and declined to rule on the “no aid” question.²³

C. *The Decision*

The *Holmes* court offered three principal grounds for its conclusion that the OSP violated Article IX. It began with an exercise in straightforward statutory construction. On the basis of this exercise, it held that Section 1 of Article IX was “a mandate with a restriction.” It required the state to educate its children by establishing public schools, and not by any other means. The court focused on the following language:

¹⁹ This claim turned out to be of little significance, since the OSP was funded from other state sources.

²⁰ *Bush v. Holmes*, 767 So. 2d 668 [hereinafter *Holmes I*].

²¹ 536 U.S. 639.

²² *Holmes II*, 886 So. 2d 340.

²³ *Holmes III*, 919 So. 2d 392.

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.²⁴

The court argued that the second and third sentences of this section had to be read *in pari materia* – in other words, that the constitution required the state to discharge its “paramount duty” by providing for a system of “free public schools.”²⁵ The court also reached the same conclusion by applying another maxim: *expressio unius est exclusio alterius*, or “the expression of one thing implies the exclusion of another.”²⁶ The constitution directed the state to educate its children by means of a system of free public schools, the court said, and not by any other means. In creating the OSP, the state had sought to discharge its duty by a means not constitutionally authorized – and thus impermissible.

Next, the court concluded that the OSP undermined the public school system by diverting funds to private schools, and in this way preventing the state from fulfilling its duty under Article IX: “[T]he OSP does not supplement the public education system. Instead, the OSP diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.”²⁷ The majority acknowledged the dissent’s argument that the reduction in funds was not “dollar for dollar,” since the tuition charged by some participating private schools (and thus the amount of the vouchers received by students attending those schools) was

²⁴ FLA. CONST. art. IX, § 1(a) (2005).

²⁵ *Holmes III*, 919 So. 2d at 406-07.

²⁶ *Id.* at 407-408.

²⁷ *Id.* at 408-09.

lower than the district’s per pupil expenditure – but it said that this distinction was “of no significance.”²⁸ The court also rejected the suggestion that because the diversion of funds from the public schools was small, it was tolerable: “The systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a).”²⁹

Finally, the court argued that the OSP violated Article IX’s “uniformity clause” by permitting the state to fund private schools that were not subject to the basic programmatic requirements governing the state’s public schools: “The OSP makes no provision to ensure that the private school alternative to the public school meets the criterion of uniformity.”³⁰ The court noted that private schools were not subject to the same level of state oversight as were public schools: “[I]n a provision directing the Department of Education to establish and maintain a database of private schools, the Legislature expressly states that it does not intend ‘to regulate, control, approve, or accredit private educational institutions.’”³¹ The court also identified two specific programmatic elements in which consistency between public and private schools was not required: teacher qualifications and curriculum. First, teachers in private schools, unlike public school teachers, were not required to have bachelor’s degrees, to be credentialed by the state, or to undergo background screening. Second, private schools were not required to abide by Florida’s curriculum guidelines, the “Sunshine State Standards,” which required public schools to teach “all basic subjects as well as a number of other diverse subjects, among them the contents of the Declaration of Independence, the essentials of the United States Constitution, the elements of civil government, Florida state history, African-American history, the history of the

²⁸ *Id.* at 409.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (citing FLA. STAT. § 1002.42(2)(h) (2005)).

Holocaust, and the study of Hispanic and women’s contributions to the United States.”³²

Accompanying the majority opinion was a dissent authored by Justice Kenneth Bell. Justice Bell concentrated on the majority’s claim that the language of the constitution revealed the OSP’s impermissibility. In his view, the meaning of Section 1 was “plain and unambiguous,” and “need[ed] no interpretation.”³³ He argued that the plain meaning of the section was *not* that the legislature was precluded from providing for the education of Florida’s children by means other than establishing public schools: “There is no language of exclusion in the text.”³⁴ And even if the text *was* ambiguous, Justice Bell maintained, the legislative history of Section 1 indicated that its drafters did not intend to make public schools the exclusive means by which the legislature could fulfill Article IX: “[T]his history provides no support for the majority’s implied exclusivity.”³⁵

Justice Bell also took exception to the majority’s invocation of traditional maxims of statutory construction. In particular, he objected to the use of *expressio unius*, which he argued was applicable only in rare circumstances, and not here: “We have repeatedly refused to apply this maxim in situations where the statute at issue bore a ‘real relation to the subject and object’ of the constitutional provision ... or did not violate the primary purpose behind the constitutional provision. The majority’s use of this maxim violates both restrictions.”³⁶

Finally, Justice Bell offered a brief objection to the second ground offered by the majority: that the OSP was undermining public schools by diverting funds. He did not disagree that it would be unconstitutional for the state to sabotage its own schools. Instead, he

³² *Id.* at 410 (citing FLA. STAT. § 1003.42(2)(a) (2005)).

³³ *Id.* at 413 (Bell, J., dissenting).

³⁴ *Id.* at 415.

³⁵ *Id.* at 417.

³⁶ *Id.* at 421 (citations omitted).

complained that the plaintiffs had offered no evidence to show that the state was doing any such thing: “[T]here is absolutely no evidence that the OSP prevents the Legislature from making adequate provision for a public school system.”³⁷ Indeed, he argued, “the purpose behind the program was to improve the public school system by increasing accountability in education.”³⁸

III. A CRITIQUE

This Part identifies flaws in each of the three grounds on which the *Holmes* court based its decision. It briefly treats the first and second grounds, which refer to the constitutional section that contains the uniformity clause, but rely on other language in that section. Then it discusses the third ground, the court’s conclusion that the OSP violated the uniformity clause. In reaching this conclusion, this Part argues, the court committed three errors: 1) it failed to acknowledge the necessity of choosing a definition of uniformity from among the possible alternatives; 2) it neglected to consult available guidance in selecting its definition; and 3) it selected a definition that was inconsistent with its own precedents and with the history of the uniformity clause.

A. *Ground One: “A Mandate With a Restriction”*

Although Justice Bell’s dissent in *Holmes* offers a thorough critique of the majority’s exercise in statutory construction, it nowhere raises an obvious objection: that the majority does not permit its interpretation of Section 1 to stand alone. If the majority’s interpretation is correct, then the OSP violates the constitution, and no more need be said. So why does the majority offer two additional grounds for its decision? If public schools are the exclusive means by which the

³⁷ *Id.* at 424.

³⁸ *Id.*

state may educate its children, then claims that the OSP diverts funds from the public schools, or permits programmatic non-uniformity, are surplusage. The court's decision to supplement its analysis looks especially strange when one considers that in offering its second and third grounds, it forced itself to weigh difficult empirical questions: whether voucher programs undermine or improve the performance of public schools by diverting funds, and whether voucher programs create an undesirable absence of uniformity among schools by allowing for programmatic diversity. Why would it have done this?

Perhaps the court was just hedging its bets. Or perhaps it intended to offer guidance to the legislature – to suggest that a voucher program might be constitutional if it did not divert funds from the public schools, or sacrifice programmatic uniformity. Perhaps it meant that a privately funded voucher program – or, better yet, a privately funded voucher program with strict controls on the programmatic choices available to participating schools – would have been acceptable. In the end, though, the court's decision to supplement its exercise in statutory construction suggests a lack of confidence in its own reasoning, and diminishes the persuasive power of its opinion.

B. Ground Two: Diversion of Funds

Justice Bell also criticized the *Holmes* majority's second ground: that the OSP diverted funds from the public schools, preventing the state from discharging its constitutional duty. As Justice Bell observed, the majority cited no evidence that the diversion had injured the public schools. Instead, having pointed out the diversion, it appeared to conclude that injury was inevitable.

Justice Bell's criticism is compelling. It is far from self-evident that any diversion of funds damages the public schools. Rather, whether voucher programs help or hurt public schools is a complicated empirical question. One problem with the majority's claim is that the funds forfeited by failing schools may be less than the cost of educating those students. As Justice Bell points out, the average tuition at voucher schools (and thus the average maximum allowable voucher amount) was lower than the average per-pupil expenditure at public schools.³⁹ In fact, state data suggest that over the first four years of the OSP, it resulted in a net *savings* to the state of more than \$37,000.⁴⁰

Moreover, school finance is a dynamic system. A school's per-pupil cost is not distributed evenly among all students, since the marginal cost of educating each additional student decreases as the number of students enrolled increases. The last student to arrive accounts for a disproportionately small portion of the school's total costs – and so does the first student to leave. Whether a voucher program hurts public schools hinges on the relationship between the voucher deduction and the actual marginal cost of educating the students who use vouchers. It may be that a more careful calculation would have cut *against* the OSP, since the number of voucher students was small, and if only a few students left the system, it stands to reason that no student left whose marginal cost was high. Still, it is hard to excuse the court's failure to assess the OSP's cost in a more sophisticated way.

The dissent also remarks on another problem: nowhere does the majority address the claim that, far from undermining public schools, vouchers actually *improve* public schools by fostering competition. Some supporters of the OSP offered this claim. Even several months

³⁹ *Id.* at 424 (Bell, J., dissenting).

⁴⁰ *Cost and Fiscal Impact*, SchoolChoiceInfo.org (2002) at http://www.schoolchoiceinfo.org/facts/index.cfm?ftp_id=7&fl_id=3 (last visited Mar. 30, 2006).

after the OSP's demise, a state website continued to maintain that "Opportunity Scholarships will help improve public schools – they are designed to help kids in chronically failing schools get a quality education, while simultaneously providing an incentive for all schools to improve."⁴¹

Likewise, in a critique of the *Holmes* decision, University of Chicago law professor Richard Epstein suggested that where a program like the OSP exists, "[t]he public school teachers and their unions ... realize that they are in competition with ... versatile institutions that they cannot control The only way they can maintain their market share is to provide, as the Florida Constitution requires, a high quality education in an efficient fashion."⁴²

The empirical data are less conclusive. In a well-known 2001 study, for example, Harvard economist Caroline Hoxby examined the effects on public school "productivity" (defined as achievement per dollar spent) of three school choice regimes, including Milwaukee's school voucher program, and concluded that "[i]n each case ... regular public schools boosted their productivity when exposed to competition."⁴³ On the other side is economist Martin Carnoy of Stanford, who has warned, based on his examination of long-running voucher programs in New Zealand and Chile, that "there is tremendous risk in relying on vouchers to improve low-performing public schools. ... The danger is that the public schools become

⁴¹ *Opportunity Scholarships*, Florida Governor's Office, at <http://www.myflorida.com/myflorida/government/governorinitiatives/aplusplan/opportunityScholarships.html> (last visited Mar. 21, 2006).

