



Florida Grows a Lemon

Court contortions overturn a successful voucher program

BY JOSH DUNN AND MARTHA DERTHICK

Florida's supreme court is no stranger to political warfare. Before the U.S. Supreme Court decided *Bush v. Gore* in favor of George W. Bush, the Florida court had ruled in favor of Al Gore. And the same court played a crucial role in the state's extraction of an \$11.3 billion settlement from the tobacco industry in the 1990s. After the legislature had passed a constitutionally dubious law loading the deck against the tobacco industry,

the court, in a 4–3 decision, found a way to uphold it. Clearly, these judges do not recoil from constitutional constructions that suit political purposes.

The court had no choice but to enter Florida's school voucher wars. In 1999 the legislature had created the Opportunity Scholarship Program (OSP), which allowed students in failing K–12 schools to transfer to better public schools or to private schools with the aid of state funds. Organized teachers, school boards, and other voucher opponents brought suit. Several years of wrangling in the state's lower courts culminated in an appellate decision that the OSP was unconstitutional. The state supreme court was obliged to hear an appeal.

To strike the program down, as happened in January in *Bush v. Holmes*, the court had to do two things. It had to find that the state's constitution prohibits the use of public funds in private schools. That was the key issue. And, to avoid a bruising political battle, it had to distinguish the OSP from other, quite similar but very popular state programs that seemed to be indistinguishable in principle. With tortured logic, the court went to work.

The court focused on an article in the Florida constitution stating: "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high-quality system of free public schools." It interpreted this to mean that "free public schools" shall be the sole way in which the state provides for children's education, although that is not what the constitution says. Seizing also on the requirement of uniformity, the court asserted that private schools are not uniform when compared with each other or with the public system. But the uniformity clause, whatever it may mean, clearly applies only to public schools.

In a brief section near the end of its opinion, the majority conceded that sometimes public spending in private schools is permissible. The court claimed that other Florida programs that permit such spending "are structurally different from the OSP,

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which provides a systematic private school alternative to the public school system...."

But we detect no "structural" difference between the operation of the OSP and—as a leading example—the state's McKay program for disabled students, which began on a pilot basis in 1999 and as of the fall of 2005 was enrolling more than 16,000 students in private schools. In the case of the OSP, parents of children in schools that received failing grades in two out of four years were entitled to

receive public funds to pay tuition at a private school. In the McKay program, parents dissatisfied with the offerings of particular public schools are entitled to move their children to other public schools or to receive public funds for use in private schools.

Of the two programs, the OSP could be thought the more threatening in the long run to the public monopoly of K–12 education. Though small, with a mere 763 students, and used almost entirely by African American and Hispanic students—in contrast to McKay's 50 percent enrollment of whites—the OSP was growing, and the court alluded to its "unlimited" potential for future growth. Also, it began with identification of failing schools rather than handicapped students, and that too, made it more threatening. Programs for a defined population can be confined—and perhaps also can more readily be grounded in a claim of rights or of equal protection. Programs that arise from failing schools are of unpredictable dimensions and are more tied to the values of "choice" and "privatization." To plaintiffs, certainly, and apparently also to the court, the OSP had the look of a "systematic" threat to public schools that needed nipping in the bud.

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