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Florida Constitutional Law: Reducing Legislative Discretion: A Clearly Unclear Application of Expressio Unius

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FLORIDA CONSTITUTIONAL LAW: REDUCING LEGISLATIVE DISCRETION: A CLEARLY UNCLEAR APPLICATION OF *EXPRESSIO UNIUS*

Bush v. Holmes, 919 So. 2d 392 (Fla. 2006)

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The Opportunity Scholarship Program (OSP) provided public school students with the option of transferring to either an eligible private school or to another public school that met certain academic requirements.[1] If the student chose a private school, the State would then issue a voucher for the amount that it would have cost for the student to attend the former public school.[2] Along with other interested groups, parents of schoolchildren brought several constitutional challenges to the OSP.[3] Disagreeing with the Petitioners, a lower court declared the OSP unconstitutional.[4] However, a three-judge appellate panel reversed and remanded.[5] Following a subsequent order by the lower court declaring the OSP unconstitutional,[6] the appellate court issued an en banc decision affirming the order.[7] Since a district court of appeal had declared a state statute unconstitutional, the Supreme Court of Florida obligatorily

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* For my family, especially my father, Otto Hamann, whose inspiration led me to my current path, and for Rashelle, whose strength came at critical times.

1. Bush v. Holmes (*Holmes III*), 919 So. 2d 392, 397 (Fla. 2006). In order for the student to transfer, the public school must receive a failing performance grade for at least half of a four-year period, and the student must have attended the school for at least one year during the failing period. *See* Law of May 16, 2002, ch. 2002-387, § 103, 2002 Fla. Laws ch. 387 (codified as amended at FLA. STAT. § 1002.38 (2005), *invalidated by Holmes III*, 919 So. 2d 392 (Fla. 2006). The transferee public school must have a satisfactory performance grade to be eligible. *Id.* § 1002.38(1). Among other requirements, the transferee private school must be financially stable, conform to accrediting body standards of curriculum, and employ teachers with at least a baccalaureate degree, or a three-year minimum of "teaching experience in public or private schools." *Id.* § 1002.38(4).

2. *See id.* § 1002.38(6)(a).

3. *Holmes III*, 919 So. 2d at 398-99. The OSP was challenged under three sections of the Florida Constitution: article I, § 3, article IX, § 1, and article IX, § 6. *Id.* at 399. Complaints were also filed under the Establishment Clause of the First Amendment to the U.S. Constitution. *Id.*

4. *Id.* The trial court found the program facially unconstitutional only under article IX, § 1 of the Florida Constitution. *Id.*

5. Bush v. Holmes (*Holmes I*), 767 So. 2d 668, 675 (Fla. 1st DCA 2000). On remand, the plaintiffs dismissed challenges under the Establishment Clause and article IX, § 6. *Id.* at 399 & n.1.

6. *Holmes III*, 919 So. 2d at 399. "The trial court found that the OSP violated . . . article I, section 3. . . ." *Id.*

7. *Id.* at 399.

reviewed the decision,[8] and HELD, that the OSP violated article IX, § 1 of the Florida Constitution, because the OSP made public funds available to private schools.[9]

Historically, Florida courts interpreted the Florida Constitution as limiting legislative power.[10] In a facial constitutional challenge, courts often employ maxims of statutory construction to determine whether legislation falls within the bounds of the constitution.[11] Though not always used in constitutional interpretation, *expressio unius est exclusio alterius* is a principle of construction which provides that "'the expression of one thing implies the exclusion of another.'"[12] Consequently, courts have used *expressio unius* to invalidate statutory enactments as beyond the limits prescribed by the constitution.[13] However, as in *Marasso v. Van Pelt*,[14] courts sometimes use the maxim to restrict limitations that are merely

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8. *See* FLA. CONST. art. V, § 3(b)(1).

9. *Holmes III*, 919 So. 2d at 398. Article IX, § 1 of the Florida Constitution states, in relevant 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 . . . .

FLA. CONST. art. IX, § 1(a).