⁴² Richard Epstein, *Vouchers Fall in the Florida Supreme Court*, Jan. 16, 2006, available at http://uchicagolaw.typepad.com/faculty/2006/01/vouchers_fall_i.html#more (last visited Mar. 20, 2006).

⁴³ CAROLINE M. HOXYBY, SCHOOL CHOICE AND SCHOOL PRODUCTIVITY (OR COULD SCHOOL CHOICE BE A TIDE THAT LIFTS ALL BOATS?) 50 (2001), available at http://post.economics.harvard.edu/faculty/hoxby/papers/school_choice.pdf (last visited Mar. 20, 2006).

identified even more as ‘losers’ than they were before vouchers were introduced. ... [I]ncentives for public schools to improve may decline instead of increase.”⁴⁴

There have been empirical studies of the effect of the OSP itself on public schools. These, too, cut both ways. In one study, Jay Greene of the Manhattan Institute found that “Florida’s low-performing schools are improving in direct proportion to the challenge they face from voucher competition.”⁴⁵ But a later study by David Figlio and Cecilia Rouse reached the opposite conclusion: “We ... conclude that the successes of the school accountability system in improving student test scores in the lowest performing schools were likely more due to the other attributes of the school accountability system ... than they were due to the threat of school vouchers.”⁴⁶

That the court was unaware of the debate over the effect of vouchers on public schools is implausible. In its amicus brief in support of the OSP, the nonprofit Independent Voices for Better Education (IVBE) argued that “when the Florida Legislature adopted the Scholarship Program, it was not seeking to advance religion, but rather was making a good-faith effort to improve the public welfare by fulfilling the command of the citizens to greatly improve the quality of education in the state.”⁴⁷ IVBE cited research purporting to show that voucher

⁴⁴ Martin Conroy, *Should States Implement Vouchers Even If They Are Constitutional?*, in *School Vouchers: Settled Questions, Continuing Disputes* 32-33, The Pew Forum on Religion and Public Life, November 2002, available at <http://pewforum.org/issues/files/VoucherPackage.pdf> (last visited Mar. 20, 2006).

⁴⁵ JAY P. GREENE & MARCUS A. WINTERS, *WHEN SCHOOLS COMPETE: THE EFFECTS OF VOUCHERS ON FLORIDA PUBLIC SCHOOL ACHIEVEMENT* (2003), available at http://www.manhattan-institute.org/html/ewp_02.htm (last visited Mar. 20, 2006).

⁴⁶ David N. Figlio & Cecilia Elena Rouse, *Do Accountability and Voucher Threats Improve Low-Performing Schools?* 6, NBER Working Paper No. 11597, Aug. 2005, available at <http://www.nber.org/papers/w11597> (last visited Mar. 20, 2006).

⁴⁷ *Holmes III*, 929 So. 2d 392, Brief of Independent Voices for Better Education at 16.

programs had raised the performance of public schools,⁴⁸ and cited Jay Greene’s study, mentioned above.⁴⁹ On the other side, the National Parent-Teacher Association (NPTA) argued that “defendants’ amici are wrong when they say that voucher programs ‘do no harm’ to students who remain in public schools. Voucher programs do incalculable harm by diverting from public to private schools the resources that are necessary to implement programs that have proven to be effective”⁵⁰ The NPTA also dismissed Jay Greene’s findings as “largely discredited.”⁵¹

In sum, the court’s legal conclusion is incontrovertible – Article IX of the Florida constitution does indeed prohibit the state from destroying its own school system – but in applying the law to the facts, the court stumbled. It failed to reckon in a sophisticated way with the question of the actual cost to public schools of the OSP, and it ignored the possibility that the OSP might improve Florida’s public schools.

C. *Ground Three: Uniformity*

Although Justice Bell advanced a sharp critique of the court’s reasoning in *Holmes*, he overlooked the most significant flaw in the majority opinion: the weakness of its third ground. As noted above, the court’s third reason for striking down the OSP was its conclusion that the

⁴⁸ *Id.* at 17-18 (citing JOHN GARDNER, HOW SCHOOL CHOICE HELPS THE MILWAUKEE PUBLIC SCHOOLS i (2002), available at <http://www.schoolchoiceinfo.org/data/research/GardnerMPS.pdf> (last visited Mar. 20, 2006); PAUL E. PETERSON ET AL., AN EVALUATION OF THE CLEVELAND VOUCHER PROGRAM AFTER TWO YEARS 10 (1999)).

⁴⁹ *Id.* at 18-19 (citing JAY P. GREENE & MARCUS A. WINTERS, WHEN SCHOOLS COMPETE: THE EFFECTS OF VOUCHERS ON FLORIDA PUBLIC SCHOOL ACHIEVEMENT (2003), available at http://www.manhattan-institute.org/html/ewp_02.htm (last visited Mar. 20, 2006)).

⁵⁰ *Holmes III*, 929 So. 2d 392, Brief for the National PTA at 20.

⁵¹ *Id.* at 14-18 (citing, *inter alia*, Gregory Camilli & Katrina Bulkley, *Critique of ‘An Evaluation of the Florida A-Plus Accountability and School Choice Program’*, EDUC. POL’Y ANALYSIS ARCHIVES 9:7 (2001)).

voucher program violated the Florida constitution's uniformity clause. The court committed three related errors in reaching this conclusion.

First, the *Holmes* court failed to acknowledge that in interpreting the uniformity clause, it was choosing from among a variety of interpretive options. Its analysis, already sketched above, proceeded in this way: Having observed that the constitution required uniformity among public schools, the court pointed out that private schools were not subject to state regulation or to Florida's accreditation regime. Then it listed two programmatic requirements to which the private schools participating in the OSP were not subject: Private schools were not required to hire state-certified teachers possessing bachelor's degrees, and they were not bound by the state curriculum guidelines. On this basis, the court concluded: "In all these respects, the alternative system of private schools funded by the OSP cannot be deemed uniform in accordance with the mandate in article IX, section 1(a)." ⁵²

In deciding to apply the uniformity clause, the *Holmes* court undertook what should have been a challenging task. As noted above, the meaning of uniformity is not self-evident. Other judicial pronouncements on the meaning of state uniformity clauses reflect a broad range of possible interpretations, suggesting that such a clause may refer to funding, opportunity, access, character of instruction, one or more programmatic elements, or the values underlying instruction. ⁵³ In order to apply the constitutional requirement, the *Holmes* court had to settle on one species of uniformity from among all these choices. It did so almost without explanation, choosing a narrow, programmatic species. But its application of this programmatic idea of uniformity to the OSP was not automatic or foreordained; it was a choice. The court should have acknowledged as much.

⁵² *Holmes III*, 919 So. 2d at 410.

⁵³ See Section IV.B, *infra*.

Second, in choosing a definition of uniformity, the *Holmes* court neglected to consult the many sources of guidance available to it. Although, elsewhere in its opinion, it had engaged in a textual analysis of the constitutional requirement that the state maintain a system of free public schools, it declined to muster a similar effort to interpret the requirement that that system be uniform. Although several of its prior cases offered discussions of the uniformity clause, it ignored those precedents. And although it had described the legislative history of Florida's constitutional education article, it failed to mine this history for clues as the meaning of the uniformity requirement. Explicitly consulting these sources would have permitted the court to render a more sensible decision; it should have done so.

The third problem with the *Holmes* court's analysis flowed almost inevitably from the second: The court's cramped, simplistic definition of uniformity, unmoored from all possible sources of guidance, is impossible to justify on any terms. It fails to incorporate the wisdom of other state courts' opinions on the subject of uniformity, represents an inexplicable break from the court's own precedents, and finds little support in Florida's history. Had the court analyzed the meaning of the uniformity clause more thoughtfully, it would not have settled on a narrow programmatic vision of uniformity, but instead would have construed the constitutional language as requiring uniformity of a more substantive nature.

In the end, because it adopted an indefensibly simplistic definition of uniformity, the court reached the wrong result. If it had developed a more thoughtful definition, and applied this definition to the available empirical data on voucher programs and citizenship education, it would have found that the OSP did not, after all, violate the constitutional uniformity requirement. This is not to say that the court could not have struck down the OSP for some other reason. But it should not have reached the result it did on uniformity clause grounds.

IV. A SUPERIOR MODEL

This Part illustrates a superior approach to the application of a state constitutional uniformity clause to a school voucher program by tracing the path the *Holmes* court should have taken in applying Florida's uniformity clause to the OSP. First, this Part examines the text of the uniformity clause. In this case, the plain language of the text would not have helped the court determine the meaning of uniformity – but its ambiguity should have alerted the court to the need to engage in an explicit analysis of the uniformity clause, rather than simply assuming its meaning. Second, this Part considers the ways in which courts in several other states have interpreted constitutional uniformity clauses. These decisions confirm that the meaning of uniformity is hotly debated, and support the contention that the *Holmes* court should have offered a thoughtful discussion of the alternatives. Third, this Part examines prior cases in which the Florida Supreme Court itself has construed uniformity. These cases suggest that Florida's uniformity clause refers, not to programmatic uniformity, but to the necessity of preparing students equally for enlightened citizenship in a democracy. Fourth, this Part consults Florida's constitutional history, and finds additional support for the proposition that the intent of the uniformity clause is to foster citizenship. Finally, this Part applies its proposed interpretation of Florida's uniformity clause to the statute authorizing the OSP, to the evidence about the OSP's performance, and to available empirical data bearing on school choice programs generally. Based on this analysis, this Part disputes the *Holmes* court's judgment that the OSP violated the uniformity clause.

