

**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 tuitions 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.”

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1                                   A bill to be entitled  
2           An act relating to governance of the State University  
3           System; providing definitions; specifying the  
4           constitutional duties of the Board of Governors of the  
5           State University System under s. 7, Art. IX of the State  
6           Constitution; specifying the constitutional duties of the  
7           Legislature; providing legislative intent; providing an  
8           effective date.

9  
10           WHEREAS, in 1999, the Florida Legislature, in its efforts  
11           to provide for a uniform, efficient, safe, secure, and high  
12           quality system of free public schools enacted chapter 99-398,  
13           Laws of Florida, the A+ Plan for transforming Florida schools,  
14           which provided a school grading system and strengthened  
15           Florida's education accountability system; and, in 2000, the  
16           Florida Legislature enacted chapter 2000-321, Laws of Florida,  
17           the Florida Education Governance Reorganization Act of 2000,  
18           which restructured the state's public education system to create  
19           a seamless K-20 system and repealed the Florida Board of  
20           Regents, an entity previously established by the Legislature to  
21           govern the administration of the State University System, and

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

27           WHEREAS, in 2002, Florida voters amended the State  
28           Constitution to create the Board of Governors to administer the

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29 management of the State University System, and

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

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

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

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

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57 and

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

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

68 WHEREAS, the canons of Florida statutory construction  
 69 require that laws on the same subject are to be construed "in  
 70 harmony with one another" so as not to render any part  
 71 meaningless based upon the presumption that the people would not  
 72 have adopted useless constitutional law [See, e.g., *Unruh v.*  
 73 *State*, 669 So.2d 242 (Fla. 1996); see, also, *State ex rel. McKay*  
 74 *v. Keller*, 191 So. 542 (Fla. 1939) (holding that principles  
 75 governing the construction of statutes are generally applicable  
 76 as well to the construction of constitutions)], and

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

81 WHEREAS, the First District Court has held (1) that the  
 82 Board of Governors is the public employer for state university  
 83 employees or at least is entitled to name the public employer  
 84 for them [*Fla. Pub. Emp. Council 79 v. PERC*, 871 So.2d 270 (Fla.

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85 1<sup>st</sup> DCA 2004)]; and (2) that the Board of Governors controls the  
86 admissions policies of state universities [NAACP v. Fla. Bd. Of  
87 Regents, 876 So.2d 636 (Fla. 1<sup>st</sup> DCA 2004)]; and, in dicta,  
88 without considering existing portions of Article IX,  
89 specifically those in section 1, and without any sufficiently  
90 interested parties raising alternative arguments, the First  
91 District Court has suggested that the Board of Governors' power  
92 is subject only to the Legislature's authority to appropriate  
93 funds, confirm appointed members of the board, and set staggered  
94 terms for the appointed members, and

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

100 WHEREAS, litigants in *Floridians for Constitutional*  
101 *Integrity, Inc., et al. v. State Board of Education and Board of*  
102 *Governors*, Case No. 04-CA-3040, filed in the Second Judicial  
103 Circuit in and for Leon County, Florida, have alleged that the  
104 2002 amendment so altered the State Constitution that the  
105 Legislature cannot enact laws controlling the policy or  
106 direction of the State University System, that the Board of  
107 Governors is not subject to legislative control, that the Board  
108 of Governors controls such public funds as tuition and student  
109 fees and federal contracts and grants, and that all authority  
110 over the State University System was transferred by the 2002  
111 amendment to the Board of Governors subject only to legislative  
112 appropriation authority of only the state's general revenues,

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113 and

114 WHEREAS, on the contrary, the Florida Supreme Court stated  
115 that while the 2002 amendment interacts with section 1 of  
116 Article IX, "it does not substantially affect or change" it  
117 [Advisory Opinion, Id. at 730], and

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

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

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

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

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

145

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

147

148 Section 1. Responsibility for the State University System  
149 under s. 7, Art. IX of the State Constitution; legislative  
150 findings and intent.--

151 (1) LEGISLATIVE FINDINGS.--

152 (a) Definitions.--For purposes of this act, the term:

153 1. "Board of Governors" as it relates to the State  
154 University System and as used in s. 7, Art. IX of the State  
155 Constitution and Title XLVIII and other sections of the Florida  
156 Statutes is the Board of Governors of the State University  
157 System which belongs to and is part of the executive branch of  
158 state government.

159 2. "Institutions of higher learning" as used in the State  
160 Constitution and the Florida Statutes includes publicly funded  
161 state universities.

162 3. "Public officer" as used in the Florida Statutes  
163 includes members of the Board of Governors.

164 4. "State university" or "state universities" as used in  
165 the State Constitution and the Florida Statutes are agencies of  
166 the state which belong to and are part of the executive branch  
167 of state government. This definition of state universities as  
168 state agencies is only for the purposes of the delineation of

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169 constitutional lines of authority. Statutory exemptions for  
170 state universities from statutory provisions relating to state  
171 agencies that are in effect on the effective date of this act  
172 remain in effect and are not repealed by virtue of this  
173 definition of state universities.

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

181 1. Defining the distinctive mission of each constituent  
182 university.

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

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

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

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

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

195 7. Adopting strategic plans for the State University  
196 System and each constituent university.

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- 197 8. Approving, reviewing, and terminating State University  
198 System degree programs.
- 199 9. Governing admissions to the state universities.
- 200 10. Serving as the public employer with respect to all  
201 public employees of state universities for collective bargaining  
202 purposes.
- 203 11. Establishing a personnel system for all state  
204 university employees; however, the Department of Management  
205 Services shall retain authority over state university employees  
206 for programs established in ss. 110.123, 110.1232, 110.1234,  
207 110.1238, and 110.161, Florida Statutes, and in chapters 121,  
208 122, and 238, Florida Statutes.
- 209 12. Complying with, and enforcing for institutions under  
210 the board's jurisdiction, all applicable local, state, and  
211 federal laws.
- 212 (c) Constitutional duties of the Legislature.--In  
213 accordance with s. 3, Art. II of the State Constitution, which  
214 establishes the separation of powers of the three branches of  
215 government; s. 1, Art. III of the State Constitution, which  
216 vests the legislative power of the state in the Legislature; s.  
217 8, Art. III of the State Constitution, which provides the  
218 exclusive executive veto power of the Governor and the exclusive  
219 veto override power of the Legislature; s. 19, Art. III of the  
220 State Constitution, which requires the Legislature to enact  
221 state planning and budget processes and requirements for budget  
222 requests by general law; s. 1, Art. VII of the State  
223 Constitution, which requires that the authority to expend state  
224 funds be by general law enacted by the Legislature; and s. 1,

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225 Art. IX of the State Constitution, which requires the  
226 Legislature to make adequate provision by law for the  
227 "establishment, maintenance, and operation of institutions of  
228 higher learning," the Legislature has the following  
229 responsibilities:

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

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

236 3. Establishing tuition and fees,

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

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

247 6. Maintaining the actuarial and fiscal soundness of  
248 centrally administered state systems by requiring state  
249 universities to continue to participate in programs such as the  
250 Florida Retirement System, the state group health insurance  
251 programs, the state telecommunications and data network  
252 (SUNCOM), and the state casualty insurance program.

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253 7. Establishing and regulating the use of state powers and  
254 protections, including, but not limited to, eminent domain,  
255 certified law enforcement, and sovereign immunity.

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

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

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