RECOMMENDATIONS TO GOVERNOR BUSH
ON THE DIVISION OF CONSTITUTIONAL RESPONSIBILITIES
BETWEEN
THE FLORIDA LEGISLATURE AND THE BOARD OF GOVERNORS
OF THE STATE UNIVERSITY SYSTEM

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Both the Florida Legislature and the Board of Governors of the State University System
are constitutional bodies. They differ in that the Legislature is one of three distinct branches of
government, while the Board is a constitutional entity considered by the proponents of the
constitutional initiative to be within the Executive branch of government. Differing views as to
the extent to which the Constitution now gives authority over the university system to the
Legislature and to the Board, respectively, and the extent to which one body is given authority to
the exclusion of the other body, stem from the interaction of that authority.

As the Florida Supreme Court said in holding that creation of the Board would not
substantially affect two then-extant provisions of the Constitution relative to education, one of
which requires the Legislature to make adequate provision for the establishment, maintenance,
and operation of institutions of higher learning:

Even though the proposed amendment interacts with both
provisions...it does not substantially affect or change either one.

In re Advisory Opinion to Atty. Gen. re Local Trustees, 819 So. 2d 725, 730 (Fla. 2002). The
responsibility for setting “tuition and fees” for the state’s universities is one of the most
controversial issues arising from the voters’ creation of the Board, and presents the best case for
analyzing the interaction of constitutional powers over education policy.

The Legislature can claim constitutional responsibility to set tuition and fees from the
power inherent in that body as the branch of Florida’s government charged with making the laws
(Art. III, sections 1 and 7), raising and appropriating the money for government (Art. VII, section 1), and having responsibility for assuring the establishment, maintenance, and operation of institutions of higher learning. (Art. IX, section 1). This authority remained intact following adoption of Article IX, section 7, as the Florida Supreme Court recognized when it held that the proposed amendment met the one subject requirement of the Constitution, because the amendment would not substantially alter or perform the function of multiple branches of government. *Local Trustees*, 819 So. 2d at 729-32. Proposed HB 1001 relies on these constitutional powers as the basis of its authority to establish tuition and fees. See HB 1001 at line 236.

The Board can claim constitutional authority to set tuition and fees from the adoption of Section 7 of Article IX by the voters of Florida, based on the well-accepted legal principle that the meaning of an amendment to the Florida Constitution which was adopted through the initiative process is construed to reflect the intent of the framers of the proposal and the voters who approved the proposal. *E.g., Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004). There is clear evidence from the framers of the proposal which created the Board, made public prior to its adoption, that they intended the Board to have the power to set tuition and fees. See August 23, 2002, letter from Education for Excellence for Florida to the Secretary of the Florida Board of Education, at page 7. Further support for the Board’s power to set tuition and fees comes from the judicial construction of section 7 of Article IX as “self-executing.” *NAACP, Inc. v. Florida Bd. of Regents*, 876 So. 2d 636, 639 (Fla. 1st DCA), review dismissed, 882 So. 2d 386 (Fla. 2004).

While the claims of the Legislature and the Board are both valid, I believe the Legislature and the Board in reality *share* responsibility for setting tuition and fees. I do not read the directives in section 7 of Article IX — that the Board’s management of the university system is subject to the Legislature’s power to appropriate, and that the Board must account for expenditures as provided by law — as a delineation of the only areas in which the Board is subjected to the power of the Legislature. The creation of a constitutional body results in "a
certain blending of powers," and "no department, not even the legislative, has unlimited power under our system of government." *Sylvester v. Tindall*, 18 So. 2d 892, 899 (Fla. 1944) (citation omitted).

