# The Opportunity Scholarship Program and Florida's Establishment Clause

## Introduction

The Opportunity Scholarship Program has been a popular and largely effective program in Florida, aimed at allowing low-income families with children in failing schools to move their children to better public or private schools. Because eligible private schools may be either sectarian or non-sectarian, the Program raises constitutional questions under the Establishment Clause. This paper will discuss the Opportunity Scholarship Program, the United States and Florida Establishment Clauses, Establishment Clause jurisprudence in both federal and state courts, and predict the likely outcome of Florida's ongoing seminal case, Holmes v. Bush.

## The Opportunity Scholarship Program

The Opportunity Scholarship Program became law on June 21, 1999.[1] It was a key component of Governor Jeb Bush and former Lieutenant Governor Frank Brogan's A+ Plan. Under the Program, a child placed in a low-performing public

[1] The Opportunity Scholarship Program is now located in Title XL VIII Fla. Stat. Sec. 1002.38.

school is given the opportunity to transfer to a higher-performing public school or the State will pay the child's tuition at a qualified, participating private school.[2]

### ***Child's Eligibility***

A child becomes eligible for an Opportunity Scholarship when he is currently enrolled in or scheduled to attend a "Two F" school.[3] A Two F school is any school that has received two "F's" in a four-year period.[4] Each public school is graded annually using a complicated formula that factors in, among other things, FCAT scores, prior years' performance, and discipline data.[5][6] Once it has been determined that a child is enrolled in or

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[2] www.opportunityschools.org. "Opportunity Scholarships Program."

[3] Id.

[4] Id.

[5] http://www.firn.edu/doe/schoolgrades/pdf/guide03.pdf. This website depicts the grading formula.

[6] "Two F" Schools:

Dade - Booker T. Washington Sr High
Dade - Floral Heights Elementary Schl
Dade - Miami Edison Senior High Schl
Dade - Miami Jackson Senior High Schl
Dade - Miami Northwestern Senior High
Duval - Jean Ribault High School
Orange - Jones High School
Gadsden - James A. Shanks High School
Palm Beach - West Technical Education Ctr

Note the relatively small number of schools. Most of the positive effect of the program appears to be the motivation it provides for schools to avoid the "failing" designation.

scheduled to attend a failing school, the now eligible child may stay in the failing school, transfer to a higher-performing public school, or enroll in a participating private school.[7]

***Parent's Responsibilities***

If a parent desires to place their child in a higher-performing public school[8], the parent must choose a school and notify the Department of Education and the school district of the decision.[9] Transportation to the new school will be provided by the school district.[10]

If a parent decides to place their child in a participating private school, the parent must first obtain admission for their child.[11] The private school will assist the parent with the admissions process,[12] but the school is required to accept students on "an entirely random and religious-neutral basis."[13] The parent then must notify the Department of Education and the school district of their

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[7] www.opportunityschools.org. "Responsibilities."

[8] A higher-performing school is defined as a school receiving a "C" or higher. Id.

[9] www.opportunityschools.org. "Responsibilities."

[10] Id.

[11] Id.

[12] Id.

[13] Fla. Stat. Sec.1002.38

decision.[14] The payment from the state to the school, known as a "warrant" is mailed to the school directly, but made out to the parent.[15] In order to receive the scholarship, the parent must endorse the warrant to the school.[16]

### ***School Eligibility***

As previously noted, the only thing required of a public school to *receive* students under this system is that it perform at a "C" level or greater. The public school will already be subject to all state regulations, making additional specifications unnecessary. Participating private schools, however, are subject to various requirements.

Participating private schools may be sectarian or non-sectarian.[17] A private school wishing to participate in the Opportunity Scholarship Program must file a "Notice of Intent to Participate" with the Department of Education[18] and demonstrate fiscal soundness.[19] In addition, the school must agree to the following:

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[14] www.opportunityschools.org. "Responsibilities."

[15] Id.

[16] Id.

[17] Fla. Stat. Sec. 1002.38(4)

[18] www.opportunityschools.org. "Responsibilities."

[19] Fla. Stat. 1002.38(b) states that demonstrating fiscal soundness means being in operation for one school year or submitting a statement

- Comply with the federal anti-discrimination law, pursuant to 42 U.S. Code Section 2000(d).
- Meet state and local health and safety laws and codes.
- Comply with all state statutes relating to private schools.
- Be subject to the criteria adopted by an appropriate non-public school accrediting body.
- Employ or contract with teachers who hold baccalaureate or higher degree, or have at least three years of teaching experience in public or private schools, or have special skills, knowledge or expertise that qualifies them to provide instruction in subjects taught.
- Be academically accountable to the parent or guardian for meeting the education needs of the student.
- Adhere to the tenets of the school's published disciplinary procedures prior to the expulsion of any Opportunity Scholarship student.

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from a CPA confirming that the school is insured and the owner(s) have the capital to support the school for the upcoming year. Lastly, the school may file a surety bond or letter of credit for the amount equal to the opportunity scholarship funds for any quarter with the department.

- Accept scholarship students on a random, religious neutral basis, without regard to the student's past academic history. Preference may be given to siblings of other Opportunity Scholarship students.
- Accept as full tuition and fees the amount of the scholarship provided by the state for each student.
- Not compel any Opportunity Scholarship student to profess a specific ideological belief, to pray, or to worship.[20]

Once the private school has met all of these requirements, it is eligible to receive Opportunity Scholarship students.

### *Fiscal Consequences*

The use of Opportunity Scholarships results in a dollar-for-dollar reduction in funding to the failing school that loses the scholarship student.[21] The maximum amount of the Scholarship is an amount equal to the foundation grant in the state's public school finance

[20] www.opportunityschools.org. "Responsibilities."

[21] Fla. Stat. 1002.38(f) says, "the Department of Education shall transfer from each school district's appropriated funds the calculated amount from the Florida Education Finance Program and authorized categorical accounts to a separate account for the Opportunity Scholarship Program for quarterly disbursement to the parents of participating students."

system.[22] This reduction in funding is counterbalanced by a pot of money set aside specifically for assisting failing schools.[23] On the flip side, outstanding schools have the chance to earn additional funding under the School Recognition Program.[24]

### *The Issue At Hand: Establishment*

As previously mentioned, a parent making use of an Opportunity Scholarship has to endorse the check that is mailed directly to the participating private school. It is well known that the vast majority of private schools in Florida and in the whole of the United States are religiously affiliated.[25] The State issuing checks to religious organizations immediately raises issues relating to the separation of church and state. Concerned citizens

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[22] Ctredpol.org/vouchers/floridavouchers.pdf. In 1999-2000, the amount of the voucher ranged from $3,400 to $4,100, depending on the school district's costs and the grade level of the student.

[23] www.myflorida.com/myflorida/government/governorinitiatives/aplusplan/opportunityscolarships. Governor Bush claims on his website that, for the 1999-2000 school year, F schools received an average $800more per pupil than A schools and that $46 million is earmarked for assistance to failing schools, with $12 million of that specifically set aside for recruiting and retaining teachers in D and F schools.

[24] Id.

[25] William G. Frey and Virginia Lynn Hogben, "Vouchers, Tuition Tax Credits, and Scholarship-Donation Tax Credits: A Constitutional and Practical Analysis, 31 Stetson L. Rev. 165, 177 (Winter 2002).

opposed to state involvement in religious affairs and, candidly, citizens opposed to the Opportunity Scholarship Program as an effective educational tool, have cited various provisions of the Florida and United States Constitutions as reasons to strike the program down. So far, the most effective argument has been based on Florida's so-called "Establishment Clause."

## The Establishment Clause and the Free Exercise Clause

Separating church and state functions while allowing the citizenry to practice the religion of their choice has long been a popular idea, and long been a source of contention. Early in the history of U.S. democracy, James Madison published Memorial and Remonstrance Against Religious Assessments, where he argued that the public support of clergy was dangerous to our civil liberties.[26] Many years later, as we will see, the issue of establishment is still very much alive.

### *U.S. Constitution*

The First Amendment to the United States Constitution states, ""Congress shall make no law respecting an

[26] Reprinted in Everson v. Board of Ed. Of Ewing, 330 U.S. 1, 65, 68 (appendix to dissent of Rutledge, J.)

establishment of religion, or prohibiting the free exercise thereof…"[27] This part of the First Amendment has been read to both prohibit government funding of religious establishments (the "Establishment Clause") and prohibit government interference with citizens' engaging in religious practices (the "Free Exercise Clause"). Justice Rehnquist noted in Locke v. Davey that the Establishment Clause and the Free Exercise Clause are "frequently in tension."[28] The tension can be understood even on a purely theoretical level: if people are allowed to practice their respective religions freely and remain free from religious discrimination, and the government cannot endorse or aid a particular religion, what happens when the government is providing funds in an area where religious organizations fill secular roles? Education and charitable work are two examples of areas where the Establishment Clause and the Free Exercise Clause are at odds. On one hand, the government cannot fund neutral, socially valuable programs and cut out religious organizations because of their religiosity, because doing so would violate the Free Exercise Clause. On the other hand, those valuable programs cannot include (or fund) religious organizations

[27] U.S. Const. amend. I.

[28] Locke v. Davey, 124 S. Ct. 1307, 1311 (2004).

to the point of aiding or advocating a position, because that would violate the Establishment Clause. It has proven to be a high wire act for lawmakers. Justice Rehnquist summarizes the Court's jurisprudence in this area by affirming the existence of a satisfactory middle ground: "there is room for play in the joints between them…[29] [T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[30]

Locke is the most recent in the U.S. Supreme Court's line of cases dealing with the Establishment and Free Exercise clauses. In Locke, a high school graduate, Joshua Davey, attempted to utilize a college scholarship (known as a "Promise Scholarship") provided by the State of Washington.[31] Davey chose to attend Northwest College, a private Bible college in Washington that was an eligible

[29] Citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669.

[30] Locke at 1311.

[31] Washington's "Promise Scholarship Program," was intended to assist academically-gifted students with postsecondary education. To be eligible, the student must graduate from a public or private high school in Washington, finishing in the top 15% of his high school class and receiving at least a 1200 on his SAT's. Additionally, the student's family income must be less than 135% of the State's median and the student must enroll at least half-time in an eligible postsecondary institution in Washington. Locke at 1309-1310.

institution under the Promise Scholarship Program.[32] Davey elected to pursue degrees in both "pastoral ministries" and business management, with an eye toward becoming a minister.[33] When Davey approached Northwest's financial aid officer, he was informed that, because he was pursuing a degree in "devotional theology," he was ineligible to receive a Promise Scholarship under the language of the Program.[34] Davey brought suit, alleging a violation of the Free Exercise Clause.[35] The State of Washington countered, arguing that, under the language of the Washington State Constitution, which has stricter Establishment Clause language than that of the United States Constitution,[36] it was permissible for the state legislature to refuse to fund a devotional theology degree.[37] The United States Supreme Court, noting that Washington had, through its own Establishment Clause, "prohibit[ed] even indirectly funding religious instruction that will prepare students for the

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[32] Id.

[33] Id.

[34] Id. at 1311.

[35] Id.

[36] Art. I, Sec. 11 of the Washington Constitution (Washington's Establishment Clause) states in relevant part, "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment

[37] Locke at 1312.

ministry,"[38] found that the denial of benefits to devotional theology students was not a violation of those students' Free Exercise Rights under the United States Constitution.[39] The Court found that the Program evinced no "animus" toward religion, and said, "[i]f any room exists between the two Religion Clauses, it must be here."[40]

Locke provides an example of a program that *restricts* religious involvement without violating the federal Free Exercise Clause, likely aiding those who would strike down Florida's Opportunity Scholarship Program. An earlier United States Supreme Court case, Zelman v. Simmons-Harris, gave credence to the arguments of Opportunity Scholarship *proponents* by striking down a federal Establishment Clause challenge to an Ohio tuition assistance program similar to Florida's Opportunity Scholarships Program.[41]

In Zelman v. Simmons-Harris, the United States Supreme Court, in a 5-4 decision, ruled that Ohio's scholarship program was not impermissible because it was a religion-neutral program of true private choice that provided a

[38] Citing Witters v. State Comm'n for the Blind, 112 Wash.2d 363, 369-70, 771 P.2d 1119, 1122 (1989)

[39] Locke at 1309.

[40] Id at 1315.

[41] Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

broad spectrum of educational options to participants.[42] The Court was swayed by the fact that payments were made to the parents of Ohio schoolchildren and the parents then endorsed the checks over to the participating school of their choice:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[43]

The Court went on to say,

> The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government whose role ends with the disbursement of benefits.[44]

It is obvious that the Florida legislature constructed the Opportunity Scholarship Program to look like this Ohio program so that it would pass federal constitutional muster. Due to the similarity of the Ohio and Florida programs, Zelman provides a clear statement of the

[42] Id at 2473.

[43] Id at 2467.

[44] Id.

Opportunity Scholarship Program's permissibility under the federal Establishment Clause.

Even with the federal Establishment Clause apparently allowing Opportunity Scholarships, Florida courts must look to the Florida Constitution to determine whether Florida's Establishment Clause provides for a more restrictive ban on state involvement with religion than does the United States Constitution.

### ***Florida Constitutional History***

The current version of Florida's Constitution is the result of a constitutional review that was conducted in 1968. The Establishment Clause that now appears in Article I, Section 3 has evolved over a series of constitutions to become what it is presently.

Florida's first constitution was adopted in 1839, but is referred to as the Constitution of 1838 because that is when the constitutional convention began.[45] The Establishment Clause was found, as it is today, in Article I, Sec. 3 and read,

> That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own

[45] Talbot D'Alemberte, "The Florida State Constitution: A Reference Guide." Greenwood Press. 1991. p.3.

conscience; and that no preference shall ever be given by law to any religious establishment, or mode of worship in this State.[46]

The next two constitutions were enacted in 1861 and 1865. The 1861 constitution was Florida's Ordinance of Secession from the United States during the Civil War and basically copied the language of the 1838 constitution replacing the United States with the Confederacy as the national government.[47] The 1865 constitution recognized Florida's renewed membership in the Union after the war. The Establishment Clause language in both the 1861 and 1865 constitutions remained at Article I, Section 3, and was unchanged from the 1838 constitution.

Yet another constitution came into effect in 1868.[48] The Constitution of 1868 was a result of Reconstruction, and its major feature was the empowerment of the governor.[49]

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[46] Fla. Const. 1838, Art. I, Sec. 3. The text of this constitution and all other historic constitutions were taken from www.law.fsu.edu/crc/conhist.

[47] D'Alemberte at 5.

[48] The 1865 constitution, while recognizing that Florida had rejoined the Union, failed to give rights to the newly-freed slaves. Consequently, federal officials were unhappy and endeavored to repair it soon afterward. Id at 6.

[49] Id at 7. The governor was given a four-year term (and no chance for reelection) and expansive appointment powers. Notably, this

The Establishment Clause was completely eliminated and replaced by a new Free Exercise clause, located in Article I at Section 4:

> The free exercise and enjoyment of religious profession and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the state.[50]

This version lasted just 17 years.

By 1885, Floridians had been free of Reconstruction long enough to form an idea of the direction they wanted their government to go. Constitutional historian Talbot D'Alemberte posits that it was Floridians' deep distrust of and disdain for the carpetbaggers who had ruled the state under Reconstruction that led to the Constitution of 1885's reclamation of some of the gubernatorial power bestowed upon the office by the Constitution of 1868.[51] The

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constitution also introduced the requirement for public schools and the homestead exemption.

[50] Fla.Const. 1868, Art. I, Sec. 4.

[51] D'Alemberte at 8. The 1885 constitution dialed down the governor's appointment powers, providing for an elected Cabinet and county

Establishment Clause was revived and given a separate section from the Free Exercise Clause. The Free Exercise Clause was placed in Article I at Section 5, and was identical to the 1868 Article I, Section 4 language, except that the last line was changed to "…practices subversive of, or inconsistent with, the peace or moral safety of the State or society."[52] The Establishment Clause followed at Article I, Section 6:

> No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution.[53]

Thus, the 1885 constitution introduced the language forbidding state aid to religious institutions, which eventually brought into question the validity of the Opportunity Scholarship Program.

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officials. Interestingly, the rest of the constitution closely resembles Alabama's.

[52] Fla.Const. 1885, Art. I, Sec. 5.

[53] Fla. Const. 1885, Art. I, Sec. 6.

The Constitution of 1968 pared down the 1885 document and made an effort to modernize Florida's constitution.[54] Emblematic of the paring down was the combination of the Free Exercise and Establishment Clauses to create the current Article I, Section 3 version:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.[55]

The Florida Legislature's analysis of the change in the Establishment and Free Exercise Clauses merely notes that the new Article I, Section 3 "[c]ombines in substance present [1885] Section 5 relating to religious freedom and liberty of conscience with Section 6 relating to religious preferences and public aid."[56] The legislature also notes,

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[54] D'Alemberte at 12. The 1968 constitution introduced civil rights-era language and produced the referendum process for amendment of the constitution.

[55] Fla.Const., Art. I, Sec. 3.

[56] Legislative analysis provided with the Draft of Proposed 1968 Constitution. July 20, 1968.

without explanation, that it deleted the "incompetent as a witness" language.[57]

The Florida Establishment Clause uses language that clearly suggests a more restrictive establishment policy than that of the United States Establishment Clause. Is it restrictive enough to disallow the Opportunity Scholarship Program? We are on our way to an answer.

**Florida's Jurisprudence**

To be candid, there is very little in the way of Florida case law to guide the debate over Opportunity Scholarships and the Establishment Clause. The two most relevant cases in this area are Johnson v. Presbyterian Homes of the Synod of Florida[58] and Nohrr v. Brevard County Educational Facilities Authority.[59]

In Johnson, the Florida Supreme Court held that a statute granting a property tax exemption to a religiously-affiliated home for the elderly did not violate the Florida Establishment Clause, saying, "[t]he grant of a tax exemption is not sponsorship since the government…simply abstains from demanding that the church support the state…

[57] Id.

[58] 239 So.2d 256 (1970)

[59] 247 So.2d 304 (1971)

There is no genuine nexus between tax exemption and establishment of religion."[60] With this decision, the Florida Supreme Court cleared the way for tax exemptions to religious organizations.

In Nohrr, the appellant's (Nohrr's) Establishment Clause argument was one of a series of arguments made in opposition to the validation of bonds that were to be used by the Florida Institute of Technology to build a dormitory/cafeteria.[61] Nohrr's argument was that, since, in the future, bonds like the ones at issue would be available to religious schools, the issuance of bonds in cases like this was an unconstitutional establishment of religion.[62] The Florida Supreme Court rejected this argument, saying, "…no aid is granted at public expense. All expenses are required to be borne by the educational institution involved and no other source of payment, which might otherwise be available for the public generally, is to be used in any matter whatsoever in connection with the project."[63] The Court went on to say, "state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious

[60] 239 So.2d 256, 261.

[61] 247 So.2d 304, 307.

[62] Id.

[63] Id.

interests may be indirectly benefited."[64] When a program promotes both religious and secular ends, the Court said that "an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion."[65] The Court then summarily concluded that the means in this case were permissible. The lack of discussion of the means utilized in Nohrr limits the usefulness of this case in the Opportunity Scholarship debate, but it does acknowledge that state bonds where the duty of repayment falls on the entity benefited may permissibly be issued for religious institutions.

Johnson and Nohrr are examples of the "play in the joints" discussed by the United States Supreme Court in Locke. Religious establishments were benefited by state actions, but the benefits did not rise to the level of state establishment of religion. 30+ years later, Florida has enacted another program that benefits religious institutions. Should it receive similar favorable treatment?

**Florida's Ongoing Seminal Case: Bush v. Holmes**

[64] Id.

[65] Id.

Immediately after the Opportunity Scholarship Program became law, parents, citizens, interest groups, and the Florida Education Association filed suit citing numerous constitutional failings. The suit, styled Holmes v. Bush,[66] (Holmes I) alleged that the Opportunity Scholarship Program violated Article I, Section 3 of the Florida Constitution (the Establishment Clause), Article IX, Section 1 of the Florida Constitution ("adequate provision for free public schools" provision),[67] Article IX, Section 6 of the Florida Constitution ("state school fund free public schools" provision),[68] and the Establishment Clause of the First Amendment to the United States Constitution.[69] The trial court elected to first hear arguments on Article IX,

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[66] 767 So.2d 668

[67] The full text of Article IX, Section 1 reads,

> **Public education.**—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.

[68] The full text of Article IX, Section 1 reads,

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

[69] Holmes v. Bush at 671.

Section I only and ruled that the Opportunity Scholarship Program was facially unconstitutional under Article IX, Section 1 of the Florida Constitution.[70] On appeal, the First District Court of Appeal held that the Opportunity Scholarship Program did *not* violate Article IX, Section 1,[71] and the case was remanded to the trial court for proceedings related to the other constitutional challenges.[72]

Holmes v. Bush (now Holmes II) went back to the trial court,[73] and the parties performed additional discovery. In the trial court opinion, it is noted how narrow the issue had become: the Article IX, Section 1 issue was resolved in Holmes I, the Article IX, Section 6 challenge was voluntarily dismissed by the plaintiffs, and the federal Establishment Clause issue was resolved in Zelman. All that remained was the issue of Florida's Establishment Clause.

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[70] Id at 672.

[71] The court held that the language of Article IX, Section 1 did not prohibit the Legislature "from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." Id at 675. Further, the court found that Opportunity Scholarships *furthered* the goal of Article IX, Section 1 by helping to provide "a high quality education." Id at 675-6.

[72] Id at 677.

[73] 2002 WL 1809079.

The basic underlying facts were agreed upon and the trial Judge (Judge Davey)[74] heard summary judgment motions.[75] Judge Davey granted summary judgment to Holmes, ruling the Opportunity Scholarship Program unconstitutional under Florida's Establishment Clause.[76] Judge Davey characterized the language of the Establishment Clause as "clear and unambiguous."[77] The State argued that the precedent established in Johnson and Nohrr established the constitutionality of Opportunity Scholarships, but Judge Davey distinguished those two cases on the basis that neither Johnson, which dealt with a tax exemption, nor Nohrr, which dealt with bonds to be repaid by the institution, dealt with state revenue paid to religious schools, whereas,

> [T]he funds disbursed under the OSP emanate directly from the revenue of Florida and its political subdivisions. Indeed, any OSP funds distributed to a participating student or their paren [sic] (guardian) result in a dollar for dollar reduction in the funds of the public school or school district where the student was assigned. These

[74] Coincidental, considering the important part Locke v. Davey plays in this debate.

[75] Id at 1.

[76] Id.

[77] Id.

funds are without question revenue "taken from the public treasury" of a political subdivision.[78]

Judge Davey also rejected the State's argument that the intervening choice of the parent to endorse the check to the selected school rendered the program constitutional, saying that, if that argument succeeded, it "would amount to a colossal triumph of form over substance."[79] Judge Davey also stated that, to allow this program would require reading the word "indirectly" completely out of Article I, Section 3.[80] The Opportunity Scholarship Program clearly "assists the institution in a meaningful way."[81] The State filed a timely appeal to the First District Court of Appeal.

The First DCA received the case in 2002, and the online docket reveals that the case has proceeded so far as to already have had oral arguments,[82] but the case was stayed pending the United States Supreme Court's ruling in Locke. The stay was put in place because a ruling in Locke

[78] Id.

[79] Id at 2. Judge Davey appears to be troubled by the fact that the check must be "restrictively endorsed" by the parent to the school.

[80] Id.

[81] Id.

[82] The author has been unable to procure transcripts of the oral arguments or view any other filings with the First DCA.

by the United States Supreme Court that the federal Free Exercise Clause was violated would have meant that the Florida courts' denial of religious institutions' right to participate in the Opportunity Scholarship Program also violated the federal Free Exercise Clause, thereby rendering Holmes II moot and throwing it out of court. Of course, as previously discussed, the United States Supreme Court did *not* rule that way, opting to allow states some leeway under their respective state constitutions. The issue, therefore, still exists, and Floridians await the First DCA's opinion to further develop the debate.

**The Seminal Case Continues: Likely Outcome**

With Locke having been resolved in a way that did not clear up the issue in Holmes II, the First DCA must now decide the case. The likely outcome will be the affirmation of the trial court's opinion, and the adjudgment of the Opportunity Scholarship Program as unconstitutional under Florida's Establishment Clause. Judge Davey's opinion in Holmes II was brief, but it covered the main points of contention. Florida has no clearly on-point precedent in this area, and what there is

points to the Opportunity Scholarship Program being unconstitutional. Judge Davey accurately noted that neither Johnson nor Nohrr dealt with direct payments to religious institutions from state revenues, and, although it was not mentioned in Judge Davey's opinion, it is hugely important to note the following language from Johnson:

> Obviously a direct money subsidy would be a relationship *pregnant with involvement* and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards…[83] (emphasis added).

This pronouncement by the Florida Supreme Court shows serious reluctance to allow direct money subsidies to private schools. The State will likely argue that the Opportunity Scholarship Program involves no such "direct payment," as the checks are made out to the parents, not the schools. But this argument misses the point of the Florida Supreme Court's stated concern, which is the specter of *entanglement*, not just financial support:

> The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some

[83] Johnson at 260.

> involvement rather than the desired insulation and separation.[84]

The Opportunity Scholarship Program creates just such entanglement. The participating private schools must agree to a laundry list of state-imposed conditions,[85] affecting not only the way they deal with scholarship students, but also the way they teach. The focus of this issue could easily be shifted to the intermingling of affairs between the government and religious institutions based on Florida precedent, and the Opportunity Scholarship Program could be found unconstitutional under that reasoning.

The more obvious hurdle the State faces is noted by Judge Davey in his opinion: the word "indirectly." It is simply very difficult to argue that the Opportunity Scholarship Program does not indirectly benefit religious schools. Certainly, the State may win on *directly* benefiting by showing the parent's intervening choice, but there is fairly clear evidence that the religious schools are indirectly benefited. The Zelman Court cites the 1999-2000 U.S. Department of Education National Center for Education Statistics, Private School Universe Survey to say

[84] Id at 260-1.

[85] See infra at 5-6.

that many American cities' private schools are predominantly sectarian. Where a preponderance of private schools are religiously affiliated and a program is created that essentially funds private schools, it is easy to see the benefit flowing, albeit indirectly, to the religious institutions. The State's arguments appear to be the arguments that succeeded in Zelman, but, unfortunately for the State, the battle in Zelman was over the appearance of government support of religion, whereas in Florida, the battle is over indirect benefits flowing to religious institutions. The Zelman arguments do not carry the day in the latter battle.

The State will be able to argue that "indirect" must have reasonable limits. They will be able to point to Johnson and Nohrr as examples of situations where religious institutions were indirectly benefited and the benefits did not reach the level of unconstitutional establishment, but the courts seem unlikely to stretch their reasoning out that far, as evidenced by the Johnson language above.

The courts are different than they were in 1970 and 1971, but, barring a vast extension of previous jurisprudence, the Opportunity Scholarship Program will likely be ruled unconstitutional under Article I, Section 3

of the Florida Constitution, Florida's Establishment Clause.