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Staff Analysis and Economic Impact Statement

Measure: CP 40		REFERENCE:	ACTION:
Sponsor:	Governmental Procedures and Structure Committee	1. GPSC 2. PBPC 3.	Pre-meeting
Subject:	Public Services through Private Providers		
Date:	February 22, 2008		

I. Summary:

Opinions of the First District Court of Appeal and the Florida Supreme Court in the *Bush v. Holmes* cases found that:

- The Blaine Amendment of Article I, section 3 of the Florida Constitution prohibits the Legislature from using state funds directly or indirectly in aid of any church, sect or religious denomination, or any sectarian institution including private religious schools.
- Article IX, section 1(a) of the Florida Constitution makes the public school system the exclusive means by which the state must educate children.
- The uniformity requirement of Article IX, section 1(a) of the Florida Constitution would require private schools receiving state funds to be subject to the same or similar regulations governing public schools.

Constitutional Proposal 40 effectively reverses opinions of First District Court of Appeal and the Florida Supreme Court in the *Bush v. Holmes* cases. This result is accomplished by:

- The implicit repeal of the Blaine Amendment of Article I, section 3 of the Florida Constitution.
- Authorizing the Legislature to fund alternatives to the public school system.
- Providing that a person may choose to be educated by a publicly-financed private service provider that meets their unique needs.

The measure expressly provides that the provision of public services through a private provider must be authorized by law and that the measure does not create an entitlement to a publicly-financed program.

II. Present Situation:

Establishment Clauses, Free Exercise Clauses, and the Blaine Amendment
The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an ***establishment of religion***, or prohibiting the ***free exercise thereof***; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[1]

Similarly, section 3 of article I of the Florida Constitution states:

> There shall be no law respecting the ***establishment of religion*** or prohibiting or penalizing the ***free exercise thereof***. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. ***No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.***[2]

The U.S. Constitution and the Florida Constitution both contain an Establishment Clause and a Free Exercise Clause. The Establishment Clauses are based on the clause including the words "establishment of religion." The Free Exercise Clauses are based on the clause including the words "free exercise." The last sentence of section 3 of article I of the Florida Constitution is known as the "Blaine Amendment" or "no-aid" provision.[3] The U.S. Constitution does not contain a similar provision.

Free Exercise Clauses
"Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause."[4] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[5]

Under the Free Exercise Clauses:

> a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to

[1] (Emphasis added).
[2] (Emphasis added).
[3] *Bush v. Holmes*, 886 So. 2d 340, 344, 348-349 (Fla. 1st DCA 2004) ("*Holmes II*").
[4] *Id.* at 365 (citing *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002)).
[5] *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

> satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[6]

A law is *not* neutral if it discriminates against religious practice on its face or "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[7]

The following are examples of the Free Exercise Clause violations:

- An ordinance that prohibited the ritual slaughter of animals as part of the Santaria religion;[8]
- Laws that disqualify members of the clergy from holding a public office;[9]
- An ordinance that prohibited preaching in a public park by Jehovah's witnesses while allowing preaching during a Catholic mass or a protestant service;[10] and
- A state statute that treated some religious denominations more favorably than others.[11]

However, under the Free Exercise Clause of the First Amendment, a state *may* exclude individuals and entities from a generally available government benefit on the basis of religion.[12]

Establishment Clauses

The Establishment Clause of the U.S. Constitution was intended to afford protection against three main "evils:" sponsorship, financial support, and active involvement of the sovereign in religious activity.[13] Thus, the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[14] The test to determine whether government aid violates the Establishment Clause of the U.S. Constitution is whether the aid:

- Results in governmental indoctrination;
- Defines its recipients by reference to religion or is neutral with respect to religion; or
- Creates an excessive entanglement.[15]

The conditions under which government may aid a religious institution under the Establishment Clause of the U.S. Constitution were identified by the U.S. Supreme Court in *Zelman v. Simmons-Harris*.[16] The *Zelman* Court stated:

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[6] *Id.* at 531 (citation omitted).
[7] *Id.* at 533.
[8] *Lukimi*, 508 U.S. 520.
[9] *McDaniel v. Paty*, 435 U.S. 618 (1978).
[10] *Fowler v. Rhode Island*, 345 U.S. 67 (1953).
[11] *Larson v. Valente*, 456 U.S. 228 (1982).
[12] *Locke v. Davey*, 540 U.S. 712, 722 (2004).
[13] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)
[14] *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002).
[15] *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

> that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to [a] religious [institution] wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.[17]

Accordingly, neutrality must be a key feature of government aid programs that benefit a religion. Aid is neutral if the aid has been directed to a religion by a private choice, rather than a government choice. Aid is neutral if "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available for both religious and secular beneficiaries on a nondiscriminatory basis."[18]

Courts have found that the following types of aid did not violate the Establishment Clause of the U.S. Constitution:

- Annual subsidies directly to qualifying colleges and universities in Maryland, including religiously affiliated institutions;[19]
- Bussing services for both public and private school children;[20]
- The provision of secular textbooks for both public and private school students;[21]
- Construction grants to colleges and universities regardless of affiliation with or sponsorship by a religious body;[22]
- The provision of grants to religious and other institutions to provide counseling on teenage sexuality;[23] and
- Payment of tuition to private religious schools for children in Cleveland, Ohio who attended poor quality public schools.[24]

Interaction of the Establishment Clauses and the Free Exercise Clause

"[T]he Establishment Clause and the Free Exercise Clause[] are frequently in tension."[25] This tension results from the idea that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[26]

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[16] *Zelman*, 536 U.S. at 652.
[17] *Id.*
[18] *Zelman*, 536 U.S. at 533-654 (quoting *Agostini*, 521 U.S. at 231).
[19] *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976).
[20] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[21] *Board of Education v. Allen*, 392 U.S. 236 (1968).
[22] *Tilton v. Richardson*, 403 U.S. 692 (1971).
[23] *Bowen v. Kendrick*, 487 U.S. 589 (1988).
[24] *Zelman*, 536 U.S. 639.
[25] *Locke*, 540 U.S. at 718.

The majority opinion of the U.S. Supreme Court in *Locke v. Davey* stated that a state, consistent with the Establishment Clause of the U.S. Constitution, could include students seeking a degree in theology within the class of students eligible for academic achievement scholarships.[27] However, the majority also held that the Free Exercise of the U.S. Constitution does not require a theology student to be included within a generally available scholarship program.[28] [29]

The dissenting opinion in *Locke* found that the exclusion of theology students from a widely available scholarship program is in violation of the Free Exercise Clause. The test asserted by the dissent to determine whether a state may withhold a benefit as the result of religion was as follows:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.[30]

Accordingly, the *Locke* Court clearly rejected the idea that the failure to include theology students within the scholarship program was discrimination in violation of the Free Exercise Clause.[31]

Blaine Amendments

"Florida's no-aid provision was adopted into the 1868 Florida Constitution during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions."[32]

> Blaine Amendments are provisions in many state constitutions that prohibit the use of state funds at "sectarian" schools. They're named for James G. Blaine, who proposed such an amendment to the U.S. Constitution while he was Speaker of the U.S. House of Representatives in 1875.
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> The amendment passed overwhelmingly (180-7) in the House, but failed narrowly (by 4 votes) in the Senate. Supporters of the amendment then turned their attention to the individual states, where they had much more success. In some states, Blaine Amendments were adopted by the usual

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[26] *Id.* at 719.
[27] *Id.*
[28] *Id.*
[29] Similarly, s. 1009.89, F.S., creates the Florida Resident Access Grant Program to provide tuition assistance for students to attend certain private independent nonprofit colleges and universities in this state. However, the tuition assistance is not available to a student "enrolled in a program of study leading to a degree in theology or divinity." Section 1009.89(4)(b)2., F.S.
[30] *Locke*, 540 U.S. at 726-727.
[31] *Holmes II*, 886 So. 2d at 366.
[32] *Id.* at 351-352.

> constitutional amendment process. In the case of states just entering the Union, they were forced to adopt similar language as a requirement for gaining statehood.
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> Today, 37 states have provisions placing some form of restriction on government aid to "sectarian" schools that go beyond any limits in the U.S. Constitution. [33]

According to the Florida First District Court of Appeal:

> [w]hether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars. Certain commentators contend that the original Blaine-era no-aid provisions were based in part on anti-Catholic religious bigotry. Other commentators argue, however, that anti-Catholic bigotry did not play a significant role in the development of Blaine-era no-aid provisions in state constitutions.[34]

In contrast, a plurality opinion of the U.S. Supreme Court, authored by Justice Thomas, asserts that Blaine Amendments were motivated by an anti-Catholic bias.[35]

Florida's Blaine Amendment or no-aid provision imposes "further restrictions on the state's involvement with religious institutions than the Establishment Clause" of the U.S. Constitution.[36] [37]

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[33] The Becket Fund for Religious Liberty, What are Blaine Amendments?, http://www.blaineamendments .org/ Intro/whatis.html (last visited Jan. 14, 2008).
[34] *Holmes II*, 886 So. 2d at note 9 (citations omitted).
[35] *Mitchell v. Helms* 530 U.S. 793 828-829 (2000). Justice Thomas wrote:

> Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for "the implied exclusion of the less favored," . . . the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S., at 743, 93 S.Ct. 2868, it coined the term "pervasively sectarian"-a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.
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> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Id. (citations omitted).
[36] *Holmes II*, at 344.

> The constitutional prohibition in the no-aid provision involves three elements: (1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used "directly or indirectly in aid of" the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[38]

Florida's Blaine Amendment became widely known recently as it was used as a basis, by the First District Court of Appeal in *Bush v. Holmes*, to invalidate the Opportunity Scholarship Program (OSP).[39]

> The Legislature created the OSP to allow a student attending a "failing" public school to attend a private school, sectarian or non-sectarian, with the financial assistance of the state. Under the OSP, the state make[s] available opportunity scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school. . . .
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> For the student attending a private school with assistance under the OSP, a state warrant is made payable to a student's parent or guardian and is mailed by the Department of Education directly to the private school chosen by the parent or guardian; the parent or guardian then is to restrictively endorse the warrant to the private school.[40]

Most of the OSP vouchers went to sectarian schools.

State Programs Potentially in Violation of the Blaine Amendment

The dissenting opinion in *Bush v. Holmes* repeated the concerns of the Attorney General that the majority opinion "would prohibit any religious institution from acting as a government service provider or participating in secular general welfare programs where there is only an incidental benefit to religion."[41] As a result, "various legislative programs, in addition to Opportunity Scholarships, that eligible persons may utilize at private educational institutions across Florida, including those that are religiously

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[37] One could argue that the Establishment Clause of the First Amendment permits a state to discriminate on the basis of religion and that Florida's Blaine Amendment requires such discrimination. *See Locke v. Davey* 540 U.S. 712 (2004); *Holmes II*, 886 So. 2d 340.

[38] *Holmes II*, 886 So. 2d at 352.

[39] *Holmes II*, 886 So. 2d 340. The Florida Supreme Court also invalidate the Opportunity Scholarship Program for violating the uniformity requirement of section 1 of article IX of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

[40] *Holmes II*, 886 So. 2d at 347.

[41] *Holmes II*, 886 So. 2d at 376-377 (Polston, J., dissenting).

affiliated or operated," may be unconstitutional under the Blaine Amendment.[42] These programs include the:

- Florida Bright Futures Scholarship Program;
- John M. McKay Scholarships for Students with Disabilities Program;
- Florida Private Student Assistance Grant Program;
- William L. Boyd, IV, Florida Resident Access Grants;
- Florida Partnership for School Readiness;
- Florida Postsecondary Student Assistance Grant Program;
- Jose Marti Scholarship Challenge Grant Program;
- Mary McLeod Bethune Scholarship Program;
- Critical Teacher Shortage Student Loan Forgiveness Program; and
- Minority Teacher Education Scholars Program.

No fewer than 23 religiously affiliated or operated private four-year universities in Florida are eligible to receive Bright Futures scholarship funds.[43]

However, the majority in *Bush v. Holmes* stated that its opinion "leaves for another day, if need be, a decision on the constitutionality of any other government program or activity which involves a religious or sectarian institution."

Public School System as the Exclusive Means for Educating Children and Uniformity
Article IX, section 1(a) of the Florida Constitution states in part:

> 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 Supreme Court has interpreted Article IX, section 1(a) of the Florida Constitution to mean that "the system of free public schools … is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children."[44] Thus, state funding of alternatives violates the Florida Constitution.

The uniformity requirement of Article IX, section 1(a) requires that the system of free public schools be "uniform."[45] The uniformity requirement:

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[42] *Id.*
[43] *Id.*
[44] *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006).
[45] *Id.*

> only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature. The constitutional mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts.[46]

The uniformity requirement also was used as a basis to invalidate the Opportunity Scholarship Program (OSP) in *Bush v. Holmes.* The Court stated that the OSP made "no provision to ensure that the private school alternative to the public school system me[t] the criterion of uniformity."[47] According to the Court, the private school alternative was not uniform with the public school system for the following reasons:

- The Legislature did not regulate private schools, but regulated public schools.
- Private school curriculum and teachers are not subject to the same standards as those in force in public schools.
- Public school teachers must be certified by the state. Private school teachers need not be certified by the state.
- Public school teachers must submit to background screening. Background screening is not required of private school employees.
- Public education is based on the Sunshine State Standards. The curriculum standards of private schools may differ from the Sunshine State Standards.

III. Effect of Proposed Changes:

Opinions of the First District Court of Appeal and the Florida Supreme Court in the *Bush v. Holmes* cases found that:

- The Blaine Amendment of Article I, section 3 of the Florida Constitution prohibits the Legislature from using state funds directly or indirectly in aid of any church, sect or religious denomination, or any sectarian institution including private religious schools.
- Article IX, section 1(a) of the Florida Constitution makes the public school system the exclusive means by which the state must educate children.
- The uniformity requirement of Article IX, section 1(a) of the Florida Constitution would require private schools receiving state funds to be subject to the same or similar regulations governing public schools.

Constitutional Proposal 40 effectively reverses opinions of First District Court of Appeal and the Supreme Court in the *Bush v. Holmes* cases. This result is accomplished by:

- The implicit repeal of the Blaine Amendment of Article I, section 3 of the Florida Constitution.

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[46] *St. Johns County v. North East Florida Builders Assn, Inc.*, 583 So. 2d 635, 641 (Fla. 1991).
[47] *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006).

- Authorizing the Legislature to fund alternatives to the public school system.
- Providing that a person may choose to be educated by a publicly-financed private service provider that meets their unique needs.

The Blaine Amendment is implicitly repealed by permitting public services to be provided through private providers having a religious nature. Moreover, the measure permits the funding of religious providers and participants in public programs, "notwithstanding this Article [I]," which contains the Blaine Amendment.

The measure authorizes funding of alternatives to the public school system by authorizing funding of private providers. The uniformity requirement appears to be inapplicable as a publicly-financed private education may conform to a person's "unique needs." Moreover, the measure permits funding of religious or private providers, "notwithstanding . . . Article IX, section 1," which includes the uniformity requirement.

The measure expressly provides that the provision of public services through a private provider must be authorized by law and that the measure does not create an entitlement to a publicly-financed program.

IV. Constitutional Issues:

Despite the flexibility permitted by CP 40 to fund private, religious providers of public services, any funding must be permissible under the Establishment and Free Exercise Clauses of the U.S. Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private entities affiliated with a religion will be able to participate as providers of public services as authorized by law. Recipients of public services through private providers may have more choices.

C. Government Sector Impact:

The Government may have more private providers available through which public services may be provided.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The use of the word, “legislature” on line 31 may limit the ability to fund private or religious providers of public services to the Legislature. The Commission may wish to consider whether the wording should be changed to clarify that funding of private, religious providers of public services is permissible at all levels of government.