This notion of shared responsibility prompted the Supreme Court to "look to the essential nature and effect" of another constitutional body formed by initiative, the Florida Commission on Ethics, in the face of a contention that it possessed constitutional status separate from the other branches of government, and to "compare the commission's powers with those assigned to each branch of our government." *Commission on Ethics v. Sullivan*, 489 So. 2d 10, 12 (Fla. 1986) (citation omitted). The Court's evaluation in that case reflected

[the] general rule . . . that no one provision of the constitution is to be separated from all the others, to be considered alone, but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument.

*Sylvester v. Tindall*, 18 So. 2d at 900.

Public policy with respect to the broad goals for the education system in Florida certainly rests with the Legislature, from creating the institutions deemed necessary for the delivery of higher education (such as community colleges and universities), to integrating higher education with the free public schools for kindergarten through twelfth grade and putting in place mechanisms to provide educational opportunities for Florida's children by such means as the Florida Bright Futures Scholarship Program and the Florida Prepaid College Program, to funding the entire education system through the appropriations process. On the other hand, the Board has responsibilities which affect the broad educational policies in Florida through its constitutionally prescribed responsibilities to articulate the missions of the state's universities with the free public schools and community colleges, to ensure well-planned coordination and operation of the state's university system, and to avoid a wasteful duplication of both facilities and programs. Art. IX, section 7(d).
In practical terms, consequently, neither body can be said to hold exclusive authority over the university segment of higher education, and neither body can effectively perform its responsibilities without the cooperation of the other. The necessity for cooperation is seen, for example, when one considers the implications for the Bright Futures and Prepaid College programs of the establishment of university tuition and fees. University tuition and fees are charged for a population which is not confined to students who are Florida residents, and for programs which have objectives unrelated to educating Floridians, such as research centers. Inevitably, however, the imposition of tuition and fees set by the Board has an effect on the Legislature's ability to finance programs created by the Legislature for Floridians, such as Bright Futures and Prepaid College.

It follows that any attempt to delineate legislative and Board responsibilities with a broad-brush, bright line, "all or nothing" approach - such as HB 1001's assignment of exclusive responsibility for setting tuition and fees to the Legislature - does not provide clarity for legislators or Board members seeking in good faith to carry out their constitutional duties. The same observation can be made with respect to some of the other provisions in HB 1001. That is not to say, however, that HB 1001's attempt to draw exclusive lines of responsibility is not an important step toward addressing the complexities brought into the state's education system by the voters' creation of the Board of Governors, or that the bill as drawn does not reflect a thoughtful and good faith effort to reconcile the constitutional duties of the Legislature and the Board with respect to education.

With a modest number of modifications, HB 1001 could be a significant step toward continuing the state's attempt to provide a seamless education system for Floridians. The following proposed amendments to HB 1001, as engrossed on March 29, would not provide the precisely drawn road map of responsibilities for the Legislature and the Board which many hope such a statute would create. They would, however, recognize the dual and overlapping responsibilities of the Legislature and the Board, and to that extent diffuse polarization among those who see clear lines of authority which, in our opinion, do not exist.
RECOMMENDATIONS

1. With respect to the Board's compliance with law:

Amend lines 210-11 of HB 1001 to read:

"the board's jurisdiction, all applicable federal laws, and all local and state laws not inconsistent with the board's exclusive constitutional authority."

2. With respect to the Board's responsibility in the area of bond finance:

Add a new subsection 13 after line 212 to read:

"13. Adopting with concurrent approval of the legislature, resolutions authorizing bond financing for the maintenance and construction of state university facilities."

3. With respect to the Board's role in setting tuition and fees:

Add a new subsection 14 after line 212 to read:

"Establishing tuition and fees for out-of-state students, and tuition and fees for in-state undergraduate students giving due regard to state educational policies and programs set by the Legislature and the articulation of university missions with free public schools and community colleges."

4. With respect to the Legislature's role in setting tuition and fees:

Delete line 236.

5. With respect to the Legislature's responsibility for financial aid.

Amend line 238 to read:

"student financial aid not inconsistent with financial aid policies adopted by the Board."