A. *Text*

A logical place for the *Holmes* court to start, in interpreting the uniformity clause, would have been the text of the clause itself. It is hornbook law that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.”⁵⁴ The *Holmes* court’s application of the *in pari materia* and *expressio unius* principles, discussed above, demonstrated that it was not averse to textual interpretation. Indeed, the Florida Supreme Court has stated, in another case, that “[t]he words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense.”⁵⁵

What result, if the *Holmes* court had chosen this approach? As noted above, Section 1 of Article IX requires the state of Florida to provide for a “uniform, efficient, safe, secure, and high quality system of free public schools.”⁵⁶ Justice Bell, in his dissent in *Holmes*, claimed that the meaning of this language was clear: “The text of article IX, section 1 is plain and unambiguous.”⁵⁷ If Justice Bell were correct, and the word “uniform,” in this context, had a single, incontrovertible, and easily apprehensible meaning, then the court would have been required simply to apply that meaning to the facts of the case.

But Justice Bell was incorrect, at least as to the meaning of the word “uniform.” Webster’s dictionary, commonly consulted by Florida courts,⁵⁸ indicates that uniform may mean

⁵⁴ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

⁵⁵ *Jacksonville v. Continental Can Co.*, 151 So. 488, 490-91 (1933).

⁵⁶ FLA. CONST. art. IX, § 1(a) (2006).

⁵⁷ *Holmes III*, 919 So. 2d at 413 (Bell, J., dissenting).

⁵⁸ 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, 368 (2000).

not only “marked by lack of variation, diversity, change in form, manner, worth, or degree,” but also “marked by complete conformity to a rule or pattern or by similarity in salient detail or practice,” and “marked by varied and changeless appearance,” as well as “consistent in conduct, character, or effect.”⁵⁹ Apply even one of these definitions to public schools and myriad possibilities at once appear. Take the last of them: “consistent in conduct, character, or effect.” If the uniformity clause were based on this definition, what would it require? Would it demand that the conduct of public schools be equal, or that they all have the same character, or that they produce equal effects? And if one says, arbitrarily, the last of these, one still must determine how the effects of public schools should be measured. What effects are most significant, from the point of view of the constitution? Graduation rates? Test scores? Student satisfaction?

Because the word “uniform” does not offer a “plain and unambiguous” meaning, textual analysis is of little use here. Robert Post observes: “[I]f for any reason [the constitutional] meaning has become questionable, it is no help at all to instruct a judge to follow the ‘plain meaning’ of the constitutional text. A meaning that has ceased to be plain cannot be made so by sheer force of will.”⁶⁰ Thus, even if the *Holmes* court had made a serious attempt to analyze the text of the uniformity clause, the attempt would have been futile. Fortunately, other interpretive methods were available.

B. Cases: Other States

The *Holmes* court’s decision not to consult prior cases in construing the uniformity clause is difficult to fathom. Robert Post has observed that “[t]he vast majority of constitutional

⁵⁹ WEBSTER’S THIRD NEW INT’L DICT. (UNABRIDGED) (1993).

⁶⁰ Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 14 (1990).

decisions rely primarily upon doctrinal interpretation.”⁶¹ Philip Bobbitt, in his typology of the modalities of constitutional interpretation, suggests a hypothetical not unlike *Holmes*: “[T]o what extent can a state constitutionally aid parochial schools?”⁶² Then he suggests the approach a court confronting this question would be most likely to take: “A judge confronting such a case would probably begin . . . by turning to precedent to find similar cases in which authoritative decisions would govern the present one.”⁶³ Not only is doctrinal analysis standard procedure in cases like *Holmes*, it might have reminded the court that its first order of business, in applying the uniformity clause, should have been to announce the necessity of choosing from among a wide range of possible definitions.

At least fourteen states other than Florida have constitutional provisions requiring uniformity in public education.⁶⁴ Many of these states’ education articles contain language similar to Florida’s Article IX, advancing demands for uniformity while saying little or nothing about what uniformity means. The Arizona constitution, for example, requires the state legislature to “enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system.”⁶⁵ The Wisconsin constitution requires “the establishment of district schools, which shall be as nearly uniform as practicable.”⁶⁶ And the

⁶¹ *Id.* at 20.

⁶² PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION [no pagination available] (1991).

⁶³ *Id.*

⁶⁴ Coulson, *supra* note 3. Even in some states whose constitutions lack express requirements for uniformity, courts have inferred such requirements. One such state is Kentucky, whose constitution calls for “an efficient system of common schools throughout the state.” KY. CONST. § 183 (2005). The Kentucky Supreme Court has interpreted this language to mean that “[p]ublic schools must be efficient, equal, and substantially uniform.” *Rose*, 790 S.W.2d 186 (finding that Kentucky’s system of public school financing violated the state constitutional requirement for efficiency).

⁶⁵ ARIZ. CONST. art. XI, § 1 (2006).

⁶⁶ WISC. CONST. art. X, § 3 (2005).

North Carolina constitution calls for “a general and uniform system of free public schools.”⁶⁷

Similar requirements appear in the constitutions of Colorado (“a thorough and uniform system of free public schools throughout the state”);⁶⁸ Oregon (“A uniform, and general system of Common schools”);⁶⁹ Idaho (“a general, uniform and thorough system of public, free common schools”);⁷⁰ and North Dakota (“a uniform system of free public schools throughout the state”).⁷¹

The case law in other states reflects agreement only on one point: Constitutional uniformity clauses do *not* mean that all public schools must be identical. In North Carolina, for example, the state supreme court has observed that its uniformity clause “does not require every school within every county or throughout the State to be identical in all respects.”⁷² The court reasoned that “[s]uch a mandate would be impossible to carry out as there are differences within a given school as the caliber of teachers and students differ.”⁷³ The supreme court of Arizona, in weighing a claim that Arizona’s system of school finance violated its constitutional uniformity clause, reviewed dozens of cases in which other state courts had considered similar claims, and concluded that as a general matter, “units in ‘general and uniform’ state systems need not be exactly the same, identical, or equal.”⁷⁴

On other questions, the case law in other states reflects sharp disagreement. For example, state courts disagree about whether constitutional uniformity provisions require equal funding for

⁶⁷ N.C. CONST. art. IX, § 2 (2005).

⁶⁸ COLO. CONST. art. IX, § 2 (2005).

⁶⁹ ORE. CONST. art. VIII, § 3 (2003).

⁷⁰ IDAHO CONST. art. IX, § 1 (2006).

⁷¹ N.D. CONST. art. VIII, § 2 (2005).

⁷² *Kiddie Korner Day Schs., Inc. v. Charlotte-Mecklenburg Bd. Of Educ.*, 285 S.E.2d 110 (N.C. 1981) (holding that a school district’s extended day program did not violate North Carolina’s state constitutional uniformity clause).

⁷³ *Id.*

⁷⁴ *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814 (Ariz. 1994) (finding that Arizona’s system of school finance violated its state constitutional uniformity clause).

public schools. The supreme court of Arizona cited that state's uniformity clause in striking down a school financing scheme that had produced financial disparities among school districts: "Because the state's financing system is itself the cause of these disparities, the system, taken as a whole, does not comply with ... the constitutional mandate of a general and uniform school system."⁷⁵ But the supreme court of Wisconsin, in a similar case, reached the opposite result: "[T]he uniformity clause ... does not require absolute uniformity in either educational offerings or per-pupil expenditures among school districts."⁷⁶ Likewise, Colorado's supreme court has held that "the requirement of a 'thorough and uniform system of free public schools' does not require that educational expenditures per pupil in every school district be identical."⁷⁷

Although most plaintiffs invoking state uniformity clauses have sought to measure uniformity in terms of the funding available to school districts, the cases reflect a variety of other metrics. The supreme court of North Dakota, in striking down that state's school finance system as violating its uniformity provision, observed: "Because educational opportunities are not substantially uniform, the existing system of educational funding needs fixing."⁷⁸ The supreme court of North Carolina, by contrast, has declined to focus on opportunity: "There is no requirement that [the state] provide identical opportunities to each and every student."⁷⁹ Instead, reading that state's uniformity clause in conjunction with its constitutional requirement that "equal opportunities shall be provided for all students," the North Carolina court has emphasized *access*: "The fundamental right guaranteed by our Constitution ... is to equal access to our

⁷⁵ *Roosevelt Elem. Sch. Dist. No. 66*, 877 P.2d at 815-16.

⁷⁶ *Vincent v. Voight*, 614 N.W.2d 388, 411 (Wisc. 2000) (finding that Wisconsin's school financing system did not violate its state constitutional uniformity clause).

⁷⁷ *Lujan v. State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) (holding that Colorado's system of school financing did not violate its state constitutional uniformity clause).

⁷⁸ *Bismarck Pub. Sch. Dist. No. 1*, 511 N.W.2d at 262.

⁷⁹ *Kiddie Korner*, 285 S.E.2d at 113.

public schools”⁸⁰ The supreme court of Wisconsin, adopting another approach, has construed that state’s uniformity clause to require that the *character of instruction* offered in Wisconsin’s public schools be uniform: “This court has stated on several occasions that the requirement of uniformity ‘applies to the ... “character of instruction” given”⁸¹ The court has construed “character of instruction” to include a variety of programmatic elements, including “minimum standards for teacher certification, minimal number of school days, and standard school curriculum.”⁸² Endorsing yet another approach, a Wisconsin Supreme Court justice dissenting in another case argued that “character of instruction” referred, not to programmatic elements, but to the *values* underlying instruction: “[The uniformity clause] requires the legislature to ensure that all Wisconsin children who receive basic education through public funding receive a uniform education reflecting the shared values of our state.”⁸³ Finally, the supreme court of Idaho has focused on the narrow issue of *curriculum*: “We continue to believe the uniformity requirement in the education clause requires only uniformity in curriculum, not uniformity in funding.”⁸⁴

Courts in other states have grappled not only with the meaning of uniformity, but also with the range of institutions to which state constitutional uniformity clauses should apply. On point is *Davis v. Grover*,⁸⁵ cited above, in which the Wisconsin Supreme Court rejected a challenge to the Milwaukee Parental Choice Program (MPCP), under which parents were

⁸⁰ *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. 1987) (citing N.C. CONST. art. IX, § 2 (2006)) (emphasis deleted).

