Florida’s Past and Future Roles in Education Finance Reform Litigation

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INTRODUCTION

In federalist parlance, the states often are called laboratories of democracy.¹ Nowhere is this truer than in the field of education, and almost no subset of the education field lends itself to this label more than education finance. Since 1973, with very few notable exceptions, the entire development of the practice of education finance has proceeded through state-specific reforms.² These reforms have occurred mostly through legislative policymaking, but the courts have played an important role in directing that policy development.³

If one were to seek to observe one of these laboratories in action—to witness the interaction of the courts, the people, and the elected representatives of the people in the development of policy—one would be hard pressed to find a better state in which to do so than Florida. The state of Florida has had in place since

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2. The Supreme Court’s landmark decision in San Antonio v. Rodriguez, 411 U.S. 1 (1973), ended what several scholars call the first wave of education finance reform litigation. See M. Heise, “State Constitutions, School Finance Litigation, and the ‘Third Wave’: From Equity to Adequacy,” Temple Law Review 68 (1995): 1151, 1152. This wave sought to establish education as a federal fundamental right. In Rodriguez, the Court declared that education was primarily a state matter and therefore does not rise to the level of a fundamental right under the U.S. Constitution, which does not mention the topic. The second wave began contemporaneously with the Rodriguez decision, beginning with the California case of Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), and the New Jersey case of Robinson v. Cahill, 303 A.2d 273 (N.J. 1973). Each of these cases established that a state constitution’s language could be used to provide the strict scrutiny of educational equality denied by the federal Constitution. After most states had litigation the equality of the education finance systems, a third wave of litigation began in earnest with the Kentucky case of Rose v. Council, 790 S.W.2d 186 (Ky. 1989), in which the supreme court of that state held that the state’s education finance plan failed to provide adequately for the education of the state’s children, as required by the education article of the state constitution.
the time of *San Antonio v. Rodriguez* an education finance system called the Florida Education Finance Plan (FEFP), which makes substantial effort to equalize per-pupil spending in all of the state’s school districts while recognizing the local factors that may necessitate changes in that spending. Still, that system has been subject to state constitutional challenges.

This article outlines the two distinct avenues through which the FEFP and other Florida school funding statutes have been challenged. Each of these approaches involves the education article of the Florida Constitution. The first part traces the historical development of the education article, and the second part examines the early challenges that were based mostly on the uniformity provision of the education article and the initial failed effort to bring what many would call a third-wave challenge to the adequacy of education spending under the education article. The second part also examines the court’s perception of its role in Florida’s three-branch government and its willingness to fulfill that role in equity and adequacy cases. This article concludes that the unique referendum process through which Florida residents can amend their constitution adds a new dimension to the education finance reform process that shapes the arguments supporting litigation and ultimately may provide a new avenue through which reformers can seek their objectives with minimal court involvement.

**Education and the Florida Constitution**

Since its first drafting in 1838, the education article of the Florida Constitution has undergone several revisions, as has the entire document. In 1838, article X provided,

1. The proceeds of all lands that have been, or may hereafter be, granted by the United States for the use of schools, and a seminary or seminaries of learning, shall be and remain a perpetual fund, the interest of which, together with all moneys derived from any other source applicable to the same object, shall be inviolably appropriated to the use of schools and seminaries of learning respectively, and to no other purpose.

2. The General Assembly shall take such measures as may be necessary to preserve from waste or damage all land so granted and appropriated to the purpose of education.

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4. See Fla. Stat. §1011.60 et seq.
6. The people of Florida have lived under six different constitutions, with the most recent being ratified in 1968.
In 1861 and 1865, the people of Florida ratified two new constitutions, but neither made any changes to the education article. Then, in 1868, the people moved education to article VIII and added several more sections providing for a state superintendent,\textsuperscript{8} a common school trust fund,\textsuperscript{9} state property tax millage and local effort requirements,\textsuperscript{10} and a state board of education.\textsuperscript{11} The people also added the following two sections:

1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.