6. With respect to the Legislature's maintenance of fiscally and actuarially sound state-administered health and casualty insurance programs:

Amend line 252 to read:

"(SUNCOM), and the state casualty insurance program; except to the extent that the Board of Governors adopts non-state administered health and casualty insurance programs which are actuarially and fiscally sound and have no substantial long-term or
short-term adverse financial effects on state-administered health
and casualty programs.”

7. With respect to the Legislature’s exercise of the police power:

Amend line 258 to read:

“on the campuses of institutions of higher learning, taking into
consideration comparable or related policies adopted by the Board
of Governors.”
A bill to be entitled
An act relating to governance of the State University System; providing definitions; specifying the constitutional duties of the Board of Governors of the State University System under s. 7, Art. IX of the State Constitution; specifying the constitutional duties of the Legislature; providing legislative intent; providing an effective date.

WHEREAS, in 1999, the Florida Legislature, in its efforts to provide for a uniform, efficient, safe, secure, and high quality system of free public schools enacted chapter 99-398, Laws of Florida, the A+ Plan for transforming Florida schools, which provided a school grading system and strengthened Florida's education accountability system; and, in 2000, the Florida Legislature enacted chapter 2000-321, Laws of Florida, the Florida Education Governance Reorganization Act of 2000, which restructured the state's public education system to create a seamless K-20 system and repealed the Florida Board of Regents, an entity previously established by the Legislature to govern the administration of the State University System, and

WHEREAS, in 2000, the Legislature consolidated the administration of Florida's institutions of higher education with grades K through 12 in the Florida Board of Education (later the State Board of Education) and the Commissioner of Education, and

WHEREAS, in 2002, Florida voters amended the State Constitution to create the Board of Governors to administer the
management of the State University System, and

WHEREAS, the ballot summary stated that the Board of
Governors would "be responsible for the coordinated and
accountable operation of the whole university system" but did
not mention any limitation of legislative powers, and

WHEREAS, in its review of the ballot title and summary to
the initiative proposal creating the Board of Governors, the
Florida Supreme Court found that the amendment would authorize
"the statewide board of governors to 'operate, regulate,
control, and be fully responsible for the management of the
whole university system' which is currently the legislative
responsibility and duty of the Florida Board of Education, an
organization located within the cabinet system of the executive
branch," [Advisory Opinion to the Attorney General Re Local
Trustees, 819 So.2d 725, 729 (Fla. 2002)], thereby equating the
powers of the Board of Governors to the powers that had
previously been allotted by the Legislature to the Board of
Education, and

WHEREAS, the Florida Supreme Court found that the ballot
title and summary for the proposed amendment plainly and
unequivocally expressed its chief purpose and that this purpose
"does not substantially affect or alter any provision in the
State Constitution" [Id. at 732], and

WHEREAS, the Court's advisory opinion indicates that the
Court interpreted "the plain unequivocal language" of the
proposal's ballot summary as not making fundamental changes
redistributing legislative power to an entity within another
branch, which would alter the balance of governmental powers,
and

WHEREAS, since 1968 and continuing through today, section 1
of Article IX of the State Constitution provides that
"[a]dequate provision shall be made by law for ... the
establishment, maintenance, and operation of institutions of
higher learning ...," and

WHEREAS, as of November 2002, the Board of Governors is
charged by section 7 of Article IX of the State Constitution
with the responsibility to "operate, regulate, control, and be
fully responsible for the management of the whole university
system," and

WHEREAS, the canons of Florida statutory construction
require that laws on the same subject are to be construed "in
harmony with one another" so as not to render any part
meaningless based upon the presumption that the people would not
have adopted useless constitutional law [See, e.g., Unruh v.
State, 569 So.2d 242 (Fla. 1990); see, also, State ex rel. McKay
v. Keller, 191 So. 542 (Fla. 1939) (holding that principles
governing the construction of statutes are generally applicable
as well to the construction of constitutions)], and