⁸¹ *Davis v. Grover*, 480 N.W.2d 460, 473 (Wisc. 1992) (quoting *Kukor v. Grover*, 436 N.W.2d 568 (Wisc. 1989) (quoting *State ex rel. Zilisch v. Auer*, 223 N.W. 123 (Wisc. 1928))).

⁸² *Kukor*, 436 N.W.2d at 492-93.

⁸³ *Id.*

⁸⁴ *Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 850 P.2d 724, 728 (Idaho 1993).

⁸⁵ 480 N.W.2d 460.

permitted to use publicly funded vouchers in nonsectarian private schools.⁸⁶ The plaintiffs in *Davis* alleged that the MPCP violated Wisconsin's uniformity clause, which declares: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable"⁸⁷ But the court found it unnecessary to consider whether the participation of private schools in the MPCP violated this language. Instead, it simply held that the uniformity clause did not apply to those schools: "We hold that the MPCP does not violate art. X, sec. 3 of the Wisconsin Constitution because the participating private schools do not constitute 'district schools,' even though they receive some public monies to educate students participating in the program."⁸⁸

As this discussion illustrates, courts in other states with uniformity clauses have interpreted them in a wide variety of ways. Although it appears that most state courts have construed their uniformity clauses not to require that all schools be absolutely identical, they have measured uniformity in many different ways, some looking to opportunity, others to access, others to "character of instruction," others to the values underlying instruction, and still others to curriculum alone. And some courts have grappled not only with the meaning of state constitutional uniformity clauses, but also with the range of institutions to which those clauses should apply. A review of these cases would have alerted the *Holmes* court to the insufficiency of simply assuming the meaning and applicability of Florida's uniformity clause, and the need to confront the task of interpretation openly and squarely.

⁸⁶ Later, the MPCP was expanded to include sectarian schools. This version of the program survived a challenge under the federal Establishment Clause and analogous state constitutional provisions in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

⁸⁷ WISC. CONST. art. X, § 3 (2005).

⁸⁸ *Davis*, 480 N.W.2d at 463.

C. *Cases: Florida*

The cases from other states suggest that the *Holmes* court followed the wrong process in deciding how to define uniformity; the Florida cases suggest that the court reached the wrong result. There are several widely cited Florida Supreme Court cases offering discussions of the uniformity clause. These cases refer to different versions of the constitutional language, which has undergone several revisions over the years,⁸⁹ but because the meaning of the uniformity requirement appears to have remained constant,⁹⁰ even the earliest of these cases might have offered the *Holmes* court useful guidance. Indeed, the court cited to some of these cases elsewhere in its opinion. But because it did not incorporate these cases into its analysis of uniformity, the conclusion it reached diverged sharply from its own precedents.

The earliest important case construing Florida's uniformity clause was *State ex rel. Clark v. Henderson*.⁹¹ At issue in *Clark* was whether homesteads were exempted from a school tax. In answering this question, the court offered a succinct statement of the purpose of the uniformity clause: "The purpose intended to be accomplished in establishing and liberally maintaining a uniform system of public free schools, is to advance and maintain proper standards of enlightened citizenship."⁹² Although the *Clark* court did not define uniformity, it indicated that Florida's uniformity clause referred to a vision of uniformity something like that advanced by Wisconsin Supreme Court Justice Shirley Abrahamson's dissent in *Davis*,⁹³ cited above – that its real concern was not equal funding, or equal access, or programmatic equality, but the ability of public schools to transmit a coherent set of values: those required for "enlightened citizenship."

⁸⁹ See Section IV.D, *infra*.

⁹⁰ See

⁹¹ 188 So. 351 (Fla. 1939).

⁹² *Id.* at 353.

⁹³ *Davis*, 480 N.W.2d 460.

The next major Florida case involving uniformity was *School Board of Escambia County v. State*,⁹⁴ in which the Florida Supreme Court considered a claim by members of the Escambia County school board that a state law expanding the board’s membership violated the uniformity clause. Unlike the *Holmes* court, the court in *Escambia County* lacked the benefit of much precedent: the court complained of “a dearth of authority construing the significance of the phrase ‘uniform system of free public schools.’”⁹⁵ It could identify only four decisions (including *Clark*) that addressed the meaning of this guarantee,⁹⁶ and it found these decisions unhelpful: “The foregoing cases advise us of variations which do not violate the uniform system provision However, they are not particularly instructive as to which variations would run afoul of the constitutional directive.”⁹⁷

In the face of this ambiguity, and in reliance on the plain meaning of the word “system” as defined in the dictionary, the *Escambia County* court declared: “By definition ... a uniform system results when the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose.” Applying this principle to the facts, the court held that it was not necessary for all of the state’s school boards to have the same number of members: “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

⁹⁴ 353 So. 2d 834 (Fla. 1977).

⁹⁵ *Id.* (citing FLA. CONST. art. IX § 1).

⁹⁶ *Escambia County*, 353 So. 2d at 836-37 (citing *State v. Holbrook*, 176 So. 99 (Fla. 1937) (holding that a law creating tenure for Orange County teachers did not violate the uniformity requirement); *Clark*, 188 So. 351; *State v. Bd. of Pub. Instruction of Pasco County*, 176 So. 2d 337 (Fla. 1965) (holding that a law creating a special school taxing district within Pasco County did not affect the uniformity of the system of schools); *District Sch. Bd. of Lee County v. Askew*, 278 So. 2d 272 (Fla. 1973) (holding that the state’s Minimum Foundation Program did not violate the uniformity clause)).

⁹⁷ *Id.* at 837 (citing FLA. CONST. art. IX § 1 (1968)).

identical size from county to county.”⁹⁸ And further: “[A]lthough equal pupil funding treatment . . . and coordinated effort and direction supplied by the State Board of Education are essential, identity in size of the constituent school boards is not.”⁹⁹

Thus the message of *Escambia County* was that local variation in programmatic particulars was acceptable, as long as there was a “common plan” or “common purpose.” The court offered hints about what a common plan or purpose might require – centralized guidance and equality of “pupil funding treatment,” but not identical facilities or curricula. But it declined to say “which variations would run afoul of the constitutional directive.”

The next major case to construe Florida’s uniformity clause was *St. Johns County v. Northeast Florida Builders Association*,¹⁰⁰ in which the supreme court considered whether St. Johns County could fund new school construction by imposing an impact fee on homebuilders. Citing Article IX, as well as state statutory language and the “common plan or common purpose” language from *Escambia County*, the court rejected the claim that the county had violated the uniformity clause: “We see nothing in this section of the constitution that mandates uniform sources of school funding among the several counties.”¹⁰¹ Then it offered a more general pronouncement: “The Florida Constitution only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature. The constitutional mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent.”¹⁰²

⁹⁸ *Id.* at 838.

⁹⁹ *Id.*

¹⁰⁰ 583 So. 2d 635 (Fla. 1991).

¹⁰¹ *Id.* at 641 (citing FLA. CONST. art. IX § 1 (1968); FLA. STAT. § 236.24(1) (1989); *Escambia County*, 353 So. 2d at 838).

¹⁰² *Id.*

If the message of *Escambia County* was that the uniformity clause called for equality among school districts' funding schemes, but not among their programmatic choices, the message of *St. Johns County* was that even this vision of uniformity was too restrictive. Neither equal funding nor equivalence among "educational programs" was required. Instead, the uniformity clause required only that every student be given "an equal chance to achieve basic educational goals." School districts were free to offer students this chance in a variety of ways.

The Florida Supreme Court next discussed the uniformity clause in 1993, when it decided *Florida Department of Education v. Glasser*.¹⁰³ The decision itself offered little insight about the meaning of uniformity, but it prefigured the *Holmes* court's reluctance to offer its own definition. At issue was a state law authorizing school boards to levy taxes in the absence of enabling legislation. The court declined to consider the plaintiffs' claim that the law violated the uniformity clause: "The school board invites us to define 'a uniform system of free public schools' We decline the invitation and leave it to the Legislature, in the first instance, to give content to this constitutional mandate."¹⁰⁴ However, perhaps sensing that a case like *Holmes* might someday arise, it observed: "We may be required in some future case to determine whether the Legislature has provided 'a uniform system,' but we are not required to do so in the instant case."¹⁰⁵

Though the majority in *Glasser* refused to define uniformity, Justice Gerald Kogan discussed the subject in his concurring opinion.¹⁰⁶ Echoing prior cases, he argued that uniformity did not preclude flexibility: "The uniformity clause is not and never was intended to require that each school district be a mirror image of every other one. Such a goal is clearly

¹⁰³ 622 So. 2d 944 (Fla. 1993).

¹⁰⁴ *Id.* at 947 (quoting FLA. CONST. art. IX § 1 (1968)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 949 (Kogan, J., specially concurring).

impossible on a practical level, and the constitution should not be read to require an impossibility.”¹⁰⁷ And further: “Florida law now is clear 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.”¹⁰⁸ Citing *St. Johns County*, Justice Kogan suggested that the touchstone was equality of student opportunity: “[V]ariance from county to county is permissible so long as no district suffers a disadvantage in the basic educational opportunities available to its students”¹⁰⁹ He even sketched a concrete application of this principle:

[T]he mere fact that one district cannot afford to provide Latin or painting classes, but another can, does not create a lack of uniformity. However, the inability of one district to pay for any instruction whatsoever in mathematics or language and writing skills would constitute a lack of uniformity The Legislature cannot allow students in one district to be deprived of basic educational opportunities while students in other districts do not suffer the same.¹¹⁰

Ultimately, Justice Kogan agreed with the majority that the task of defining uniformity was for the legislature, not the courts: “The courts are poorly equipped to deal with the finer nuances of providing for uniformity. ... Of necessity the Legislature must be given substantial leeway in determining how uniformity will be achieved; and the courts will intervene only where the Legislature clearly has failed to fulfill the constitution’s mandate.”¹¹¹

Like the court in *St. Johns County*, Justice Kogan suggested that the critical question, under the uniformity clause, was whether local school districts had given students an “equal chance,” and rejected the notion that programmatic uniformity was required. But he also recognized the connection between programmatic uniformity and equality of opportunity. Where a school does not offer math courses, his opinion suggests, that is not simply a local

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *St. Johns County*, 583 So. 2d 635).