10. *Compare* State v. Bd. of Pub. Instruction, 170 So. 602, 606 (Fla. 1936) (stating that "[t]he power of the Legislature is inherent, though it may be limited by the Constitution."), *with* Savage v. Bd. of Pub. Instruction, 133 So. 341, 344 (Fla. 1931) (stating that the state constitution "is not a grant of power to the Legislature but a limitation only upon legislative power").

11. *See, e.g.*, Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (following statutory construction principles in interpreting the constitution); Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 501 (Fla. 2003) (using *in pari materia* to determine whether a statute was constitutional); Dep't of Envtl. Prot. v. Millender, 666 So. 2d 882, 886 (Fla. 1996) (resorting to *in pari materia* in construing a constitutional amendment as a whole); S & J Transp., Inc. v. Gordon, 176 So. 2d 69, 71 (Fla. 1965) (applying *expressio unius* to determine whether a statute was unconstitutional); Weinberger v. Bd. of Pub. Instruction, 112 So. 253, 256 (Fla. 1927) (applying *expressio unius* to interpret the constitutionality of a statute). *But cf.* Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992) (explaining "that where the language of a statute is plain and unambiguous," then "judicial interpretation" is inapplicable); A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931) (stating that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. . . .").

12. *Holmes III*, 919 So. 2d at 407.

13. *See S & J Transp., Inc.*, 176 So. 2d at 71-72 (using *expressio unius* to invalidate a statute that was clearly contradicting a constitutional provision); *Weinberger*, 112 So. at 256-59 (applying *expressio unius* to strike down a statute).

14. 81 So. 529 (Fla. 1919).

implied by the language of the constitution.[15]

In *Marasso*, the police arrested a man for possession of excessive amounts of liquor.[16] At the time, the Florida Constitution expressly prohibited the manufacture, sale, or trade of alcohol, but was silent on the legality of possession.[17] The legal issue was the constitutionality of a statute regulating alcohol possession.[18] As a foundation, the court stated that *expressio unius* should never be used to defeat legislative intent.[19] Recognizing that the Florida Constitution gave the legislature permission to "enact suitable laws" to enforce the constitutional provisions,[20] the court stressed that a statute which "has a real relation to the subject and object" of a constitutional provision is "suitable law."[21] Furthermore, the court rejected an application of *expressio unius* that would use constitutional silence as the sole basis for implied limits on legislative power.[22] Instead, the court found that implied limits on legislative power may only be used when absolutely necessary to implement an "express provision of the constitution."[23]

Essentially, by requiring necessity, the court indirectly acknowledged the notion that the Florida Constitution is a limitation, and not a grant, of power.[24] Since regulating alcohol possession not only effectuated the general purpose of the constitutional provisions—to discourage alcohol consumption—but actually promoted the specific express provisions,[25] the court held that the regulation was constitutional.[26] However, the *Marasso* court did not determine the degree of clarity needed to find the necessity required to impliedly limit legislative power.

Eight years later, the court further clarified the application of *expressio unius* in the context of the school system in *Weinberger v. Board of Public Instruction*.[27] The court considered whether the payment pattern of school district bonds, which conformed to statutory mandates, was constitutionally valid.[28] The constitutional provision at issue required the

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15. *See id.* at 530.
16. *Id.* at 529.
17. *Id.*
18. *Id.*
19. *Id.* at 530.
20. *Id.*
21. *Id.* at 532.
22. *Id.* at 530.
23. *Id.*
24. *See infra* note 68 and accompanying text.
25. *See Marasso*, 81 So. at 530 (discussing the article at issue's requirement that suitable laws be enacted to enforce it).
26. *Id.* at 532.
27. 112 So. 253, 256-57 (Fla. 1927).
28. *Id.* at 254.

school board to pay off the bonds according to a specific payment schedule.[29] However, a later statute authorized the school board, in its discretion, to determine the manner in which the bonds became payable.[30] Using *expressio unius*, the court stressed "that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner."[31] Recognizing that the three-year payment periods that the school board approved were incongruent with the constitutional schedule,[32] the court prohibited the legislature from allowing a discretionary payment pattern.[33] In analyzing whether the legislature acted contrary to an express limitation in the constitution, the court provided several guidelines.[34]

The court delineated three instances signifying express contradictions between statutes and constitutional provisions in an almost quantifiable framework.[35] By emphasizing a numerical measure, the court refined *Marasso*'s standard of absolute necessity.[36] According to the court, setting a specific threshold value in the constitution—such as the amount of votes necessary for authorization, the limit of debt incurred, or specific maturity dates—was critical to indicating a clear contradiction when compared to the legislative enactment.[37] In other words, where the statute opposed these clear quantifiable limits, there was a direct conflict rendering the statute void.[38] While the *Weinberger* court provided a means to analyze a conflict between statutes and constitutional provisions, it did not provide guidance for considering legislative purpose during the conflict analysis.