2. The Legislature shall provide a uniform system of Common schools, and a University, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.\textsuperscript{12}

When Reconstruction ended, Florida ratified a fifth constitution. That constitution again moved the education article, this time to article XII, added several new sections,\textsuperscript{13} changed most of the others to update them,\textsuperscript{14} and deleted section 1 along with the requirement for a state university in section 2, which became the new section 1.\textsuperscript{15}

The people of Florida ratified their most recent constitution in 1968. This new Florida Constitution made substantial changes to the education article, including completely eliminating eight sections of the 1885 version.\textsuperscript{16} Now housed in article IX, the 1968 education article provided more detailed enumerations of state and local authority\textsuperscript{17} and streamlined the 1885 provisions relating to taxation and

\textsuperscript{8} Florida Constitution, art. VIII, §1 (1868).
\textsuperscript{9} Florida Constitution, art. VIII, §§4, 6, 7 (1868).
\textsuperscript{10} Florida Constitution, art. VIII, §§5, 8 (1868).
\textsuperscript{11} Florida Constitution, art. VIII, §9 (1868).
\textsuperscript{12} Florida Constitution, art. VIII, §§1, 2 (1868).
\textsuperscript{13} Florida Constitution, art. XII, §§10–15 (1885). One of these additional sections resulted from splitting a former section into two. Section 4 from the 1868 Constitution became sections 4 and 9 of the 1885 Constitution. Aside from such minor changes, the people also added sections 10 and 11, which authorized dividing counties into smaller districts, appointing school trustees, and levying discretionary millage for capital improvements; section 12, which mandated separate but equal schooling for whites and nonwhites; section 13, which forbade the appropriation of any public school funds to non–public school purposes, including support for any sectarian institution; section 14, which provided for the establishment of two normal schools for teacher training; and section 15, which determined the funding source for the salaries of different categories of school system employees.
\textsuperscript{14} See Florida Constitution, art. XII, §§2–9 (1885). These alterations were uniformly minor, except the change to section 8, which formerly required each district to raise through taxation an amount equaling at least half the total amount appropriated to that county from the state Common School Fund. Florida Constitution, art. VIII, §8 (1868). The 1885 version converted this requirement to a minimum and maximum millage for each county of three and five mills. Florida Constitution, art. II, §8 (1885).
\textsuperscript{15} Florida Constitution, art. XII (1885).
\textsuperscript{16} Florida Constitution, art. IX (1968).
\textsuperscript{17} Florida Constitution, art. IX, §§2–5 (1968).
the state school fund. The new constitution also added the language, “Adequate provision shall be made by law” to section 1, replacing the 1885 language, “The Legislature shall provide,” and added language encouraging the support of universities and other public educational institutions. In addition, the 1968 Constitution eliminated section 13, which had prohibited the expenditure of any public funds on any sectarian school, and instead combined sections 5 and 6 of the Declaration of Rights in the 1885 Constitution, creating section 3 of the Declaration of Rights in the 1968 Constitution, which prohibited taking any money from the public treasury to aid any sectarian institution.

Since then, the education article has been amended twice, in 1998 and 2002. The amendment most important to this article was proposed by the Florida Constitution Revision Commission and adopted by the people in 1998. This revision altered the language of section 1 to read,

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.

The supporters of the 1998 amendment drafted it in direct response to a 1996 Florida Supreme Court case, Coalition for Adequacy and Fairness in School Funding v. Chiles. Their intent was to strengthen the language of Florida’s education article to make it clear to both the legislature and the courts that education holds a special importance for the citizens of Florida. Whether they succeeded linguistically is beyond doubt; whether they succeeded substantively, however, has yet to be decided.

With this discussion in mind, one can group the broad requirements of the Florida Constitution related to spending into two categories. First, and most basi-

19. Compare Florida Constitution, art. IX, §1 (1968), with Florida Constitution, art. XII, §1 (1885).
22. Ibid., 1.
cally, the education provided must be “uniform” and “free.” Each of these terms has survived the many revisions to the education article, and the Florida Supreme Court has in the past ascribed at least some content to them. These terms are well suited to the second wave of education litigation strategy. That is, they lend themselves to equality-based theories and definitions. However, until very recently no case had focused on how the meanings of these terms have changed now that other modifying words appear with them in a list. The terms efficient, safe, secure, and high quality evoke thoughts not of equality but of quality.