¹¹⁰ *Id.* at 950-51.

¹¹¹ *Id.* at 951 n.9.

choice about curriculum – that is a constitutional violation. Even though courts should not be in the business of “determining how uniformity will be achieved,” in other words, there is a limit to permissible programmatic variation, and cases may arise in which courts must decide exactly how much is too much.

The last case, prior to *Holmes*, in which the Florida Supreme Court confronted the uniformity clause was *Coalition for Adequacy and Fairness in School Funding v. Chiles*.¹¹² Here the central issue was adequacy, not uniformity – but in contrasting the two ideas, the court shed light on both. A group of plaintiffs alleged that the state had not fulfilled its constitutional duty to provide all students with an adequate education. At issue was the 1968 constitution, which declared that “[a]dequate provision shall be made by law for a uniform system of free public schools”¹¹³ Citing separation of powers, the court declined to interpret this language to create a judicially enforceable right to an adequate education.

In rejecting the plaintiffs’ claim, the court drew a contrast between the constitutional requirements for adequacy and uniformity. Of the two, it said, a court was competent to apply only the latter: “While the courts are competent to decide whether or not the Legislature’s distribution of state funds to complement local education expenditures results in the required ‘uniform system,’ the courts cannot decide whether the Legislature’s appropriation of funds is adequate in the abstract, divorced from the required uniformity.”¹¹⁴ The question of adequacy was a political question, and not for a court to decide. In this sense, adequacy stood in contrast

¹¹² 680 So. 2d 400 (Fla. 1996)

¹¹³ FLA. CONST. art. IX, § 1 (1968).

¹¹⁴ *Coalition for Adequacy*, 680 So. 2d at 406.

to uniformity, about which the court declared: “the phrase ‘uniform’ has manageable standards because by definition this word means a lack of substantial variation.”¹¹⁵

Though it seemed to describe the uniformity requirement as simpler to apply than the adequacy requirement, the *Coalition for Adequacy* court followed *Escambia County, St. Johns County*, and *Glasser* in rejecting the simplest possible interpretation: “The constitutional mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent.”¹¹⁶ Instead, it endorsed the language of Justice Kogan’s concurrence in *Glasser*, describing the uniformity requirement as “establishing a larger framework in which a broad degree of variation is possible.”¹¹⁷ Once again, the court characterized uniformity as a flexible mandate, rather than as a requirement for absolute funding or programmatic equality. The new wrinkle in *Coalition for Adequacy* was the court’s apparently increased willingness to construe the term itself.

In sum, when it decided *Holmes*, the Florida Supreme Court was interpreting the uniformity clause against a backdrop of prior cases in which it had confronted constitutional language that was similar, though not identical.¹¹⁸ Unaccountably, the court elided the sharp divergence between its opinion in *Holmes* and those it had issued previously. Although the earlier Florida cases described above do not set out a clear definition of uniformity, they do

¹¹⁵ *Id.* at 408.

¹¹⁶ *Id.* at 406.

¹¹⁷ *Id.* (quoting *Glasser*, 622 So. 2d at 950 (Kogan, J., concurring)).

¹¹⁸ There is yet another source of doctrine the court might have consulted: cases in which courts have construed constitutional requirements for uniformity in contexts other than education. Although this Article does not offer an account of such cases, Richard Epstein suggests the potential for such an account by contrasting *Holmes* with the U.S. Supreme Court’s interpretation of two federal constitutional uniformity requirements, both contained in Article I, Section 8: the requirement for uniform taxation, and the requirement for uniform naturalization and bankruptcy rules. Epstein, *supra* note 42. See also Nelson Lund, *The Uniformity Clause*, 51 UNIV. CHI. L. REV. 1193 (1984) (arguing that the Supreme Court should reconsider its interpretation of the Article I uniformity clause).

establish some basic parameters. Absolute uniformity in every aspect is not required, but schools should provide students with equal educational opportunities, with the ultimate objective of “maintain[ing] proper standards of enlightened citizenship.”¹¹⁹ Had it examined its own precedent, the *Holmes* court would have adopted this definition, and applied it to the OSP; but it did not. The earlier cases indicate, as well, that some programmatic variation among schools (as, for example, in curriculum) is acceptable – but it was based on exactly this sort of programmatic variation that the *Holmes* court struck down the OSP. Finally, the earlier cases suggest that although the job of interpreting the uniformity clause belongs first and foremost to the legislature, the courts have an important role to play. The *Holmes* court decided not to play this role openly, however, choosing instead to rule as though the term “uniform” required no interpretation.

D. *History*

Another source of potentially useful guidance for the *Holmes* court was the history of Florida’s uniformity clause. Blackstone wrote that “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.”¹²⁰ More than two centuries later, though less optimistic about its efficacy, Richard Posner echoed Blackstone’s endorsement of historical interpretation: “[w]hen confronting unclear statutes, judges, like junior officers confronting unclear commands, have to summon all their powers of imagination and empathy, in

¹¹⁹ *Clark*, 188 So. 351. Although the court’s focus seems to shift, between *Clark* and *Coalition for Adequacy*, away from uniform values and toward uniform opportunity, there is no reason to suspect that the court did not read the uniformity clause as requiring *both*.

¹²⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

an effort – doomed to frequent failure – to place themselves in the position of the legislators who enacted the statute that they are being asked to interpret.”¹²¹

The historical approach was available to the *Holmes* court, since “courts [in Florida] look to the legislative history of the provision and statements by the drafters and adopters in interpreting a constitutional provision.”¹²² Elsewhere, the *Holmes* court seemed to embrace historicism; its opinion includes a history of Florida’s education article, taken as a whole.¹²³ But the court did not look to this history in deciding how to interpret the word “uniform.” Had it done so, it might have seen that its literal reading of the uniformity clause was inconsistent, not only with its own precedent, but also with the drafters’ intent. It might have seen that the word “uniform,” as understood by the people who added it to Florida’s organic law, refers not simply to programmatic uniformity, but to the idea that public schools should prepare all students equally for citizenship in a democracy.

The uniformity clause construed by the court in *Holmes* was quite new – it was the product of a 1998 constitutional amendment¹²⁴ – but the Florida constitution has required uniformity in public education for nearly 150 years. As the *Holmes* court pointed out, the first Florida constitution, adopted in 1838, contained an education article,¹²⁵ but the idea of uniformity first appeared in 1868, with the addition of a provision requiring “a uniform system of Common Schools.”¹²⁶ In 1885, an amendment replaced this language with the requirement that

¹²¹ RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 273 (1990).

¹²² Mills & McLendon, *supra* note 58, at 367-68 (citing *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1995) (considering legislative intent in construing a constitutional provision)).

¹²³ *Holmes III*, 919 So. 2d at 402-05.

¹²⁴ FLA. CONST. art. IX, § 1 (2006).

¹²⁵ *Holmes III*, 919 So. 2d at 402 (citing FLA. CONST. art. X (1838)).

¹²⁶ *Id.* at 402 (citing FLA. CONST. art. VIII, §§ 1-9 (1868)).

“[t]he Legislature shall provide for a uniform system of public free schools.”¹²⁷ Next, a 1968 revision declared, “Adequate provision shall be made by law for a uniform system of free public schools”¹²⁸ Finally, an amendment passed in 1998 added the language at issue in *Holmes*: “Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools”¹²⁹

As this account demonstrates, despite numerous amendments to Florida’s education article, the language of its uniformity requirement has changed only slightly over the past century and a half, suggesting that the notion of uniformity articulated by that requirement has remained essentially the same. Moreover, the intent of the 1998 revision was not to alter the uniformity requirement: “The intention of the [Constitution Revision Commission] ... was not to modify Florida’s already satisfactory uniformity requirement.”¹³⁰ Its objective, instead, was “to allow the people of [Florida], through the Constitution, its document, to instruct its state government that its paramount duty is to provide an adequate ... education for its children.”¹³¹ In interpreting the uniformity clause, therefore, the *Holmes* court should have examined its origins in the state’s 1868 constitution.¹³²

In 1868, and indeed for much of the nineteenth century, American thinking on the subject of education reform was dominated by the common schools movement. Horace Mann, often

¹²⁷ *Id.* at 402-03 (citing FLA. CONST. art XII § 1 (1885)).

¹²⁸ *Id.* at 403 (citing FLA. CONST. art. IX § 1 (1968)).

¹²⁹ *Id.* at 403-04 (citing FLA. CONST. art. IX § 1 (1998)).

¹³⁰ Mills & McLendon, *supra* note 58, at 373.

¹³¹ *Id.* at 370 (quoting Fla. Const. Revision Comm’n (CRC) Meeting Proceedings, Mar. 17, 1998, at 237 (Statement of Comm’r Brochin)).

¹³² Because the meaning of the uniformity clause appears to have remained constant since its adoption, looking to the 1868 constitution would have accomplished the purposes not only of a pure historicist approach, but also those of a more responsive approach – the idea that, in Robert Post’s words, one should “read the Constitution in a manner designed to express the deepest contemporary purposes of the people.” Post, *supra* note 60, at 18.

hailed as the movement's father, claimed that its goal was to unite Americans: "The spread of education, by enlarging the cultivated class or caste, will open a wider area over which the social feelings will expand; and, if this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society."¹³³ More recent commentators have suggested that the common schools movement sought to achieve this goal by instilling in students a common set of understandings about morality, religion, citizenship, and work. Writes Carl Kaestle: "Common schools ... trained children to be good citizens, they developed moral character and work habits, they drew people into a common culture based on native Protestant ideology, they spread literacy, and they offered opportunities for individual advancement."¹³⁴

Lawrence Cremin offers a similar account:

The school performed many functions: it provided youngsters with an opportunity to become literate ... ; it offered youngsters a common belief system combining undenominational Protestantism and nonpartisan patriotism; it afforded youngsters an elementary familiarity with ... some rules of life at the level of the maxim and proverb; it introduced youngsters to an organized subsociety other than the household and church that observed such norms as punctuality, achievement, competitiveness, fair play, merit, and respect for adult authority¹³⁵

In many cases, the common schools advocates' insistence on inculcating children with Protestant values reflected deep prejudice against other faiths, especially Catholicism. Writes Diane Ravitch: "The rise of the American common school during the nineteenth century cannot be understood without reference to the dominant influence of evangelical Protestantism in their

¹³³ HORACE MANN, TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE MASSACHUSETTS SCHOOL BOARD (1848).

¹³⁴ CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS & AMERICAN SOCIETY 1780-1860 102 (1983).

¹³⁵ LAWRENCE A. CREMIN, TRADITIONS OF AMERICAN EDUCATION 51 (1976). *But see id.* at 85 ("[O]ne need not deny the fact that groups used education for the purpose of social control to affirm the equally important fact that the multitude of groups doing so, and the greater availability of diverse options that resulted from their efforts, extended the range of choice for individuals.").

formation and, more specifically, to the relentless efforts by evangelical Protestants to deny public funds to Catholic schools.”¹³⁶ For good or ill, the common schools movement incorporated a deep desire for cultural uniformity: “[T]he anxiety about cultural heterogeneity propelled the establishment of systems of public education; from the very beginning public schools became agents of cultural standardization.”¹³⁷

Several factors point to the conclusion that the drafters of Florida’s 1868 constitution were influenced by the common school movement. The first, and most obvious, is the language of the constitution itself, which requires the state to maintain “a uniform system of Common Schools.”¹³⁸ A second factor is the timing of its adoption. During the antebellum period, the proponents of common schooling were less successful in the southern states than in the Northeast and the Midwest.¹³⁹ But by 1868, their ideas were gaining widespread support: “[C]ommon-school reform became less controversial after 1860 and ... there was an expanding consensus around its ideology.”¹⁴⁰ Third, and most importantly, the 1868 education article exemplifies a broader trend during the Reconstruction era toward remaking antebellum Southern schooling on the common school model.

Florida’s 1868 constitution is an artifact of Radical Reconstruction. The state had adopted a constitution only three years previously, in 1865, but this document had denied

¹³⁶ Diane Ravitch, “Somebody’s Children: Educational Opportunity for *All* American Children,” in *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* 251, 262 (Diane Ravitch & Joseph P. Viteritti eds., 1997).

¹³⁷ Michael B. Katz, *The Origins of Public Education: A Reassessment*, in *THE SOCIAL HISTORY OF AMERICAN EDUCATION* 91, 104 (B. Edward McClellan & William J. Reese eds., 1988).

¹³⁸ FLA. CONST. art. IX, § 2 (1868). In fact, the 1868 education article contains nine references to common schools.

¹³⁹ Cremin, *supra* note 135, at 182-83.

¹⁴⁰ *Id.* at 219.

suffrage to all but white men, and Congress had refused to accept it.¹⁴¹ In 1867, following the second occupation of Florida by the federal military, black and white Floridians voted together to elect delegates to a new convention. Of forty-six delegates to the 1868 constitutional convention, eighteen were African Americans.¹⁴² Although one contemporary observer has described the 1868 convention as “a tumultuous and schismatic affair,”¹⁴³ it produced a document largely free of the 1865 constitution’s egregious flaws.¹⁴⁴

Few differences between the 1868 constitution and its predecessor were as stark as that between their provisions for public education. Whereas the 1865 constitution had included only “minimal and weak provisions for public education,” the 1868 provisions were “highly specific and strong.”¹⁴⁵ The substance of the 1865 education article was that “[t]he proceeds of all lands for the use of schools and a seminary or seminaries of learning shall be and remain a perpetual fund.”¹⁴⁶ This 1868 version, by contrast, not only required the state to establish a “uniform

¹⁴¹ FLA. CONST. art. VI, § 1 (1865); 2 SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS 352 (William F. Swindler ed., 1973).

¹⁴² CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 247-49 (1971).

¹⁴³ BETSY L. STUPSKI, GUIDE TO FLORIDA LEGAL RESEARCH, 1-13 (2001).

¹⁴⁴ Daniel Richards, the convention’s first president, echoed Lincoln in articulating the delegates’ lofty goals: “With the mantle of charity we would cover the mad heresies, monstrous injustice and red-handed cruelty of the past, and with malice towards none and charity for all, and ‘firmness in the right as God gives us light,’ let us enter upon the majestic work of laying deep the foundations of a Government that shall sacredly care for and protect the rights of all, and that shall deserve and receive the respect, love and confidence of all our citizens.” JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA 6 (1868). Major General Gordon Meade, governor of the Third Military District, later forced Richards to resign the presidency; shortly after that, Richards was ejected from the convention on grounds he did not live in the district he claimed to represent. *Id.* at 34, 47-48. Nevertheless, the succeeding president, Horatio Jenkins, Jr., suggested at the convention’s end that it had achieved Richards’s objective: “Avoiding the extremes of partizan bigotry, prejudice and animosity, you have succeeded in framing a Constitution and Civil Government which, in all its features, is founded on the principles of universal justice and the equal rights of all men.” *Id.* at 133.

¹⁴⁵ David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 244 (1986).

¹⁴⁶ FLA. CONST. art. X, § 1 (1865).

system of common schools,” but also declared that “[i]t is the paramount duty of the State to make ample provision for the education of the children residing within its borders, without distinction or preference.”¹⁴⁷

The transformation of Florida’s education article was typical of a wider process, enacted by black and white reformers in coalition, by which “the haphazard and halting constitutional provisions for education in the antebellum South were transformed into elaborate legal frameworks for universal public schooling”¹⁴⁸ In carrying out this transformation, Southern reformers drew on the ideas of the common school movement: “In Radical Reconstruction conventions, blacks pressed for modern common schools modeled on the best Northern state systems.”¹⁴⁹ Their efforts reflected the desire of newly free black citizens to ensure that their children would receive a free public education.¹⁵⁰ They embraced not only the notion of universal free public education, but also the belief that a key objective of schooling was to prepare students to be good citizens: “The educational provisions of those Radical Reconstruction constitutions and the debates on education in the conventions reveal how passionately the freedmen and their white allies believed in the traditional ideology that linked schooling and republican citizenship.”¹⁵¹ In later years, whites recaptured political control and forced black Southerners into second-class schools. But the institutional changes the reformers

¹⁴⁷ FLA. CONST. art. IX, §§ 1-2 (1868).

¹⁴⁸ James D. Anderson, *Black Rural Communities and the Struggle for Education During the Age of Booker T. Washington*, 67 PEABODY J. EDUC. 46, 50 (1990).

¹⁴⁹ Tyack & Lowe, *supra* note 145, at 238.

¹⁵⁰ Anderson, *supra* note 148, at 48 (observing that “[f]ew values and aspirations were more firmly rooted in the freedmen’s culture than education.”).

¹⁵¹ *Id.*

had wrought survived, as the resurgent whites “kept the central features of educational governance and finance created by [the new] constitutions.”¹⁵²

Had it looked to history, therefore, the *Holmes* court would have seen that the reformers who drafted Florida’s uniformity clause, influenced by the common school movement and acting as part of a larger Reconstruction-era trend toward the enactment of constitutional guarantees of universal schooling, had more in mind than programmatic uniformity. Their primary goal was not that all schools should use the same instructional techniques, but that all schools should prepare students for enlightened citizenship. Only by overlooking history was the *Holmes* court able to construe the uniformity clause as referring merely to programmatic uniformity.

It is important to point out, as Justice Kogan did in his *Glasser* dissent, that in any education reform movement, programmatic and ideological elements are linked. Even as the common school reformers used modern instructional techniques to advance their ideological objectives, they exploited the broad appeal of their ideology to advance their programmatic goals: “Essayists, state superintendents, and local school committees continually coupled their specific reform proposals with a repetition of the unassailable social functions of common schooling.”¹⁵³ It must be acknowledged, as well, that the common school reformers admired centralization and consistency. Early adherents of the movement in Massachusetts were motivated not only by a desire to teach students citizenship but also by a desire to bring order to a chaotic system. One historian notes that when Horace Mann assumed charge of the Massachusetts schools, “[t]he need for reform ... was urgent [I]n two thirds of the towns teachers were allowed to begin their schools without being certificated as required by law. There

¹⁵² Tyack & Lowe, *supra* note 145, at 245.

¹⁵³ Kaestle, *supra* note 134, at 95.

was a confusion of textbooks, and one third of the children were absent from school in winter

.....¹⁵⁴

But the common schools reformers' interest in programmatic uniformity was tempered by their respect for local variation:

Reformers coupled the drive for [graded schools] with a desire to see more uniformity in classroom programs. They did not want lock-step conformity, to be sure. They were for innovation, change, and the adaptation of schools to local circumstances; but they also thought that there were desirable standards of quality and that consistency was a virtue.¹⁵⁵

A case in point is the campaign among some nineteenth-century Florida educators for uniform textbooks:

In the mid and later 1800's Florida school men and parents were harassed by many problems about textbooks: pupils might come to school with no textbooks or each might come with a different one. With the demand for "graded" schools such conditions made the teacher's work an impossibility. During this period state superintendents repeatedly urged statewide uniformity of texts.¹⁵⁶

Even some of the delegates to the 1868 constitutional convention favored textbook uniformity.

Delegate Jonathan C. Gibbs, who later became Florida's first black cabinet secretary, "had moderate success in securing adoption of uniform texts in elementary and secondary schools."¹⁵⁷

But the campaigners for textbook uniformity did not necessarily want statewide uniformity; they only wished to have all the schools in each county use the same textbooks. The first Florida law on this subject, passed in 1883, demanded uniformity only at the county level; Florida did not enact a law requiring statewide uniformity until 1911, and this requirement lasted only until

¹⁵⁴ EDGAR W. KNIGHT, *EDUCATION IN THE UNITED STATES* 211 (3d ed. 1951).

¹⁵⁵ Kaestle, *supra* note 134, at 134.

¹⁵⁶ Marian Watkins Black, *The Battle Over Uniformity of Textbooks in Florida, 1868-1963*, 4 HIST. EDUC. Q. 106, 116 (1964).