WHEREAS, in accordance with these dictates, it is the
Legislature's intention herein to harmonize and give meaningful
effect to both sections 1 and 7 of Article IX of the State
Constitution, and

WHEREAS, the First District Court has held (1) that the
Board of Governors is the public employer for state university
employees or at least is entitled to name the public employer

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1st DCA 2004)]; and (2) that the Board of Governors controls the
admissions policies of state universities [NAACP v. Fla. Bd. Of
Regents, 875 So.2d 636 (Fla. 1st DCA 2004)]; and, in dicta,
without considering existing portions of Article IX,
specifically those in section 1, and without any sufficiently
interested parties raising alternative arguments, the First
District Court has suggested that the Board of Governors’ power
is subject only to the Legislature’s authority to appropriate
funds, confirm appointed members of the board, and set staggered
terms for the appointed members, and

WHEREAS, such a view renders meaningless section 1 of
Article IX and grants greater powers to the Board of Governors
than the State Constitution dictates, while stripping the
Legislature of powers in a manner not intended by Floridians,
and

WHEREAS, litigants in Floridians for Constitutional
Integrity, Inc., et al. v. State Board of Education and Board of
Governors, Case No. 04-CA-3040, filed in the Second Judicial
Circuit in and for Leon County, Florida, have alleged that the
2002 amendment so altered the State Constitution that the
Legislature cannot enact laws controlling the policy or
direction of the State University System, that the Board of
Governors is not subject to legislative control, that the Board
of Governors controls such public funds as tuition and student
fees and federal contracts and grants, and that all authority
over the State University System was transferred by the 2002
amendment to the Board of Governors subject only to legislative
appropriation authority of only the state’s general revenues,
WHEREAS, on the contrary, the Florida Supreme Court stated that while the 2002 amendment interacts with section 1 of Article IX, "it does not substantially affect or change" it [Advisory Opinion, Id. at 730], and

WHEREAS, the allegations of the plaintiffs in Floridians for Constitutional Integrity, Inc., cannot be reconciled with the Court's holding in Advisory Opinion to the Attorney General, infra, because the essence of legislative power is the exercise of policy-related discretion over the content of law and were the 2002 amendment construed to have given all lawmaking authority except for the authority to appropriate funds to the Board of Governors that certainly would have effectuated a very significant and substantial alteration to multiple provisions in the State Constitution, and

WHEREAS, section 7 of Article IX of the State Constitution does not expressly provide for the Board of Governors to exercise all legislative powers save the power to appropriate, and

WHEREAS, it is the duty of the Florida Legislature to uphold section 3 of Article II of the State Constitution and safeguard the powers of one branch of government from encroachments from entities of the other branches, and

WHEREAS, the Legislature has found that the powers of the Legislature in section 1 of Article IX of the State Constitution and the powers of the Board of Governors in section 7 of Article IX of the State Constitution must and can be defined in harmony to give each entity its full measure of constitutional

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responsibility while fitting together in the balanced symmetry envisioned by the voters of Florida who expressed their desire for a Board of Regents type of executive oversight of the State University System, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Responsibility for the State University System under s. 7, Art. IX of the State Constitution; legislative findings and intent.--
(1) LEGISLATIVE FINDINGS.--
(a) Definitions.--For purposes of this act, the term:
1. "Board of Governors" as it relates to the State University System and as used in s. 7, Art. IX of the State Constitution and Title XLVIII and other sections of the Florida Statutes is the Board of Governors of the State University System which belongs to and is part of the executive branch of state government.
2. "Institutions of higher learning" as used in the State Constitution and the Florida Statutes includes publicly funded state universities.
3. "Public officer" as used in the Florida Statutes includes members of the Board of Governors.
4. "State university" or "state universities" as used in the State Constitution and the Florida Statutes are agencies of the state which belong to and are part of the executive branch of state government. This definition of state universities as state agencies is only for the purposes of the delineation of
constitutional lines of authority. Statutory exemptions for
state universities from statutory provisions relating to state
agencies that are in effect on the effective date of this act
remain in effect and are not repealed by virtue of this
definition of state universities.

(b) Constitutional duties of the Board of Governors of the
State University System.--In accordance with s. 7, Art. IX of
the State Constitution, the Board of Governors of the State
University System has the duty to operate, regulate, control,
and be fully responsible for the management of the whole
publicly funded State University System and the board, or the
board's designee, has responsibility for:

1. Defining the distinctive mission of each constituent
university.

2. Defining the articulation of each constituent
university in conjunction with the Legislature's authority over
the public schools and community colleges.

3. Ensuring the well-planned coordination and operation of
the State University System.

4. Avoiding wasteful duplication of facilities or programs
within the State University System.

5. Accounting for expenditure of funds appropriated by the
Legislature for the State University System as provided by law.

6. Submitting a budget request for legislative
appropriations for the institutions under the supervision of the
board as provided by law.

7. Adopting strategic plans for the State University
System and each constituent university.
8. Approving, reviewing, and terminating State University System degree programs.

9. Governing admissions to the state universities.

10. Serving as the public employer with respect to all public employees of state universities for collective bargaining purposes.

11. Establishing a personnel system for all state university employees; however, the Department of Management Services shall retain authority over state university employees for programs established in ss. 110.123, 110.1232, 110.1234, 110.1238, and 110.161, Florida Statutes, and in chapters 121, 122, and 338, Florida Statutes.

12. Complying with, and enforcing for institutions under the board's jurisdiction, all applicable local, state, and federal laws.

(c) Constitutional duties of the Legislature.—In accordance with s. 3, Art. II of the State Constitution, which establishes the separation of powers of the three branches of government; s. 1, Art. III of the State Constitution, which vests the legislative power of the state in the Legislature; s. 8, Art. III of the State Constitution, which provides the exclusive executive veto power of the Governor and the exclusive veto override power of the Legislature; s. 19, Art. III of the State Constitution, which requires the Legislature to enact state planning and budget processes and requirements for budget requests by general law; s. 1, Art. VII of the State Constitution, which requires that the authority to expend state funds be by general law enacted by the Legislature; and s. 1,
Art. IX of the State Constitution, which requires the
Legislature to make adequate provision by law for the
"establishment, maintenance, and operation of institutions of
higher learning," the Legislature has the following
responsibilities:

1. Making provision by law for the establishment,
maintenance, and operation of institutions of higher learning
and other public education programs that the needs of the people
may require.

2. Appropriating all state funds through the General
Appropriations Act or other law.

3. Establishing tuition and fees.

4. Establishing policies relating to merit and need-based
student financial aid.

5. Establishing policies relating to expenditure of,
accountability for, and management of funds appropriated by the
Legislature or revenues authorized by the Legislature. This
includes, but is not limited to, policies relating to:
budgeting; deposit of funds; investments; accounting;
purchasing, procurement, and contracting; insurance; audits;
maintenance and construction of facilities; property; bond
financing; leasing; and information reporting.

6. Maintaining the actuarial and fiscal soundness of
centrally administered state systems by requiring state
universities to continue to participate in programs such as the
Florida Retirement System, the state group health insurance
programs, the state telecommunications and data network
(SUNCOM), and the state casualty insurance program.
7. Establishing and regulating the use of state powers and protections, including, but not limited to, eminent domain, certified law enforcement, and sovereign immunity.

8. Establishing policies relating to the health, safety, and welfare of students, employees, and the public while present on the campuses of institutions of higher learning.

(2) LEGISLATIVE INTENT.--It is the intent of the Legislature to enact laws relating to the Board of Governors of the State University System, the university boards of trustees, the State Board of Education, and the postsecondary education system in accordance with the findings of this act.

Section 2. This act shall take effect upon becoming a law.