Second, the Florida Constitution makes it a “paramount duty” of the Legislature to “make adequate provision” for education, which is a “fundamental value” of Florida’s people. Again, no case has construed the nature of the duty that such language imposes on the legislature, but the language seems well suited to a quality- or adequacy-based challenge to Florida’s educational funding system, resembling the cases that make up the so-called third wave of reform litigation.

**Constitutional Challenges to Florida’s System of School Finance**

*Equity-Based Challenges*

Unlike the highest courts of many states, Florida’s Supreme Court has in the past shown great deference to the legislature in interpreting the education article. The substance of the uniformity provision has been litigated far more than any other in the education article, but the court has never fashioned a strict rule of equality, or even one of equity. The court first gave content to the term in the 1939 case of *State ex rel. Clark v. Henderson*, in which it held that uniform meant “established upon principles that are of uniform operation throughout the state.” This tautology did little to establish any meaningful standard by which legislative actions toward education could be judged. Accordingly, Florida courts heard no new challenges based on the uniformity provision until 1973.

In *Lee County v. Askew*, a school district asked the Florida Supreme Court to declare that the Minimum Foundation Program (MFP), Florida’s then-current system of school funding, failed to meet the education article’s mandate for a uniform system of public schools. Without much discussion or any citation to other case law, the court held that the system passed constitutional muster. The court

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26. See *Rose, 790 S.W.2d 186 (Ky. 1989); Robinson, 303 A.2d 273 (N.J. 1973).*

27. *State ex rel. Clark v. Henderson, 188 So. 351 (Fla. 1939).*

28. *District Sch. Bd. of Lee County v. Askew, 278 So. 2d 272 (Fla. 1973).*

29. Ibid., 273.
found that the program’s provision of a “uniform expenditure per teaching unit throughout the State regardless of the tax base of the various counties” clearly met the constitution’s requirement for uniformity.30

Interestingly, while the Askew case was pending, the Florida legislature was already reforming and fine-tuning the MFP in response to the then-recent California case Serrano v. Priest.31 Thus, although the plaintiffs lost in court on the question of the MFP’s constitutionality,32 the legislature ultimately made changes to the MFP that probably would have resulted from a court decision favorable to the plaintiffs.33 Among these were switching from a per-unit model to a per-pupil model, adjusting the per-pupil allotment to reflect the special needs of each pupil, and adjusting each county’s per-pupil allotment based on local cost-of-living factors.34 The MFP became the FEFP not because of court-ordered reform but because of proactive thinking in the legislature.

Florida courts have had a few opportunities to further define the meaning of the uniformity provision since Askew, but the courts have never used any of these opportunities to establish strict equality, or even simple equity, as a measure of constitutionality. In School Board of Escambia County v. State, a challenge to the FEFP’s provision allowing school districts to levy discretionary millage, the Florida Supreme Court specifically declined to hold that the uniformity provision mandated equality. Instead, the court held that uniformity means that the separate parts of the school system “operate subject to a common plan or serve a common purpose.”35 This definition seems to indicate that even substantial inequalities would be constitutionally permissible as long as the state’s school districts share the same goals and operate under the same mandates.

Later, in two impact fee cases, the court developed the position that it seemed to favor until very recently of leaving the definition of constitutional terms up to the legislature. In St. Johns County v. Northeast Florida Builders Ass’n, the court considered whether the imposition of impact fees on new construction violated the uniformity provision or the “free public schools” provision of the education article. As to the “free public schools” provision, the plaintiffs contended that an impact fee amounts to an attendance fee, and charging tuition for public school

30. Ibid.
32. The constitutional issue actually was a very small part of the case. The ultimate issue was whether the state could override the property valuation decisions of local tax assessors in the pursuit of greater fiscal equity. Askew, 278 So. 2d, 274. The court held that the state’s unilateral alteration of local valuation decisions violated the Florida Constitution (p. 275).
34. Fla. Stat., §1011.60 et seq.
35. School Board of Escambia County v. State, 353 So. 2d 834 (Fla. 1977), 837.
attendance, even indirectly, would conflict with the Florida Constitution. The court held that severing any provision from the ordinance that allowed homeowners without children to opt out of the fee would preserve the ordinance’s constitutionality.

As to the uniformity provision, the plaintiffs contended that each county was required to draw its school funding from the same sources; otherwise, funding could not be uniform. The court rejected this contention, holding that the Florida Constitution did not appear to mandate any particular funding source, nor did it prohibit any use of unique sources. Indeed, the court held that the use of impact fees might constitute an important means by which fast-growing counties maintain uniformity when ordinary funding sources cannot keep up with the pace of development and the need for new facilities. As a definition of uniformity, the court merely adopted the definition it had proffered in its Escambia County decision.

The last 20th-century case in which the court had an opportunity to ascribe any meaningful content to the uniformity provision was Florida Department of Education v. Glasser. In that case, a school board challenged the FEFP’s limitations on the ability of county officials to levy nonvoted discretionary millage as a violation of the uniformity provision. The district argued that it was empowered to assess nonvoted discretionary millage in excess of the FEFP’s limits without additional enabling legislation and that the FEFP’s limits therefore were unconstitutional. The court rejected this argument, stating that it is the legislature’s constitutional prerogative to specifically authorize local taxation, and an authorization like the one in the FEFP, which contains limits, cannot be unconstitutional. Then the court considered the district’s contention that it must further define the uniformity provision of the education article. The court declined to do so, holding that the legislature must give the provision its content and meaning.

The Florida Supreme Court’s treatment of the uniformity provision has ranged over the years from Henderson, where it reluctantly offered a “definition” that yielded little guidance, to Glasser, where it adopted what appeared until recently to be its favored approach to interpreting the education article so as to defer to the legislature. The Florida Supreme Court has very recently granted substantial meaning to the language in the education article mandating a “uniform . . . system of free public schools.” However, the plaintiffs in this case did not pursue an equity theory. The court’s treatment of the uniformity provision in the 20th century in equity cases foreshadowed its treatment of other provisions of the

37. Ibid., 640.
38. Ibid., 641.
40. See Bush v. Holmes, 191 So. 2d 392–413 (Fla. 2006).
education article during the failed attempt in the 1990s to challenge the adequacy of education spending.

Adequacy-Based Challenge

The Florida Supreme Court has heard only one challenge to the state’s education finance system based on adequacy of spending. In Coalition for Adequacy and Fairness in School Funding v. Chiles, the plaintiffs brought what is commonly classified as a third-wave challenge to the FEFP, contending that the level of per-pupil spending in the state did not meet the requirements of the education article. The plaintiffs also sought to have education classified as a “fundamental right” under the Florida Constitution. Unlike the equity-based challenges discussed, which were based mostly on the “uniform system” language of the education article, the complaint in Chiles was based on the “adequate provision” language. The plaintiffs contended that the phrase “adequate provision” imposed requirements on the legislature that were separate from and additional to the requirements imposed by the “uniform” language. The court disagreed, holding that the court could not enforce the adequacy requirement without reference to the uniformity requirement, which had always been interpreted deferentially.

The court also considered and rejected the plaintiffs’ argument that interpreting the adequacy provision would not violate Florida’s firmly rooted separation of powers doctrine. The court explained that giving content to the words “adequate provision” by striking down the current level of educational funding would cause the court to impermissibly intrude on the clearly mandated legislative function of budgeting. In other words, the court would be required to “subjectively evaluate the Legislature’s value judgments as to . . . spending priorities.” The court then expanded on its reasoning, holding that the case presented a nonjusticiable political question.

The plaintiffs had attempted to counter the constitutional separation of powers mandate by arguing that the mandate implied an exception for violations of the constitution itself. After applying the well-known test from Baker v. Carr,
though, the court disagreed.51 That test has six factors, and the court is required to weigh those factors together to determine whether they generally tend toward justiciability:

(1) A textually demonstrable commitment of the issue to a coordinate political department;

(2) A lack of judicially discoverable and manageable standards for resolving the issue;

(3) The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;

(4) The impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government;

(5) An unusual need for unquestioning adherence to a political decision already made; and

(6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.52

The court in Chiles focused only on the first two factors.53 The court held that the constitution mandated that the legislature was to determine the adequacy of education spending because the phrase “by law” in both the adequacy provision and the appropriations clause referred to the legislature’s discretion.54 Thus, there was a textually demonstrable commitment to the legislature of the issue of determining the adequacy of education spending. In addition, the court held that the plaintiffs had offered no judicially manageable standard for determining adequacy that would not cause the court to intrude on the legislative functions of making appropriations and setting spending priorities.55

ANALYSIS OF THE FLORIDA COURTS’ APPROACH TO EDUCATION FINANCE CASES

The court’s justiciability holding in Chiles can be explained in part by contrasting the concepts of equity and adequacy in their operational senses. The court approved of the state’s argument that, unlike the word uniform, which merely

51. Chiles, 680 So. 2d, 408.
53. Chiles, 680 So. 2d, 408.
54. Ibid. The court did not specifically articulate its reasoning, but it indicated that the Florida Constitution made two textual commitments to the legislature of determining the adequacy of education spending: one in the appropriations clause in article VII, §1, and the other in the phrase “by law” in the education article.
55. Ibid.
means “a lack of substantial variation,” the word *adequate* can be defined only subjectively.\(^56\) The court clearly felt uncomfortable overruling the subjective judgments of elected political representatives with its own subjective judgment. One could reasonably conclude that the court therefore would have no problem passing judgment on a challenge to the equality of educational spending in the state, but the court has shown similar reluctance in equity cases to grant the word *uniform* any specific content. This reluctance probably stems from the fact that courts are understandably uncomfortable with the idea of ordering elected legislators to appropriate more money, which is only a small step removed from ordering tax increases.\(^57\) The judiciary’s traditional tendency is to view a constitution as a source of limitations on power, not affirmative duties, and it tends to avoid outcomes that require the latter interpretation.\(^58\) The *Chiles* court correctly pointed out that a decision favorable to the plaintiffs in that case, merely holding the present level of funding to be inadequate, might lead to perpetual court supervision over the legislature’s appropriations, blurring the line between the legislative and judicial branches.\(^59\)

*The Voucher Case: The End of Deference?*

A contrast with another sort of challenge to legislative decision making in education spending in Florida provides insight into the courts’ reluctance to enforce the education article in equity and adequacy cases. Recently, the Florida Supreme Court struck down the nation’s first statewide program using public funds to provide students with private school tuition vouchers: the Opportunity Scholarship Program.\(^60\)

By its text, the Florida Constitution clearly and unambiguously forbids any spending of public funds to directly or indirectly aid any religious institution.\(^61\) Nevertheless, Florida has in place several programs that effect indirect transfers of public funds to religious schools by granting private school tuition vouchers to the parents of Florida school children.\(^62\) Many expected that the court, if it struck down the Opportunity Scholarship Program, would do so based on this “no aid to sectarian institutions” provision. However, the court decided the case

\(^{56}\) Ibid.

\(^{57}\) This is not to say that such orders have not come from courts in education finance cases; they have, but the results have not been consistent. Compare *Robinson*, 303 A.2d 273 (N.J. 1973), with *Rose*, 790 S.W.2d 186 (Ky. 1989).

\(^{58}\) See *Bush v. Holmes*, 767 So. 2d 668, 673 (Fla. 1st DCA 2000).

\(^{59}\) *Chiles*, 680 So. 2d, 407.

\(^{60}\) *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

\(^{61}\) Florida Constitution Declaration of Rights, §3 (1968).

on education article grounds, interpreting both the uniformity provision and the “free public schools” language that had been left substantially untouched by earlier Florida courts.63

The court began by interpreting the “system of free public schools” language as implying a mandate of exclusivity.64 That is, the court held that the language of the education article proscribed the provision of education by the Florida legislature through any means other than a “system of free public schools.”65 Because the private schools accepting vouchers were not part of Florida’s public schools, the court reasoned, the legislature’s provision of education through them violated the constitution’s implied limitation of exclusivity.

The court then invalidated the Opportunity Scholarship Program on the alternative ground that it stood in violation of the uniformity provision.66 Without specifically defining the word uniform, the court held that the program provided no assurance that the inclusion of private schools within Florida’s publicly funded “system” would not destroy the uniformity of the system.67 In fact, the court reasoned, it was virtually certain that the system could not be considered “uniform” in light of the voucher program.68 The court cited the lack of state oversight, differences in teacher credential requirements, differences in curriculum mandates, and the lack of background checks of private school employees as examples of

63. Holmes, 929 So. 2d, 392–413. It is likely that the court chose to avoid the “no aid” provision because it may have been borne of religious bigotry. At the time of the provision’s first appearance in the education article, many states had adopted or were adopting similar provisions to prevent public funds from aiding Catholic institutions. A federal constitutional amendment was even proposed, and it is known today as the Blaine Amendment. The Blaine Amendment never passed federally, but state versions at least began as its ideological offspring. Deciding the case on “no aid” clause grounds, then, would have exposed the court’s ruling to a possible reversal by the U.S. Supreme Court under the Fourteenth Amendment’s equal protection clause, in the mold of Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996), in which the Supreme Court invalidated a Colorado Constitution provision that made it illegal to enact legislation to protect homosexuals from discrimination. It is possible that the rewriting of the “no aid” clause in the 1968 Florida Constitution has removed the taint of earlier religious bigotry, but it is just as likely that the Florida Supreme Court did not want to see its ruling tested on Blaine Amendment grounds.

64. Ibid., 407.

65. Ibid. One of the more interesting debates surrounding the court’s reasoning involves its use of two legal maxims of interpretation, one of which holds that related provisions should be read in pari materia, or as one related whole, and the other of which holds that the expression of one thing implies the exclusion of alternatives to that thing (expressio unius est exclusio alterius), to interpret the language of the education article. The dissent devotes much of its criticism to this technique (Ibid., 419–423, J. Bell, dissenting). The use of these canons of statutory construction, as they are called, marks a dramatic shift in the court’s orientation toward ascribing meaning to the education article. Where the court was once very reluctant to apply even clear provisions, it now appears to be willing to supply meaning that must be inferred. The difference between interpreting the constitution’s limitations, as opposed to its commands, is the most likely explanation for this shift.

66. Ibid., 410.

67. Ibid., 409.

68. Ibid., 410.
nonuniformity.69 Obviously, the court’s reasoning in *Bush* indicates a marked change from its earlier approach to the uniformity provision, exemplified in the *Escambia County* and *St. Johns* decisions.

One question that sheds light on the likely future treatment of equity and adequacy suits by the Florida Supreme Court is why the case was not dismissed on separation of powers grounds or as a nonjusticiable political question. The answer is readily apparent. Unlike in the equity or adequacy cases brought in the 20th century, the court in *Bush* was not asked to order the legislature to take any affirmative action, such as increasing or equalizing funding. Nor was the court placed in the position of mandating that which the legislature ordinarily has discretion to decide, such as the priority placed on education relative to other state functions or the propriety of raising additional state revenues. Instead, the court was asked to perform its most traditional function: determining whether legislative action exceeds constitutionally imposed limitations on its power.

Simply put, the Florida separation of powers doctrine was not implicated. Dismissal on political question grounds also would have been inappropriate because determining whether legislative action exceeds constitutional limitations, rather than being textually committed to the legislature, is clearly textually committed to the courts.70 As compared with its reluctance to trample on legislative prerogatives in *Chiles*, the court understandably had fewer reservations about interpreting the education article in *Bush* because the case required the justices to apply the constitution’s limitations, not its commands.

Because the Florida Supreme Court decided the *Bush* case in the posture of interpreting the limitations and not the commands of the Florida Constitution, the case is likely to be of little help to plaintiffs in adequacy—or even equity—suits. Even if it could be seen as helpful in terms of the court’s decreased diligence in the realm of defining constitutional terms, none of the terms defined in *Bush* qualify as adequacy-based terms. Both *uniform* and *free* are quantitative terms, whereas *adequate, safe, secure, and high-quality* are more qualitative. Thus, because *Bush* is unlikely to change the litigation landscape regarding Florida adequacy suits, the question remains whether any of the changes to article IX, section 1 enacted in response to *Chiles* will alter the court’s perception of its proper role in cases broadly challenging the FEFP on adequacy grounds.

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69. Ibid., 409–410. Through this reasoning, the court may have exposed the state’s 300 charter schools to greater constitutional scrutiny because those schools often are exempted both from state requirements for teacher certification and from certain state curriculum mandates.

Likely Effects of the 1998 Amendments

As discussed, the Florida Constitution Revision Commission set out to address the court’s concerns in Chiles by amending the education article and making its language stronger.71 The amendment to article IX, section 1 adopted in 1998 does indeed contain much stronger language than the same provision as it existed in the 1968 constitution. The language arguably contradicts the Chiles court’s holding that education is not a fundamental right by declaring that education is a “fundamental value.”72 In addition, the court’s misgivings regarding usurping the legislature’s role in determining spending priorities may be addressed by the new language stating that it is “a paramount duty” of the legislature to adequately fund education.73 Finally, in keeping with the court’s approval of the state’s characterization of the word uniform as easily defined, the amendment added several other words to the uniformity provision: efficient, safe, secure, and high-quality.74 Whether the courts will find these words as easy to define as uniform is still unresolved, but placing them in the same section as the word uniform at least visually distances them from the word adequate.

The important question is whether these changes will have the desired effect. It is inarguable that the amendment strengthened the education article’s language, but the Chiles court did not hold the strength of the language to be determinative. The court focused much more on the specificity of the language and the ease with which it could be operationalized.75 Regardless of how much stronger the language of the education article appears to be after the 1998 amendment, it is still riddled with words that are very difficult to operationalize, such as adequate, safe, secure, and high-quality. It is important to remember that the court’s main concerns involved crossing a line that divides legislative functions from judicial ones. With this in mind, it is difficult to conclude that the court will be willing to define and operationalize quality-oriented terms now simply because more of them appear in the education article.

The one aspect of the 1998 amendment that should provide optimism to the supporters of education finance challenges in Florida is the fact that it was passed by

71. Several scholars have established a categorization system by which they rank the relative strength of the states’ education articles based on the duties imposed through the constitutional language. See W. Thro, “To Render Them Safe,” Virginia Law Review 75 (1989): 1639. Florida’s rank in this system has ranged from Category I before 1868, to Category IV in 1868, to Category II in 1968, and back to Category IV in 1998 and afterward. See also Mills and McClendon, “Setting a New Standard.” Whether these characterizations influence judicial decision making is debatable, but in Florida, at least, the supreme court has granted the system credence. See Chiles, 680 So. 2d, 405, n.7.
73. Ibid.
74. Ibid.
popular referendum. The Florida Constitution provides for its amendment through any one of several methods. However, each of these methods requires a popular vote in a statewide election adopting the amendment. The Florida Constitution Revision Commission originally proposed the 1998 amendment to the education article, and the people adopted it in a general election in November of that year. The court in a future case challenging the adequacy of education spending in Florida may find it important that it was the clearly expressed will of the people of Florida to strengthen the legislative duty to provide adequate funding for education. In fact, it is clear that the Bush court found the popular amendment to be quite important and highly relevant. However, to convince the court to alter the posture that it took in Chiles, the plaintiffs in any such case would have to successfully argue that the 1998 revision intended to remove the determination of whether spending is adequate from legislative discretion and place it with the judiciary.

The new language in the education article can be read many ways, but it cannot reasonably be read as imposing the duties that it mandates on any body other than the legislature. In fact, the actual mandate in the amended provision remains unchanged, reading "Adequate provision shall be made by law." The phrase "by law" has already been construed in Florida as textually committing a duty to the legislature. No new language specifically requires any action by any other branch of government. Thus, to avoid dismissal pursuant to the political question doctrine, a plaintiff in a Florida adequacy case will have to convince the court that the sheer strength and volume of terminology in the amended article IX, section 1, as compared with that in the 1968 version, implies the intent to have the Florida courts oversee the legislature’s determination of adequacy. Considering the reluctance of the Florida courts to read language into the state constitution that places constraints on legislative discretion in appropriations, and considering that a decision to recognize an implied mandate for court supervision would only force the court to define a large number of vague terms, it is unlikely that any plaintiff could survive a motion to dismiss the case.

Swelling of the Fourth Wave

It is likely that the Florida courts will always shy away from generalized legal challenges to the entire system of educational finance in Florida. Considering the ten-

76. Florida Constitution, art. XI (1968). The legislature, a constitution revision commission, or a constitutional convention may formally propose amendments (see §§1, 2, and 4), or the people can formally place an amendment on a general election calendar through the filing of a petition with the required number of signatures (see §3).
78. See generally Mills and McClendon, “Setting a New Standard.”
dency of courts to approach constitutional provisions as limitations rather than compulsions, it is intuitively much easier to invalidate legislative action in clear contrast to a constitutional provision than it is to invalidate legislative inaction that fails to meet constitutional mandates. This is especially true when a constitutional mandate for legislative action is qualified by several inherently subjective adjectives, such as *adequate* and *high-quality*. It is possible that the popular process through which the Florida Constitution is amended may sway the Florida judiciary to cross boundaries that it has declined to cross in the past. However, it is unlikely that the most recent effort will have that effect.

A more successful effort to redefine the roles of the legislature and the courts in education finance would begin from the premise that, in a suit challenging the adequacy of education spending, the affirmative requirements of the Florida education article are inherently unenforceable as they are currently written. The Florida Supreme Court has declined to usurp the legislature’s function of giving content to the word *adequate*, and it probably will decline to do so for the adjectives that resulted from the 1998 amendment. Instead of providing more adjectives or stronger adjectives, future reform advocates would do well to change the language of the mandate itself. Perhaps the only action required would be the removal of the words “by law.” If the textual commitment to the legislature were no longer present, the court may not be so reluctant about defining the terms that follow.

Reformers can also look to the subsequent amendments to the education article that contain more specific mandates, such as the 2002 amendment to the section that is the subject of this article. That amendment established specific maximum class size limits for all of Florida’s public schools.\(^81\) In effect, mandating specific class sizes mandated what many believe to be a concrete indicator of school quality without using vague terms such as *high-quality*. Reformers are likely to be far more successful with such specific amendments because they entail no court interpretation and therefore do not implicate the separation of powers provision or the political question doctrine. Admittedly, achieving the goals sought by the drafters of the 1998 amendment through the methods used by the drafters of the 2002 amendment would amount to a piecemeal process, and there would be significant disputes over whether a proposed specific requirement

\(^81\) See Florida Constitution, art. IX, §1(a) (1968) (as amended 2002). The amendment states, “To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that: (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students; (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.”
would actually enhance educational quality. However, amendments in this mold would be more successful, and they would lead to less frequent, and probably more successful, litigation.

If Florida reformers recognize the success of the more specific form of constitutional amendment, their actions in achieving their objectives might one day be considered the fourth wave of education finance reform. Just as the emergence of the second wave involved a shift in litigation venues from federal to state, the emergence of this fourth wave would be marked by a shift of venues from the courts to the ballot box. Ultimately, reformers may be able to achieve through popular referendum what the legislature is unwilling to provide and what the courts have been unwilling to address: a higher-quality system of education in Florida.