Marasso's refusal to apply *expressio unius* to nullify the statutory

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29. *Id.* The Florida Constitution required that the bonds be paid annually after three years of their initial issuance. *Id.*

30. *Id.*

31. *Id.* at 256; *see also infra* note 51. Another interpretation of *expressio unius* is that "'very nearly everything . . . in a state constitution operates as a restriction on the legislature, for . . . commands . . . directed to . . . government . . . will operate to invalidate inconsistent legislation.'" Bush v. Holmes (*Holmes II*), 886 So. 2d 340, 369 (Fla. 1st DCA 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006) (quoting Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964-65 (1968)).

32. *Weinberger*, 112 So. at 254, 257.

33. *Id.* at 259.

34. *Id.* at 257.

35. *See id.*

36. *See supra* note 23 and accompanying text (explaining that only absolute necessity triggers implied limits on legislative power).

37. The court drew a numerical nexus between the three examples, explaining that exceeding "the debt limit," not obtaining "a two-thirds vote," or not setting a specific maturity date were all similar since the illustrations clearly violated mandatory provisions. *See Weinberger*, 112 So. at 257.

38. *See id.* at 259.

objective raised questions that the court in *Taylor v. Dorsey*[39] attempted to resolve. In *Taylor*, a woman defaulted in paying her real estate broker.[40] The Florida Constitution stated that if a married woman bought or improved her property, she could be liable for those actions in a court of equity.[41] The legislature, on the other hand, enacted a statute giving a married woman the right to make contracts, and therefore be sued in a court of law for any contractual dispute.[42] The question was whether the statute was unconstitutional.[43] The court said no.[44] In analyzing whether claims had to be of a particular kind and in a particular court to trigger liability for a married woman, the court circumvented the *Weinberger* approach by focusing on the general constitutional purpose, and not solely on the specific provision.[45]

The court weighed two separate questions: whether the enactment's purpose was to specifically enumerate grounds for liability, or whether the constitution intended that the legislature act on specific matters.[46] The court chose the latter, thereby freeing the legislature to advance the constitutional objective by expanding the current list of permissible action.[47] Although the court failed to explicitly justify its interpretation, it mentioned that it "should be liberal in its interpretation . . . [and] every doubt should be resolved in favor of the constitutionality of the law."[48] Additionally, the court showed legislative deference by emphasizing that *expressio unius* should not be used frequently.[49]

The majority in the instant case acknowledged legislative deference, though merely as an introduction to its statutory construction analysis.[50] Instead, in striking down the OSP, it relied heavily on the *Weinberger* decision, and emphasized that express provisions of the constitution must be followed in the same way that they are prescribed, thus precluding execution in a different manner.[51] The majority then directed its attention

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39. 19 So. 2d 876 (Fla. 1944).
40. *Id.* at 877-80.
41. *Id.* at 880.
42. *Id.*
43. *Id.*
44. *Id.* at 882.
45. *See id.*
46. *Id.*
47. *See id.*
48. *Id.*
49. *See id.* at 881.
50. *Holmes III*, 919 So. 2d 392, 405 (Fla. 2006). The majority began by stating that statutes are presumably constitutional. *Id.* However, after that statement, the majority abruptly concluded that the OSP was unconstitutional, and began its constitutional analysis. *See id.*
51. *Id.* at 407. The majority focused on the following language:

> Where the Constitution expressly provides the manner of doing a thing, it

to the article IX, § 1 language,[52] which in relevant part states that "[a]dequate provision shall be made . . . for a . . . system of free public schools."[53] