

This is a slightly edited version of the original WFSU "Gavel to Gavel" transcript (http://www.wfsu.org/gavel2gavel/transcript/04-2323_04-2324_04-2325.htm) of the Bush v. Holmes Florida Supreme Court school voucher case. The identities of speakers have been added where possible, and the case changed from ALL CAPS to "sentence" case. A few grammatical errors were corrected, but most have been left unchanged. I have added a handful of comments of my own, which appear indented and in blue text.

Interested readers can find the full text of the Florida Constitution at: <http://www.flsenate.gov/Statutes/index.cfm?Mode=Constitution&Submenu=3&Tab=statutes#A09>

--Andrew J. Coulson, www.TheGantelope.com

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Jeb Bush v. Ruth Holmes

Marshal: Hear ye. Hear ye. Hear ye. The supreme court of the state of Florida is now in session. All who have cause to plea, draw near, give attention and you shall be heard. God save these United States, this great state of Florida and this honorable court. Ladies and gentlemen, the Florida Supreme Court. Please be seated.

Chief justice: welcome to the Florida Supreme Court. And welcome to our new marshal. His first "hear ye hear ye", and I think he did a pretty good job this first time. Of course this is his first time, also, keeping track of time, so we have got to make sure we help him with that. The first case on this morning's docket is Bush versus Holmes, and the parties, I know, are ready, and I just want to make sure how you are dividing the time, so we are clear about that. You are going to take 15 minutes?

Barry Richard: Yes, your honor, I will take 5 minutes for rebuttal and the attorney general and the third party will split the other ten minutes.

Chief justice: another question, is are you going to divide up the issues in the case, or are you going to argue all three of the issues?

Mr. Richard: We are all available to answer questions on any issue, is what I assume you are getting at, your honor.

Chief justice: thank you, Mr. Richard. You may proceed.

Mr. Richard: May it please the court. My name is Barry Richard, and I am counsel for the appellant. Nothing in either the Florida or federal constitution suggests that the drafters and the adopters of the religious provisions of those two documents intended that a person or an institution otherwise qualified, be denied a generally available benefit, solely because of an association with a religious denomination.

Justice?: Let me ask you, as we begin here, the structure of, the statutory structure for this program, is that the money which the legislature annually appropriates for school districts, is done on a per student basis, under 1011.62. That money, then, is what is used if the student's parents make the decision that the, there is going to be used, one of these opportunity scholarships. Correct?

Mr. Richard: That is essentially correct, your honor. There is a formula.

Justice: A dollar-per-dollar basis, the amount of money, rather than staying in the public school system, is going to go into the private schools.

Note: Here the Justice is probing to see if the voucher program violates Article IX, Section 6 of the Florida Constitution, which requires all money in the public school fund to be spent on public schools.

Richard: Yes, your honor. That's correct. For those who select a private school. Or for those who select an adjacent public school that meets the criteria, it is shifted to that public school.

Justice: Is there any instance, really, since Florida adopted a commitment to public education, committed to public schools, that money has been authorized to be transferred directly to a private school, money that would otherwise have been, to be used for public schools?

Richard: I am not aware factually, of the answer to that question. However, we need to keep in mind that the money that is being transferred is not the money dealt with in article ix regarding the school fund. This is general appropriations money which the legislature, through its plenary authority, has the quintessential authority to direct wherever it chooses.

Justice: That is where I am, really, trying to understand, is that, am under 1011.62, the discussion or what it states there, is that there is this education finance program, Florida education finance program. That is the money that is to be transferred, then, to the school districts, for use for the public schools, is it not?

Richard: I am not sure how to answer the question. If I can try it this way, perhaps it would help. I am only aware of two groups of funding that are of relevance here. One of them, which has been raised tangentially, is article ix section 6, which is the state school fund that requires all the money in that school fund be spent on public schools. That is

not an issue in this case, because it is not suggested that any of that money is utilized for purposes of these scholarships. The money that is used for these scholarships, is money the legislature appropriates within its plenary authority and its quintessential power to appropriate the money of the state. That money can be taken and utilized for any other purpose.

Mr. Richard is asserting that the money spent on scholarships is not from the public school fund, and therefore is not subject to Article IX, Section 6.

Justice: isn't that, now, let's go back to we actually are jumping ahead to article ix section 1. Isn't that, really, the argument of the appellees here, that there is a restriction, a prohibition in the area of education on what the legislature can fund, in terms of the education it provides its children. You agree, that is the article ix section 1 issue. Correct?

The Justice, having been rebuffed in her first inquiry, turns to the teachers union's (plaintiff's) argument that a separate provision of the Florida Constitution (Article IX, Section 1) limits the legislature's discretion when it comes to providing educational services, and does so in such a way as to make the voucher program unconstitutional.

That section was amended by a 1998 ballot initiative to read: "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."

Richard: Yes, your honor. That is certainly their argument, but no language can be found anywhere in article ix section 1 or elsewhere, that says that.

Justice: let's just, is the purpose of the opportunity scholarship program to fulfill the constitutional mandate under article ix section 1?

Richard: I believe that was the intent of the legislature, yes, ma'am.

Justice: which portion or which sentence of article ix section 1 does it fulfill?

Richard: I think it was intended to fulfill the requirement for a uniform, efficient, safe, secure and high-quality system.

Justice: there is what I thought was interesting, is that in the findings of legislative intent, the legislature found that the state constitution requires the state to provide a uniform, safe, secure, efficient and high-quality system, which allows the opportunity to obtain a high-quality education. The only thing left out of that line, is the constitution provides it should be a high quality system of free public schools. Do you agree with that?

Richard: Yes, I do, your honor, and there are two aspects of this law that one must keep in mind. The first is that the scholarships are not the only aspect of this law. It, also, provides various methodologies of bringing up to standards, those public schools that are

failing under the testing that this statute has, and it provides additional funding to those schools, through other methodologies, to bring up their standards.

Justice: we are only looking, the only thing under attack today is the opportunity scholarship program.

Richard: Yes, your honor, and I would suggest this, if the plaintiffs were able to establish for the trial court and show this court anything in the record to indicate that the Florida legislature was failing to meet its obligation, because there is no question that there is a mandate under the constitution, to provide a uniform, efficient, safe, secure and high quality system of free public schools. If the record of this case suggested the legislature was failing to do that, that would be the issue for this court, but it is completely unrelated to the other issue, which is whether the legislature also has the authority, if it so chooses, to fund other programs.

Justice: That is the problem here, is where does the legislature, then, get the authority to, in fact, have other forms of education, other than the public education that is provided for in article ix section 1?

Richard: Well, under the Florida constitution, your honor, the legislature has plenary authority, restricted only to the extent that the constitution expressly restricts its authority.

Justice?: So when you read article ix section 1, doesn't that give, isn't that an expression of the way that the legislature is to, in fact, educate the children of this state? That is through a system of free public education?

Richard: Your honor, I would have to answer your question no, to the extent that the question suggests that article ix says that the public schools are the exclusive method by which the state provides education. It says nothing like that and nothing in the language can fairly be read to say that, and it would be completely inconsistent with the long history of this state, which has always permitted private education as an alternative to the public school system.

The Justice is arguing that Article IX, Section 1 only explicitly authorizes the legislature to fund and operate a system of free public schools, and is asking if that means the government is forbidden from funding or operating any other, parallel or related systems of k-12 education.

Richard is arguing that the clause requiring the operation of public schools is not meant to be exclusive because the language of the clause does not say that it is meant to be exclusive.

The justice then asks: if Richard is right that the legislature is not forbidden from operating or funding other sorts of k-12 services, where in the Constitution of Florida is it actually EMPOWERED to do so (because the lack of an explicit prohibition is arguably not equivalent to positive authority for the government to do something).

Justice: At the person's expense.

Richard: That's not true, your honor. The legislature of Florida, even prior to the 1885 constitution, provided funding for k-through-12 and private as well as public schools, as an alternative. It has always done that, but more importantly, there is nothing in the constitution that prohibits the legislature from funding private programs, anymore so than it prohibits the legislature from funding private health programs, environmental programs, anything else the legislature chooses to do, provided, provided that it meets its mandate, and I shouldn't even say provided, because the mandate is entirely separate. The legislature has an obligation to provide for efficient, high quality public schools. It either meets that mandate or it does not. If it does not, it is the job of the courts to call to the attention of and to provide whatever remedy there is for the legislature, to meet that mandate.

Justice: But that is where I am having difficulty, is that this money is not an additional amount of money that is being appropriated for education. This is money that is coming dollar for dollar, out of the money that would otherwise be for the uniform system of public schools. And so I would like for you to answer and then I will let you talk. I am having difficulty understanding the difference between the school fund and the Florida education finance program. Where is that difference drawn?

[Here the justice is challenging Richard's earlier claim that the vouchers are not coming out of the public school fund.](#)

Richard: Okay. You are letting me talk, your honor. I would rather talk about what you want to hear rather than what I want to say in any case, but let me try it from this perspective. Let's assume that we have no opportunity scholarship program and let's assume that the legislature simply decided as matter of policy, to reduce the funding to education. To appropriate less general funds to education. That would not be unconstitutional. So long as they continued to provide, to meet the mandate in article ix, for a uniform, efficient, safe, secure, high quality system of education. This, there is no provision anywhere in the constitution, that has a minimum amount of funding that the legislature must provide. It could reduce the funding by the same amount that currently goes into the opportunity scholarship program and there would be no issue before this court, unless the plaintiffs had established a record that they were not providing the mandate of article ix.

Justice: How does that take into account, though, the express provision in the constitution, dealing with the state school fund? I would like you to address that, where it is expressly provided that the income derived from the state school fund, shall, and the principle of the fund may, be appropriated, but only to the support and maintenance of free public schools. Now, I think this is, also, concerns justice Well's lines of questions there, only now we are really shifting to this funding issue, so if it is true that, in your answer to justice Well's question, that dollar for dollar, this money is appropriated, and the money that goes to a student, that goes to a private school, then, doesn't go to the free public schools as mandated here. How can that comply, then, with this express mandate, only to the support and maintenance of free public schools? Wouldn't you agree that it appears to be the intent of the drafters of that, that any money appropriated for schools, in

public school or school education, can only go to the system of free public schools?
Wasn't that the intent of the drafters of that provision?

Article IX, Section 6 of the Florida Constitution: "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."

Richard: With all due respect, your honor, I cannot agree with that proposition. The reference to the state school fund refers to a discreet fund that receives its money from discreet sources, and I believe it is my understanding that the plaintiffs are not suggesting that the money in the opportunity scholarship fund comes from the state school fund.

Justice: But wasn't that ingredient in the state school fund, any appropriations by the legislature, to go to education or school funding? In other words, that was a pretty comprehensive list, was it not, to include all money appropriated for public education?

Richard: I don't believe so, your honor, and if you were to read article ix section 6 that expansively, you would be saying that, once the legislature appropriates money for schools, it can never reduce that appropriation again, regardless of the circumstances, because it would, then, be part of the school fund, and the money would have to go, would have to remain t couldn't be used for any other purpose.

Justice: What do you think the intent of the drafters of this provision or of the citizens that approved it was?

Richard: Of article ix section 6?

Justice: Yes. The express provision that I read.

Richard: I think it was intended to refer to a discreet, described fund, which is the state school fund, which is provided for by Florida law and which receives its money from discreet sources, and I apologize to your honor but I don't have the details with me now, to give it to you, but it is a clearly delineated fund that is unrelated to the general revenue. If that fund never fully funds education in Florida, as a result of which the legislature appropriates additional money, for the educational system of the state of Florida, beyond what is in the state school fund, which is a recurring fund, it is the additional money that we are talking about here. It is not the money that the constitution refers to in article ix section 6, and, again, if we were to expand the meaning of article ix section 6, to include any money that has been appropriated, we would essentially be saying that, once the legislature appropriates money to the public schools, it can never reduce the amount of money, and I don't believe that is what article ix section 6 means.

It is certainly not explicit in the constitution that the term "school fund" is meant to refer to any and all funds used for education. It does sound like it refers to a specific fund, but Article IX, Section 6 is vague and the enactors' intent is not obvious from the language. (This issue comes up again in the transcript, below).

Chief justice: justice Cantero has a question.

Justice Cantero: If I can ask you to step back a second and change gears, I know that there is, also, an argument here, somewhere, about article I section 3, and as far as your free exercise argument, I don't know if you are prepared to discuss that issue. But if you are, I am wondering whether your issue on that, your argument, is precluded by the fact that the first district invalidated the entire statute and not simply the part that allowed parents to choose parochial schools.

Article I, Section 3 reads: "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."

Justice Cantero seems to be asking this: Given that the lower court struck down the voucher program as a whole, and not simply the part that allowed the selection of religious schools, how can you argue that the lower court's decision specifically impedes the free exercise of religion?

Richard: No, your honor, I am not bothered with that, for this reason. If we were to say that a legislative enactment which is otherwise valid for all purposes, becomes invalid, solely because it is available on the same criteria as it is to anybody else, to somebody that has a religious affiliation, that would be an animus towards religion. We would be saying that the Florida constitution prohibits anybody from getting it, and I don't think we can fairly read Locke any way except to have it in your decision, which shows an animus towards religion which singles out religion.

Richard has the obvious and seemingly sound rejoinder that the REASON it was struck down as a whole is that it allowed the participation of religious schools. He's arguing that it doesn't matter how much of the program was struck down, it only matters WHY it was struck down, and he says it was struck down for reasons that violate the Free Exercise of religion clauses of the state and federal Constitutions.

Justice: Except here we have no more statute. We had a statute that said you can get any education you want except to become a minister. Here we have got no statute left, so nobody can go anywhere to a private school.

Richard: But we are saying there is no statute left, because we are saying that article I section 3 prohibits you from providing a benefit to anybody solely because of the association with religion, and in order to pursue that animus, we are going to deny it, if we have to. That makes article I section 3 under the interpretation I have of the federal free exercise clause, unconstitutional, but if we were to say that [it was not unconstitutional] and there is no principled way to distinguish that from a multitude of programs, scholarships and funds, and it is there for going to drag down all these other funds, can we say to ourselves that, are we able to conclude that the drafters and adopters of article I section 3 intended such a draconian result, and there is nothing in the history of the Florida constitution to suggest that. To the contrary, at the time that the constitution was adopted in 1885 and readopted in 1996, 1968, we had a multitude of

programs that were being funded of that type and that continued afterwards. So to suggest that the framers intended that type of a result, just makes no sense.

Richard is saying that if you interpret Article I, Section 3 of the Florida Constitution in the way the plaintiffs want and the justices are suggesting, and if you construe that interpretation to be acceptable under the federal Constitution, then a whole passel of other Florida government programs that indirectly benefit religious organizations because they are neutrally available to all organizations would in fact have to be struck down as well.

This is certainly a plausible argument. The only question is, will the justices accept it or will they try to come up with some legal spin that will allow them to selectively kill the voucher program without also killing the other programs that seem to run afoul of Article I, Section 3?

One argument that has been used to make such a distinction is that education is different from other enterprises. Providing fire service to churches, which is legal, supposedly does not help them to disseminate their message. Paying for children to have the opportunity to be proselytized by them supposedly does. The teachers' unions' lawyer makes this argument later.

Chief justice: I am concerned with the time here, because I feel like 15 minutes has gone by.

Richard: I am out of my time.

Chief justice: I didn't see a light coming on for you, and I just wondered how many minutes have been --

?: Thirteen minutes left of total time.

Chief justice: for everybody.

Richard: The light, as I understand it, works for the total amount of time.

Chief justice: so you were supposed to manage your own.

Richard: According to my light here, I have done 17.4 minutes, which leaves me with a few minutes for rebuttal.

Chief justice: I don't want to stop you. I do have a question, then, that the position of the governor, you represent the governor in this matter, that this severance is not an option.

Richard: Yes. That's correct, your honor. We do not believe there is any way to sever this or that the legislature intended severance, and we don't believe that you can sever it, without running afoul of the U.S. Constitution. Thank you.

Marshal?: May it please the court. Christopher Kise on behalf of attorney general Charlie Crist.

Chief justice: how many minutes?

Christopher Kise: I had six, but I am going to try to keep it under that to be brief, because I think the courts have already focused our attention. The opportunity scholarship program, though, to deal with a different issue than we were discussing earlier, the opportunity scholarship program is in aid of Florida's children, period. It is not a contrivance or a clandestine way to fund schools. This is in aid of Florida's children, so consistent with this court's precedent on article I section 3, looking at the primary purpose of the program, which is in aid of Florida's children, looking at the primary purpose of the program, this program is constitutional. That is the analysis that this court has applied in its previous cases, and directly or indirectly relates solely to the means of aiding religion as such.

Chief justice: so “directly or indirectly,” does it modify "aid", or does it modify "taken from"? [Referring to Article I, Section 3 on government appropriations, ed.].

Kise: "aid", your honor.

Chief justice: it is an adverb?

Here the Chief justice is really trying to pin them to the wall because if the term is an adverb it must modify a verb, and the verb it would modify would be “taken.” If it modifies taken, that ostensibly puts the defense of the voucher program at a disadvantage.

Kise: It modifies "aid", your honor.

Chief justice: it doesn't modify “taken from”?

Kise: No, your honor. Our position, respectfully, is and consistent with this court's precedent, that it does modified "aid". You look at what is being aided, and simply because some incidental benefit, some dollar, whether it be \$1, \$10 or \$100, goes to a religious or sectarian institution, does not render the entire program unconstitutional, if it is a program that is designed to serve the public welfare.

Justice: What is your summary analysis of what this sentence in the Florida constitution is intended to mean? What is the "no aid to any sectarian institution", what is this intended to mean?

Kise: It is intended, your honor, to mean that the legislature cannot act for the purpose of benefiting a religious or sectarian institution. We cannot come up with ways, whether they be obvious or clandestine ways, to promote the interest of a sectarian institution.

Chief justice: that is what the establishment clause says, there shall be no law affecting the establishment of religion. That is where you look at what the purpose is, of the enactment, but it is hard to look at the third sentence that says "no revenue of the state

shall ever be taken in aid of", to, then, say that that just is a reiteration of what is said in the first sentence of that provision.

Kise: I don't know that I would use, respectfully I don't know that I would use the word "reiteration". I would use the word "emphasis", to demonstrate that there is an emphasis on prohibiting funding of that nature, but, again, this court's analysis has been, over the last number of years when you have considered article I section 3, you have considered the primary purpose of the program, and a program that is designed for general welfare--

Justice: Is it your view, then, that under this provision as you interpret it, that the legislature could provide a provision that said simply, that any child eligible to attend the public school system in the state of Florida, shall have the right of choice to attend any sectarian or nonsectarian private education system, and the state will pay in the same amount that is allocated for the education in the public schools.

Kise: Without compromising any future arguments, your honor, I would say no to that, but this is a different case than that. I mean, this case --

Justice: Why is that any different than this? In other words, if the, if the legislature, then, under our education provisions in the constitution, and all that is set out there, can give the choice to any parent or student, to give them the same amount of money that would be allocated to them in the public school system, and take it and use it to go to a private school system, then, really, wouldn't that basically completely undermine the system that has been provided in the constitution, for the free system of public schools?

Kise: Let me answer that in two parts. The first part is that is not what has been done here. What has been done here, is a recognition by the legislature that you don't get a second chance with children's education, and here you have failing schools that have been defined, and you have a situation where primarily minority and disadvantaged children who, don't have choices, who don't have the free pocketbook that a wealthy child or wealthy parents do have to escape this failing school this. Is a program designed to get them out of this system that is failing. You can't have little Johnny or Suzy standby on the sidelines, while that school is fixed. That has to be addressed immediately and that is what is happening here, a difference from the wholesale advocacy of a public school system, which is what our opponents are arguing. There seems to be an argument because we have come up with away to provide in these vouchers that are very necessary, desperately necessary, I would submit to this court, for the education of our children and the constitutional mandate that the legislature has, to educate our children.

Justice: Here they set the standard by identifying failing schools for two successive years, is that right?

Kise: I believe that is right. I am sorry. Yes.

Justice: They can set the standard there.

Kise: Yes.

Justice: Then why couldn't they set the standard someplace else that is closer to the hypothetical that I gave you?

Kise: Perhaps they could but that may raise other constitutional questions and that may raise article ix section 1 questions, because then this court may have to look fundamentally to what the legislature is doing and to determine whether or not they have provided for a free system of public schools, which I would submit they have. They have done. That what we are doing here is providing a supplement, fulfilling the educational mandate, giving children who don't have a second chance with their education, the second chance to get them out of a failing school and out to where they need to be, and in some cases I would submit to this court, there are relatively few schools that are available to these children. I would submit that it would be impossible to fulfill this mandate, if you limited to nonsectarian or nonreligious schools.

Chief justice: you say "referring to the mandate". You are referring to article ix section 1 that the people of this state have imposed on the legislature?

Kise: Yes, your honor.

Chief justice: what mandate is that? Is that for an efficient, safe, secure and high quality system of free public schools?

Kise: It is for the education of our children in an efficient, safe, secure, this is a adjunct to that system, your honor. I see I am out of time.

Chief justice: justice Lewis has a question.

Justice Lewis: When you are talking about adjuncts and separate kinds of educational systems, how does this blend in conformity, not only safe and secure that the constitution requires but uniform, and as I go through the statute and look at the administrative code on this, I don't find that you have the same curriculum defined. I don't find that you have the same standards for educators that, of course, this would get into an unwarranted mixing of church and state, with regard to religious institutions, but I don't seem to find the uniformity. I seem to find the uniformity aspect missing, I guess I should say. I am trying to fit that in, and could you help me with that concern, because it seems as though we are creating a separate and distinct, and it doesn't go towards improving the existing school, but it is for the individual, but that is not the uniform education.

Justice Lewis observes that the schools are not uniform. This is of course not the same as saying the system is not uniform. The system is arguably uniform: any school rated "failing" for two years in a row makes its students eligible for vouchers. The question at issue is thus: uniformity of WHAT? Does every school have to be identical, or can the system's provisions be identical in the range of options that they offer to all students.

Kise: Well, it is uniform in a sense that it is providing children who are otherwise not receiving that uniform education under the constitution. They are not receiving, because they already in a failing school, as defined by the legislature. They are not receiving that uniform education. It is providing that way out. It is providing that way for them to receive that education, as a supplement, and it is somewhat akin, I would say, your honor, and I think that these programs are in jeopardy, if this court were to decide in favor of our opponents, to disabled children, who the public system is not necessarily able to deal with them in a straightforward manner because they are not equipped to. Here the school is failing for whatever reason. And there they are failing for children with special needs. It is the same principle that we give must not tight parents and say, parents, we failed to educate your children, take your money and go somewhere, where your children can get educated.

Justice: But the schools, or most could take advantage of this voucher system, and where does that leave the school?

Kise: It leaves the school with the quandary of trying to fix itself, your honor, and I would submit that the legislature and this governor has made the determination that the child is more important than the institution.

Chief justice: Mr. Neily, you are all in your rebuttal, and how many minutes are left?

?: Two and-a-half.

Chief justice: what do you want to do with your four minutes?

Mr. Neily: I would like to address two points. May it please the court. I represent children who receive opportunity scholarships, your honor. Very briefly two points in response to justice Well's question at the beginning of the argument, Florida has taken public money and used it in private school. If you look at statute [1002.42 \(12\)](#), it is the exceptional schools program [Actually the "Exceptional Education Services" program, ed.] and it has for decades seen money spent on private schools for children who need to be in a different school system. That principle is established in the state and never held to violate article ix section 1.

Justice: Based on the fact that the school system, itself, does not have the facility or the wherewithal to deal with those particular kinds of children.

Arguably, this is the same basis on which students are provided vouchers under the voucher program: students in public schools that have clearly failed them, based on the state's own rating system. So if the Exceptional Educational Services program's basis is acceptable -- and the justice did not challenge it -- then so, too, is that of the voucher program.

Neily: That's true, justice quince, but a larger principle is that this money can be spent on private schools, that is well-established in the state's history. The second point I would like to make, your honor --

Chief justice: are there separate standards in the state contracts for schools to provide those services, are there standards that have to be met?

Neily: Your honor, there are and there are standards for schools that participate in the "opportunity scholarships" program as well. If I can answer the question about [the] "direct and indirect" [language of the Florida] constitution. That language speaks to a different time in this country, when there was an attempt actually to fund catholic schools as a separate school system. That was attempted to be done directly at first and [when] it was unsuccessful, they used indirect means. This principle speaks to a much different set of circumstances than we have now, where these people are being given scholarships and these parents are making real choices about where they want to send their children to schools.

Justice: You are espousing [that] because article I section 3 may have come at a time when there was bigotry, that we should weed it out of the constitution?

Neily: Not at all, justice Pariente. The provision must be read and given its full force, but it is direct and intentional efforts by the government to fund sectarian education. That is not what is going on here. The government is making a direct and intentional effort to help children who are in failing public school systems.

Justice: Do we have a percentage of what schools are sectarian and what are not secular?

[This is actually irrelevant to the church/state separation question, because the state is not involved in the selection of schools, only the parents are. Past federal Supreme Court rulings have taken cognizance of that fact.](#)

Neily: Yes. 58 percent of the children receiving opportunity scholarships at this time are in religious schools and 42 percent are in nonreligious schools, if I can make one final point before I close, the legislature's intent with this program was to improve the public school system. Four separate studies have all shown that it has had that result. There is no rebuttal for those studies. They have all improved the public school system.

Justice: Is that part of the record here? For example, these kinds of statistics, I was trying to find the results of the fact testing under this program, parents are required to submit their children to this kind of testing, and if not, and they do not, they lose the scholarships, and I was unable to locate, through other sources and research, whether, in fact, that is happening, what is going on, where can we find, can you direct us to where that source would be, so that we can look to that information?

Neily: Your honor, it is my understanding that that material is not directly available to the public. I don't know why that is, but the three, the --

Justice: You mean we can't find out whether the state is following the law and whether it is following through with the legislative requirement that they take FCATs. If they do not, then that scholarship is terminated. Is that what you are suggesting?

Neily: No, sir. My understanding is that there is no question that the state has been following the law. These children are being tested in the private schools as they are required to be.

Justice: Can you direct us where we can find that information and literature and some published information?

Neily: Yes, your honor. I can direct you where the information is in the literature. Two studies by Jay Green, one in 2001 and one in 2003 that have, both, shown this improvement. There is a recent one published in March 2005 by Paul [Peterson] at Harvard, that all those studies have shown that, in fact, the public schools most threatened by competition from private programs, have shown the greatest improvement of public schools.

Justice: Do they disclose where he can go and find the base information about whether the state is following this?

Neily: Your honor, I am afraid I am unable to answer that question.

Chief Justice: Everyone is out of time, so what I am going to do is, since Mr. Richard, you were going to have five minutes for rebuttal, I am going to give you three minutes for rebuttal. Hopefully that will do it. And thank you very much. Therefore the, Mr. West is it? You have 30, I guess you are going to take the whole 30 minutes?

Plaintiffs' Attorneys Address the Court

John West: I am, your honor. John West, representing the plaintiffs, together with Robert Chanin and Ronald Meyer.

Justice: Can I ask one question. What is the impact on the other side of the equation, as far as how the student is testing, but the impact on the number of failing schools since this program was implemented. The overall a+ and opportunity scholarships.

West: I don't know that I can give you a specific answer to that question, Justice Bell. What I would do is, the issue that was raised here, just at the end, about studies that purport to show that the opportunity scholarship program or voucher programs in general, improve public schools, that, of course, doesn't really go to the constitutional issues before the court, but I would just refer the court to the amicus brief submitted on behalf of the number of education organizations by attorney Bill McBride, which addresses precisely the studies that were cited here, the studies --

Justice: Let me ask, for my research and some from the state department of education information, in 1999 there were 78 failing schools, and last year there were 14.

West: Well, that may be, sir, but there is a question of cause and effect there, and what some of the studies that have been done by researchers other than Paul Peterson and Jay

Greene have shown, that that, their assertion of that result was linked to the opportunity scholarship program, is not supported. I am not here to get into this social science literature about the effect of voucher --

Justice: You would agree, would you not, that whether they have been an overwhelming success or an utter failure, is, really, irrelevant to whether the program is constitutional.

West: Absolutely, your honor. Absolutely.

Justice: Let me direct you to the constitution, in article ix, section 6. And I have got two questions in that regard that I will pose at the same time. And that is, one: the first district [court] makes the statement that thereafter, the plaintiffs voluntarily dismissed their challenges under the establishment clause of the first amendment to the united states constitution, and under article ix section 6 of the Florida constitution. I would like to you speak to that. I would, what is your position on what the school fund that is referred to in section 6 is?

West: Your honor, the question you are asking is correct. We brought four different causes of action, when we filed this lawsuit. One of them was specifically under article ix section 6, as a separate and independent ground for the unconstitutionality of the program. At the time when article ix section 1 had initially been disposed of, the first time it was up in the district court of appeal, and then the establishment clause issue had been disposed of by the u.s. Supreme court's decision, we dismissed the school fund issue as a separate ground in order to expedite processing of the case and a decision of the case, with respect to article I section 3. So it is correct that that is not a separate and independent ground that we are relying on at this point. But as the concurring opinion in the district court of appeal pointed out, reading article ix section 6, which was written at the same time as the education clause generally came into the constitution, certainly helps to shed light on what the framers of the 1868 constitution meant, with the language requiring the state to maintain an adequate system of free public schools. And our submission is that the language of article ix section 1, which requires two things. It establishes a duty of the state to make adequate provision for the education of all children residing within its borders. That is the second sentence of article ix section 1, and then in the third sentence, it says using the same language, adequate provision shall be made for a uniform, efficient, safe, secure and high-quality system of free public schools. And it is our position that that third sentence instructs the legislature on how the mandate of the second sentence is to be carried out.

Justice: Try to, going back to answer justice Well's question, I don't, if section 6 is not directly implicated, that is that the legislature, as Mr. Richard said, can use general appropriations for, to, from other sources, for education, then do you agree with that, that that is the opportunity scholarship money was not taken from the school fund and --

West: I don't believe that is technically correct, your honor. My understanding is that school fund money goes into the Florida education finance program, and then the

opportunity scholarship program provides that it is to be funded through money taken from --

Chief justice: so we don't actually, the state of the record is that we don't really know. You said you dropped it as, I mean, clearly, if money was coming from a prohibited fund, that would be the most direct way to attack this program.

West: Yes. It is a small amount of money, to be sure, your honor. As Mr. Richard said, the vast majority of the money that goes into the public schools and into the opportunity scholarship program, comes through the direct appropriations from the legislature, but there are certain --

Chief justice: what is the school fund?

West: The school fund is proceeds from a number of sources that are defined in the constitution, including funds from land grants and certain other specific sources, and it is the income on that school fund, which, then, goes into the pool of money available for the public schools. I think --

Justice: Where is that defined? You said it is defined in the constitution. What section of the constitution defines it?

West: It is in article ix. The --

Chief justice: the school fund is in article ix section 6.

West: The restriction on the, on the use of the school fund, on the income from the school fund, is contained in part had, in section 6.

Justice: You said there was a constitutional provision that indicates what makes up the school fund.

West: I thought there was, your honor, and apparently it is no longer in the constitution. I am relatively certain that, in earlier versions of the constitution, there was a separate section that described the sources of the school fund. It may be statutory at this time.

Justice: Would you address a question that I have, and that is the proposition the first dace[?] majority opinion that the last sentence of article I section 3, expands or provides further restrictions than the federal establishment clause, because when I read the federal decisions, particularly in *Zelman* and justice O'Connor's concurrence, there is a long history of federal establishment case law that talks about direct or indirect benefit, so how do you justify the position of the first dace?

West: Well, I think the important point is that the Florida constitution, article I section 3, has a far more specific restriction on the use of public funds, than does the federal establishment clause.

Justice: The argument on the other side that the Florida constitution is explicit, where the federal constitution, that same restriction is implicit, as has been given by the federal --

West: Certainly. The federal constitution has no differentiation over religion. That was interpreted over the years, more stringently than it is today. If you compare the Nyquist decision in the early '70s to the Harris decision a couple of years ago, but the third sentence of article I section 3, makes quite clear that, whatever is contained in the first sentence that is similar in language to the establishment clause, and however the united states supreme court interprets that establishment language, the Florida constitution means something very specific. It means no funds, that first word is quite clear, no revenues shall be taken from the state, directly or indirectly, in aid of sectarian institutions.

Justice: Don't we have to look at the history of that provision and the fact that, when that provision was first put in the 1885 Florida constitution, the federal establishment clause didn't even apply to the states, and wasn't interpreted as broadly as it had later on, during the 1900s, and after 1940, especially, and so at the time, it may have been more specific than the u.s. Constitution, but as time has evolved until now, 2005, they have essentially joined together.

West: Well, I was not disagreeing with most of what you said, until the last point. I think the, I think the point justice Cantero, the article I section 3, no aid language was written at a time when the, as has already been said, the issue was whether public funds are going to go to sectarian schools. That was the major issue, not only in Florida but in --

Justice: Is it even more specific than that? It was at a time when certain governments wanted to give grants and subsidies to sectarian schools. And there was a backlash of no money into sectarian schools. Here we are not throwing money at private schools. We are doing fees for transaction. You educate one child and we will pay you "x" amount of money.

West: I think, justice Cantero, it is not a fee for service, in the sense that we think about renting a polling place, renting a church building for use as a polling place, where we are getting a service in exchange for that fee. Here, what the state is paying for, the service that it is paying the fee for, is religious indoctrination of young children. It is clear that the sectarian schools, that children are attending under the opportunity scholarship program, have, as a major part of their program, religious training and instruction.

Justice: You can't say that about every single school, right? It is going to depend on a particular school.

West: Certainly we have in the record, at the time of the summary judgment record, at the time that the trial court granted summary judgment, there were only four, there were only five schools participating in the program, four of which were sectarian. They enrolled about 90 percent of all of the participating students. All four of those schools in Pensacola were catholic schools, and we have in the record, depositions of the diocese of

Pensacola, two of the schools and materials from the literature of the two other schools. All of these, documents made clear that the, a very --

Justice: I don't think you are suggesting that, in order to determine whether it is constitutional under article I section 3, we need to go into each school and determine how far the religious indoctrination goes.

West: We don't, because we know that there, that the, under the statute, funds are going to institutions for the purpose of teaching religion to young children.

Justice: You would argue that funds cannot be used to send Johnny to St. Mary's school, regardless of whether St. Mary's even had a religion class.

West: I would say, if this were a statute, no, I wouldn't say that, justice Cantero.

Justice: If it is a religious school, it is a sectarian school.

West: Our view is that the critical point is not whether the school is, has some affiliation with a church, but rather, what the funds are going for.

Justice: This statute has been invalidated on its face. It is not an as-applied challenge, so it hasn't been applied to school a, b, c and d. It has been applied to any religious school, private school, globally.

West: It has been, justice Cantero, I am not saying that there are not schools participating in the program that would not be eligible to receive public funds, if the statute limited the program in such schools. Certainly there are a few nonsectarian, totally nonsectarian schools that are participating in the program now, and if you had a statute that provided for a nonsectarian voucher program, and I would suggest even a statute that allowed the participation of church-affiliated schools in the sense that there was an affiliation with the church, but with the program that was entirely secular, the way that most colleges and universities are. Such a statute would not pass muster.

Justice: But doesn't the statute allow there to be payments to non-profit or profit, for-profit organizations, without their being denominational or sectarian? I mean, this statute would allow that. And if it is struck facially, it would have to be unconstitutional for the state to give, to make those payments, would it not?

West: No. I don't agree with you, sir. The statute is facially unconstitutional, I would say, for two reasons. First of all, because it specifically provides for the participation of schools that are sectarian within the meaning of article I section 3, and secondly, because it, it functions in an environment where, as the attorney general has admitted in his reply brief, and I think Mr. Richard agreed a few moments ago, it is inevitable that a significant, a substantial portion of the public funds that are being spent through this program, are going to sectarian schools, to teach religious truth to young children.

Justice: How does that --

Chief justice: who's on first.

Justice: I cede my time to justice quince.

Justice: How does that argument, then, how does that fit in with article ix section 1, about the free public schools, because if you read article ix section 1 literally, then, you should not be giving money to any of these schools, whether it is secular or nonsecular.

West: Yes. I appreciate the question, justice quince, and you are absolutely right. I had my focus on article I section 3, in answering the previous question. I think there would not have been any problem under article I section 3, but you are absolutely right. We believe that, under article ix section 1, funds can, that the state cannot set up a program like this, even if it were purely nonsectarian, under which funds go to private schools, in lieu of the public schools that article ix instructs the legislature to use as the means for full filling its education. It is not, absolutely not, your honor. What I am referring to is the claim under article ix section 1, which is the claim that initially we prevailed on in the trial court. The district court of appeal reversed --

Justice: By your answer to say the previous questions, aren't you, really, suggesting that, with just a little bit of tinkering, then, this statute would pass muster?

West: No. I am not, your honor. Let me say two things. First of all, I think there is no amount of tinkering that could save the statute under article ix section 1, and I will be happy to elaborate on that in a moment, if I may. So that is number one. Number two, if we are just looking at article I section 3, I would agree that theoretically, if the state enacted a statute that said here is a voucher program. Vouchers may be used only at nonsectarian institutions, whatever that term means. That that would not be objectionable, under article I section 3, but I believe the other side has conceded that certainly it was not something that the legislature could be presumed to have been, to have intended to enact, that you can't sever the statute because such, it was impossible to accomplish the objectives of the statute, without including sectarian schools.

Chief justice: justice wells.

Justice Wells: Is the standard by which we would make a decision on facial unconstitutionality, that under no set of circumstances, could the statute operate constitutionally. Is that the standard?

West: Under no set of circumstances, can this particular statute, because first of all, the statute contains the specific inclusion of sectarian institutions, and secondly, a big portion of the analysis in deciding whether you can sever out the unconstitutional part of a statute, goes to whether the legislature would have enacted the remaining portion of the statute, if they had known that one part would be unconstitutional, and that is very clear. The other side has admitted, the attorney general admitted in his reply brief, Mr. Richard

said just now, the legislature would not have enacted this program as a, as a purely nonsectarian program.

Justice: How do we know that?

West: Well, let me, let me read to you from the attorney general's reply brief, page 4, where the attorney general talks about the objectives of the opportunity scholarship program, and he says, recognizing that many private schools in Florida are sectarian, the legislature could not possibly have accomplished this objective, without allowing parents of eligible students to choose among all alternatives, including sectarian alternatives.

Justice Cantero: That is because there would be a free exercise problem with not, with prohibiting parents from sending their children to sectarian schools but not prohibiting them from sending them to nonsectarian schools.

Is the Justice serious? Is it really the Justice's understanding that the attorney general was talking about free exercise as the problem? Seems to me that the attorney general was talking about practical viability - the lack of availability of a sufficient number of non-sectarian schools at the present time (in the absence of a voucher program).

West: That is an additional problem, justice Cantero. I don't think that is what is being talked about here.

Justice: You said that is a problem.

West: I think that is an additional reason why you can't presume that the legislature, in 1999, would have enacted a purely nonsectarian program, because even though we believe that, after *Locke versus Davey*, there is no substantial free exercise claim, if it were included here in the case.

Justice: *Locke v Davey* didn't concern the amendment. That was not the issue in that case.

West: *Locke v Davey*, I think the point goes back and, if we go back and read the briefs in that case, I think many of those who were attacking article I section 11 of the Washington constitution, it was an argument as to the amendment and making the same argument --

Justice: You just said that it wasn't.

West: The supreme court said that it wasn't.

Justice: In fact, in *Locke versus Davey*, the statute allowed students to go to sectarian institutions. The only thing it prohibited was getting a degree in theology.

West:. That's true, and certainly there are some differences in specific facts between voucher programs and *Locke versus Davey*, but the, the whole thrust of *Locke v Davey*,

is that the states have leeway to restrict funding of religious activity, and that a refusal to fund religious education in the same manner that you fund sectarian education, does not indicate hostility towards religion but is in fact, an acceptable and permissible choice for a state to make.

Justice: In *Locke v Davey*, the statute allowed a student to go to a sectarian school, correct? The only thing it prohibited was you cannot get a degree in devotional theology.

West: It is difficult for me to believe that the supreme court decision can be read as making that the critical distinction. Indeed, the first circuit has had occasion, in the *Hough* case, which we cited in our brief, to address that very question and applying it to a voucher program very much like the nonsectarian voucher program in the state of Maine, where the program was challenged on free exercise, equal protection grounds, and the court said, shortly after *lock v Davey*, that the courts tried to read this as only applying to theology studies, but it can't be read that narrowly, and in any event, justice Cantero, I think the more fundamental point is, as the case stands here, there is really no free exercise issue.

Justice: Let me ask you a question, I know you are running out of time, on article ix section 1.

West: Yes.

Justice: Is it your position, then, that under no circumstances, can the state contract with any private party, to educate any child?

West: I wouldn't go that far, justice Cantero.

Justice: How do you distinguish one circumstance from another?

West: I think the situation here, the situation in the, some of the programs that Mr. Neily was referring to, which I would add have never been tested for constitutionality to my knowledge, my understanding is that these are programs for students with severe disabilities, severe emotional disturbances, who are sent to highly specialized programs. I believe --

Justice: Principally, under the constitution, how does that make a constitutional difference?

West: I think there is ground for differentiating situations where a student is being sent to specialized programs that simply don't exist in the public sector, that the public education system can't provide. That seems to me, to be a qualitatively different situation than what we have here, where --

Justice: You said if the government can't provide it, then under your theory, it is violating the constitutional requirement that it provide a high quality education to all children.

West: Well, but, the constitution specifies how the government is to provide that high-quality education and says, through a system of free public schools. The question is whether there can be an exception drawn for a very narrow class of cases, where the use of private institutions is supplementing public education, rather than supplanting. What you have here, is a program that sends children wholesale, to private schools, that essentially apart from teaching religion, are no different from the public schools.

Justice: So your position would apply to bright future scholarships, for both the public k-through-12 and university system?

West: No. I am glad you asked that question, justice bell. Bright future scholarships are, and college scholarships, are generally, I think, are a different category entirely. We cited in our brief, we have fairly long footnotes, citing cases from other states, which had really gone both ways on, under constitutional language not dissimilar to Florida's, had gone both ways on whether the same rules should apply to higher education as applies to k-12 education. And there are a number of decisions that stand for the proposition that, where you are dealing with post-secondary education, which generally does not involve pervasively sectarian institutions. I am talking about under article ix section 1, which limits the funding to public schools.

West: I am sorry. No. Under article ix section 1, what the public school requirement is for k-12 education, I don't believe that would implicate the --

Justice: You don't think it applies to secondary education?

West: I don't think it would apply to secondary education, no, but we --

Chief justice: I am seeing a yellow light on. Is that --

?: Two minutes left.

West: I have two minutes left. Maybe I can just conclude by saying this, I think that the choice, that the people of Florida and the framers of the Florida constitution made in the mid-nineteenth century and since then, changed the way by which public schools has a means to carry out the educational mandate, is a recognition of the importance to society, of the common school as it was called then, in which children from all walks of life learn together, rather than being taught separately, on basis of religion, social status, race, gender and so forth. The free public school system, as this court has put it, the cornerstone of our civilization, upon which the very future of our form of government may well depend. And we urge the court in that spirit, to affirm the judgment of the en banc district court of appeals, either on the ground of article I section 3 or article ix section 1 or both. Thank you very much.

Appellant Lawyer?: If it please the court, I would like to begin by responding to justice Anstead's question to Mr. Keyes, as to whether any student could attend a public school with private funds. I believe that is important, and the reason I want to address that is because it goes to the heart of article ix section 1, and I believe the answer to that is yes, the legislature has the power to do that because there is nothing prohibiting it do that. It does not relieve the legislature of providing a uniform quality public school system. The fact that doing both might be an unreasonable expenditure of public funds, is for the voters to decide.

Appellant Lawyer?: But could it take the money which is calculated under the Florida education finance program, to be transferred to the district schools, and say that money is going to be divided in half, and half is going to be going to private schools and half go to the public schools.

Appellant Lawyer?: It can take whatever money it has the authority to place in the fund or not place in the fund. This court can say, and any court can say to the legislature, you are failing to comply with your affirmative mandate, to provide a quality, uniform public school system. What the courts cannot say, cannot tell the legislature, is how to allocate funds, because that goes to the very essence of the distinction between the separation of powers, between the judicial and the legislative branch, and if the court were to say you cannot put this money into the schools, or you cannot put this money into any other program until you fund your mandate, then the courts are thrust into the allocation of funds.

Chief justice: so wait. What you are saying is, there could be 50 or 60 percent of monies spent on a competitive system of private schools that, and as long as there was whatever percentage was left of, that there was 40 percent that was being spent on public schools or 90 percent and 10 percent t wouldn't matter, until someone challenged that the 10 percent existing didn't meet the need of those that were --

Appellant Lawyer?: Yes, your honor.

Chief justice: and if we had done this during the post-brown v board, we would have had all of the white students a system of private schools and left the public schools for the minorities. I mean, that could have been done under your interpretation of this article.

Appellant Lawyer?: First of all, we are running into another interesting problem, which is the equal protection issue, which is what brown was based upon, and I am not prepared to get into. That said, however, I can certainly answer your question. And I think that you touch on the quintessential point. Percentages are a decision for the legislature to make. The only thing mandated by the constitution, is that the legislature provide an available uniform, quality public education. No student is required to take it, and the legislature has the right to spend it. You know, when you say 40 percent, 60 percent, you don't have to be talking about opportunity scholarships. The fact is that the state of Florida provides a large percentage of funds for many programs, other than education, and the legislature can decide that 70 percent of the total state funds shall go to things other than education,

30 percent shall go to education. That is not the job of the courts, because that gets into the allocation of state funds. It is the job of the courts, to decide whether or not the legislature has met its affirmative mandate, but the plaintiffs had made no record below to suggest that the legislature has failed to meet its mandate under article ix of section 1.

Justice: Where do you find, in the language of that article, any suggestion that the drafters or the voters in approving that, intended that no, not just one way to carry out this mandate, to provide this education system, to Florida's children, but that the legislature would be authorized to provide two or three or four or more, as opposed to the provision, the express provision, that it be provided in a system of free public schools. I am having difficulty with your point of saying that, no, under that constitutional mandate and scheme, the legislature is perfectly free to provide numerous alternatives to the free public school system, out of state funds. Where do you find in that language, any expression of intent that the drafters intended that there be more than one way to fulfill the education mandate of the constitution?

Appellant Lawyer?: I believe, your honor, that it goes to the heart of our system. The constitution does not have to affirmatively authorize the legislature to do anything. Under our system, the legislature has the authority to do anything not restricted by the state or federal constitutions, and nothing in article ix section 1 restricts the legislature's authority to provide alternative programs, whether they be educational, environmental, criminal protection, anything, so long as they meet their affirmative mandate under article ix section 1, and that is not an issue before this court!

Justice: Well, in many instances, this court and other courts have decided that, if the provision in the constitution is so express, in terms of how it mandates something be done, that there is a implied intention not to allow an alternative. What do you say about those cases?

Appellant Lawyer?: Two things. First, this court as we pointed out in our brief, has cautioned that that rule ought to be used very sparingly when we are talking about an interpretation of the constitution, but beyond that, there, if we were to apply that rule, we would, then, be saying, and the reason it cannot apply to the constitution as it relates to the legislature, is we would, then, be say had gone that the legislature essentially can do nothing except those things which are authorized in the constitution, and that makes the state constitution what the federal constitution is to congress, and we know it is not. It is the reverse. That the --

Chief justice: I want to remind you that your time is up. Just if you could conclude your answer to justice Anstead's question.

Appellant Lawyer?: That concludes it. Thank you.

Chief justice: thank you very much. I commend both sides for a very informative oral argument for answering our questions, the briefs, both sides, were excellent, and the amicus were, also, helpful and with that we will take this case under consideration, and

we will stand in recess, and before I take our recess, I want to ask just so that we can keep things in order for the attorneys and parties, if they are allowed to exit the chambers first, and then the audience. So thank you very much. The court will take its morning recess.

Marshal: please rise.