¹⁵⁷ Joe M. Richardson, *Jonathan C. Gibbs: Florida's Only Negro Cabinet Member*, 42 FLA. HIST. Q. 363 (1964), available at http://fulltext.fcla.edu/DLData/CF/FullText/fhq_42_4.txt (last visited Apr. 15, 2006). See also Black, *supra* note 156, at 107.

1937.¹⁵⁸ Thus the purpose of the campaign for textbook uniformity was not forcing all Florida's students to march in "lock-step." It was remedying an essentially anarchic state of affairs, in order that teachers could teach. Once that purpose was achieved, county school boards were free to innovate.

More importantly, although the common schools reformers admired consistency, it was not the core purpose of their movement. The invitation to the 1839 convention of the American Lyceum, a nineteenth century education reform society associated with the common school movement, reflected its priorities:

[The common] schools therefore must be with us the hope of civilization, liberty and virtue. To elevate them so as to meet the wants of our republic is the high and single aim of the convention. ... [The convention's] deliberations and results, when published to the country, will bring the great cause of Education simultaneously before the several states in a form for enlightened, definite and successful action. As subservient to this humane and patriotic object we would suggest a few among the many topics which will demand the consideration of the meeting: viz. ... What is the organization of the school system? What branches of knowledge should be taught in our common schools? What should be the character of our common school books? ... What should be the qualifications of teachers?¹⁵⁹

The common school reformers were interested in curriculum, and textbooks, and teacher qualifications, in other words – but those considerations were *subservient* to the principal goal of schooling: meeting the wants of the republic. Here is a blunter formulation of their goals, offered by the Illinois superintendent of public instruction in 1862: "The chief end is to make GOOD CITIZENS. Not to make precocious scholars ... not to impart the secret of acquiring

¹⁵⁸ Black, *supra* note 156, at 115.

¹⁵⁹ *Invitation to the 1839 Convention of the American Lyceum*, in ROBERT ULICH, A SEQUENCE OF EDUCATIONAL INFLUENCES 68-70 (1935).

wealth ... not to qualify directly for professional success ... but simply to make good citizens.”¹⁶⁰

The same priorities appear to underlie the first law passed by the Florida Legislature implementing the 1868 constitution’s education article. Passed in 1869, the law does not command teachers to use any particular mode of instruction; instead, it commands them to carry out the core mission of the common school – that is, to teach students the values of citizenship:

Each teacher is hereby directed and authorized ... [t]o labor faithfully and earnestly for the advancement of the pupils in their studies, deportment, and morals, and embrace every opportunity to inculcate, by precept and example, the principles of Truth, Honesty, Patriotism, and the practice of every Christian virtue ... to cultivate in them habits of industry and economy, a regard for the rights and feelings of others, and their own responsibilities and duties as citizens.¹⁶¹

Moreover, in describing the duties of school boards, the law permits substantial programmatic latitude. It instructs school boards “[t]o do whatever they may judge expedient with regard to ... procuring the proper apparatus, text-books for the schools, books and stationery for the teachers’ use; grading and classifying the pupils, and providing separate schools for the different classes in such manner as will secure the largest attendance of pupils, promote harmony and advancement of the school”¹⁶² The 1869 Florida legislature was in a position to assess accurately the intent of a constitutional provision adopted in 1868. Indeed, some of its members had been delegates at the convention.¹⁶³ Its decision to emphasize ideology over program in its implementation of the provision suggests a like intent on the part of the provision’s drafters.

In the end, it is possible that drafters of Florida’s uniformity clause contemplated not only that Florida’s schools would provide all students a uniform opportunity for enlightened

¹⁶⁰ Kaestle, *supra* note 134, at 98.

¹⁶¹ 1869 Fla. Laws 16.

¹⁶² *Id.* at 11-12.

¹⁶³ These included, *inter alia*, C.R. Mobley and Horatio Jenkins, Jr. 1868 Fla. Laws iv. At the time of the law’s passage, delegate Jonathan Gibbs was Secretary of State. 1869 Fla. Laws ii.

citizenship, but also that they would do so through uniform methods. But the language of the clause and the circumstances of its adoption should have been a signal to the *Holmes* court that its drafters intended it to do much more than guarantee that all Florida's children received instruction based on the Sunshine State Standards and delivered by teachers on whom the state had performed background checks. The drafters might even have approved of programmatic requirements like these, but they would have seen such requirements as a means, rather than as an end. Their question about the OSP would not have been, does it cause the state of Florida to fund schools that deviate from the Sunshine State Standards? Their question would have been, does the OSP deliver state funding to schools that fail to prepare students equally for enlightened citizenship? Does the OSP defeat the purpose of public education? Does the OSP tear at the fabric of society? These questions – much more difficult, and much more important – are the ones the *Holmes* court should have confronted.

E. Application

Had it discovered that the purpose of the uniformity clause is to see that all Florida's children have an equal opportunity to attain enlightened citizenship, the *Holmes* court would have faced one final task: applying its discovery to the evidence. Did the OSP frustrate the state's effort to fulfill this purpose? The claim is not unreasonable. The primary tension between Florida's uniformity clause, properly understood, and the OSP – indeed, between uniformity clauses and school voucher programs generally – is that where the uniformity clause commands the state to educate students for citizenship, a voucher devotes public funds to schools that may educate students for other purposes. A voucher program may do more than fund schools that use diverse curricula, or hire teachers with diverse qualifications, in other words; it

may fund schools that seek to produce students with diverse values. Even the very first school voucher proposals were sensitive to the concern that such diversity might be harmful. Milton Friedman, in perhaps the first-ever proposal for a school voucher scheme, acknowledged that “[o]ne argument ... for nationalizing education is that it might otherwise be impossible to provide the common core of values deemed requisite for social stability.”¹⁶⁴ If the OSP impeded the state’s efforts to provide students with a “common core of values,” then the *Holmes* court was right to strike it down. Neither the statute itself nor the available evidence appears to support this conclusion, however.

In applying the uniformity clause to the OSP, the *Holmes* court examined the statute authorizing the program, as it should have done. Although the court focused on the law’s ability to provide for programmatic uniformity, rather than the more ideological brand of uniformity intended by the constitution, some of the provisions it singled out for criticism raise legitimate concerns about the law’s constitutionality. Weak programmatic controls, on their face, would not have violated the uniformity clause – but they might have produced violations by preventing

¹⁶⁴ Milton Friedman, *The Role of Government in Education*, in *ECONOMICS & THE PUBLIC INTEREST* (Robert A. Solo ed., 1955), available at <http://www.schoolchoices.org/roo/fried1/htm> (last visited Feb. 19, 2006). Persuasive philosophical arguments exist for and against the ability of school voucher programs to advance citizenship education. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 160-61 (1980) (claiming that “Friedman’s [voucher] plan legitimates a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint” and that “[s]uch an education is a mockery of the liberal ideal.”); HARRY BRIGHOUSE, *SCHOOL CHOICE & SOCIAL JUSTICE* 196 (2000), available at <http://www.oxfordscholarship.com/oso/private/content/politicalscience/0199257876/p050.html> (last visited Feb. 19, 2006) (advocating a voucher program in which participating private schools would be required to adopt “a programme of autonomy-facilitating education.”); AMY GUTMANN, *DEMOCRATIC EDUCATION* 68 (1987) (arguing that voucher plans “attempt to avoid rather than settle our disagreements over how to develop democratic character through schooling”); Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in *NOMOS XLIII: MORAL & POLITICAL EDUCATION* 87, 125 (Stephen Macedo & Yael Tamir, eds., 2002) (claiming that “democratic values will be more reliably and effectively conveyed by schools that reflect particular moral and religious worldviews than by schools run by the government.”).

the state from carrying out its constitutional duty. For example, the court criticized the requirement that voucher schools be subject to “instruction, curriculum, and attendance criteria” that were selected, not by the state, but by “an appropriate nonpublic school accrediting body.”¹⁶⁵ Perhaps the absence of a requirement for state accreditation deprived the state of the power to supervise OSP schools adequately. The *Holmes* court also suggested that provisions *absent* from the OSP statute should have been included. For example, as noted above, the statute does not require OSP schools to use the state curriculum, which instructs public schools to teach students about the “essentials of the United States Constitution,” and “the elements of civil government.”¹⁶⁶ Perhaps the OSP impermissibly weakened Florida’s ability to ensure that all students received instruction in these essential areas.

The problem with these arguments is that none of them states a violation of the uniformity clause; instead, each describes a situation that *might* have permitted a violation, depending on how the state education department implemented the statute. Did the absence of requirements for state accreditation and certain forms of civics instruction compromise the state’s ability to satisfy the uniformity requirement? Or did the state supervise the private accreditation process adequately, and insist that students receive instruction in “the elements of civil government,” perhaps relying on the statute’s apparent invitation to exercise discretion in determining which private school accrediting organizations were “appropriate”? The available evidence does not say, and the court does not ask. Moreover, though the court chooses not to focus on them, the statute does contain safeguards against potential violations. It requires

¹⁶⁵ FLA. STAT. § 1002.38(4)(f) (2005). The court points out that these accrediting bodies have “widely variant quality standards and program requirements.” *Holmes III*, 919 So. 2d 392 (quoting Fla. Dep’t of Educ., *Private School Accreditation*, at http://www.floridaschoolchoice.org/Information/Private_Schools/accreditation.asp (last visited Apr. 18, 2006)).

¹⁶⁶ *Holmes III*, 919 So. 2d at 410.

schools participating in the OSP to comply with antidiscrimination law,¹⁶⁷ to “[a]ccept scholarship students on an entirely random and religious-neutral basis,”¹⁶⁸ and to “[a]gree not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.”¹⁶⁹ In the end, the OSP does not seem to constitute a facial violation of the uniformity clause.

The next logical question for the *Holmes* court, at this point, was whether the OSP was unconstitutional as implemented by the state. As noted above, researchers have examined the effects of the OSP on students’ academic performance, with conflicting results.¹⁷⁰ But little evidence exists to indicate whether the OSP harmed the ability of Florida’s schools to teach *citizenship*. Certainly little such evidence was before the court. The only party even to address the issue was Ruth Holmes, the named plaintiff, who argued that the goals of the private schools participating in the OSP were antithetical to the goal of the uniformity clause. Of the private schools, she observed: “Discovery taken of the four sectarian schools ... makes clear that religious indoctrination is an integral part of the schools’ educational programs. The Diocese itself identifies as one of the ‘goals’ of its schools to ‘inculcate in each student a strong spirit of faith in the message of Jesus ...’”¹⁷¹ Citing *Clark*, Holmes contrasted this goal with the purpose of Florida’s public schools, as expressed by the drafters of the uniformity clause: “[T]he framers recognized the important role the common schools play in preparing citizens to function in a free society – both through a curriculum that teaches the responsibilities of citizenship, and through

¹⁶⁷ FLA. STAT. § 1002.38(3)(c) (2005).

¹⁶⁸ FLA. STAT. § 1002.38(3)(e) (2005).

¹⁶⁹ FLA. STAT. § 1002.38(4)(j) (2005).

¹⁷⁰ See Section III.B, *supra*.

¹⁷¹ *Holmes III*, 929 So. 2d 392, Answer Brief of Ruth Holmes, at 3.

the formal interaction and socialization of children from diverse walks of life.¹⁷² If Holmes’s suspicions are correct, and the religious schools participating in the program were proselytizing among voucher students, the program did indeed violate the uniformity clause – but the evidence here seems too thin to permit the conclusion that it did so.

Not having found conclusive evidence about the OSP’s effect on citizenship education, the *Holmes* court might have looked to empirical data on other voucher programs, as well as on other forms of school choice. Here, too, most of the available data bear on questions other than whether such programs advance citizenship education.¹⁷³ But there are a few potentially useful sources the court might have consulted. First, as a general matter, many educational researchers have argued that schools need not – indeed, *should* not – adopt the same programmatic approach in order to pursue the same goal. Summarizing a study of state-level education reforms, education historians David Tyack and Larry Cuban write: “[E]xcellence cannot be coerced. At best, laws and rules might create some necessary but not sufficient conditions under which competent and caring teachers and intellectually curious students might flourish.”¹⁷⁴ As a sensible alternative to “lock-step” reform, Tyack and Cuban suggest that “[i]nstead of being ready-made plans, reform policies could be stated as principles, general aims, to be modified in the light of experience, and embodied in practices that vary by school or even by classroom.”¹⁷⁵ More recent research confirms the effectiveness of this approach in the school choice context. For example, a recent study of five charter schools operated by KIPP, a private organization, found that “[f]rom classroom work to student behavior, all five Bay Area KIPP schools have translated

¹⁷² *Id.* at 10 (citing *Clark*, 188 So. at 353).

¹⁷³ See Section III.B, *supra*.

¹⁷⁴ DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 80 (1995) (citing THOMAS R. TIMAR & DAVID L. KIRP, *MANAGING EDUCATIONAL EXCELLENCE* (1988)).

¹⁷⁵ *Id.* at 83.

high expectations into actions with visible results.”¹⁷⁶ The schools reached this result by insisting on a core ideology, while permitting a significant degree of programmatic flexibility: “[T]he five schools differ significantly along several dimensions including student body composition, style of leadership and teaching, and the ways in which they implement different aspects of the KIPP model”.¹⁷⁷

The *Holmes* court also might have consulted existing studies on the effects of school choice schemes on schools’ ability to teach “civic values” (e.g., political participation and patriotism). In a meta-analysis of nineteen such studies, Patrick J. Wolf of Georgetown University found that “[s]ixteen of the studies concluded that school choice and private schooling generally enhance the democratic values of students; whereas the remaining three studies found no difference in democratic values caused by school choice.”¹⁷⁸ Wolf concluded: “School vouchers ... appear to promote democratic values.”¹⁷⁹ His findings suggest not merely that the OSP was unlikely to have damaged Florida’s ability to educate its children for citizenship, but that it may have *enhanced* the state’s ability to achieve that goal.

Finally, the *Holmes* court could have examined the effect of school choice schemes on racial and economic integration. Though distinct from questions about schools’ ability to teach citizenship, this question is closely related, since policies that increase integration may help students from different racial, ethnic, and socioeconomic groups learn to communicate with and

¹⁷⁶ JANE L. DAVID ET AL., BAY AREA KIPP SCHOOLS: A STUDY OF EARLY IMPLEMENTATION ES-1 (2006), *available at* <http://www.sri.com/policy/cep/pubs/choice/KIPPYear1Report.pdf> (last visited Apr. 17, 2006).

¹⁷⁷ *Id.* at 69.

¹⁷⁸ Patrick J. Wolf, Testimony Before the Texas House Select Committee on Public School Finance, Subcommittee on Alternative Methods (Aug. 22, 2003), *available at* <http://www.texaspolicy.com/pdf/2003-08-22-SFSC-Wolfe-testimony.pdf> (last visited Mar. 31, 2006).

¹⁷⁹ *Id.*

respect one another – essential capacities for citizens in a diverse society. After analyzing the effects of the District of Columbia’s voucher program, researchers Jay Greene and Marcus Winters reported that “voucher-accepting private schools have racial populations that better resemble the racial composition of the surrounding metro area [than do the populations of corresponding public schools] and are less likely to have student populations that are racially homogenous.”¹⁸⁰ Along the same lines, a 2002 report of the American Education Reform Council found that participants in voucher programs in Milwaukee and Cleveland were less racially isolated than their nonparticipating peers.¹⁸¹ Some evidence does indicate that school choice program *decreases* integration. In an examination of a school choice program in New Zealand, for example, Helen Ladd and Edward Fiske found “polarization of enrollment by ethnicity and economic advantage.”¹⁸² But here, again, most of the available data appear to suggest that school choice programs like the OSP are likely to enhance, rather than damaging, students’ opportunities to become enlightened citizens.

In sum: Neither the statute itself, nor the available evidence, indicates clearly that the Opportunity Scholarship Program violated Florida’s uniformity clause. The statute contains provisions that are potentially concerning, and others that offer some reassurance, but does not

¹⁸⁰ Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.’s Voucher Program on Public School Achievement and Racial Integration After One Year* 8 (Education Working Paper No. 10, Jan. 2006), available at http://www.manhattan-institute.org/pdf/ewp_10.pdf (last visited Mar. 31, 2006).

¹⁸¹ Howard L. Fuller & Deborah Greiveldinger, *The Impact of School Choice on Racial Integration in Milwaukee Private Schools*, American Education Reform Council (Aug. 2002), at www.schoolchoiceinfo.org/data/research/integ0802.pdf (last visited Mar. 30, 2006).

¹⁸² Helen Ladd & Edward B. Fiske, *Does Competition Generate Better Schools? Evidence From New Zealand* 10 (Terry Sanford Institute of Public Policy Working Paper No. SAN01-16, July 2001), available at <http://www.pubpol.duke.edu/people/faculty/ladd/SAN01-16.pdf> (last visited Mar. 31, 2006) (citing Helen F. Ladd & Edward B. Fiske, *The Uneven Playing Field of School Choice: Evidence from New Zealand*, 20 J. POL’Y ANALYSIS & MGMT. 43-64 (2001); Edward B. Fiske & Helen F. Ladd, *When Schools Compete: Performance-Based Reform in Education* (2000)).

violate the uniformity clause on its face. Nor is there sufficient evidence to say with confidence whether the state's implementation of the OSP violated the constitutional mandate. Meanwhile, the available data on voucher and school choice programs in other states tilt against the conclusion that such programs impede citizenship education. Having reviewed this evidence, the *Holmes* court might have remarked on what appears to be an urgent need for more data. It might even have upheld the OSP on the theory that, if all such programs are struck down, their effects will never be known. But it should not have held that the OSP violated the uniformity clause.

V. CONCLUSION

As noted in the Introduction to this Article, the *Holmes* case was closely watched by policymakers, legislators, and educators from across the nation. Some have speculated, since the court struck down the Opportunity Scholarship Program, that *Holmes* heralded the demise not only of similar programs in Florida (e.g., the McKay Scholarship Program for disabled children), but also of school choice initiatives in other states.¹⁸³

To the extent that other courts interpreting state constitutional uniformity clauses consult the *Holmes* opinion for guidance, however, those courts should view the Florida Supreme Court's approach as an example of what *not* to do. Although the meaning of "uniform" is not self-evident, the court failed to acknowledge the necessity of choosing from among the many possible meanings. In crafting its own definition, it ignored its own precedents on the subject, as well as relevant historical evidence. It selected a simplistic, literal definition that is indefensible on doctrinal or historical grounds. And it used that definition to strike down a program that appears not to have violated the core objective of Florida's uniformity clause.

¹⁸³ See, e.g., Coulson, *supra* note 3.

This Article does not advance a normative claim about how future uniformity clause challenges to school choice programs should come out. It does argue, however, that courts hearing such challenges should eschew the *Holmes* court’s approach in favor of the four-part approach outlined above: 1) acknowledge the necessity of choosing a definition of the term “uniform”; 2) consult all available sources of guidance, including case law and historical sources; 3) choose a definition that reflects this guidance; and 4) apply this definition both to the statute and to available empirical data.

Whether remedying the *Holmes* court’s errors would have changed the outcome of the case is beyond the scope of this Article; had the court not found a uniformity clause violation, it might have struck down the OSP on other grounds. If the court’s uniformity clause analysis determined its outcome, of course, it is especially regrettable. In that case, the court needlessly and unfairly terminated a program that appeared to confer substantial benefits on several hundred schoolchildren, while not violating the state constitution. But even if the court would have struck down the OSP on other grounds, its flawed decision worked a significant harm, in that it confused our national conversation about school vouchers and other forms of school choice.

The question whether school choice programs are compatible with the traditional common school model is enormously important. On one hand, such programs represent the cutting edge of school reform. On the other hand, even in states that do not have uniformity requirements, the common school model is widely understood to be the philosophical foundation on which our entire system of public education rests. Determining whether school choice and common schools can be reconciled – or, if not, which of them should yield – will require a thoughtful and sustained process of national deliberation. Presented with an opportunity to advance this process, the *Holmes* court ducked. State courts presented with future uniformity

clause challenges to voucher programs and other school choice schemes should confront them honestly and squarely.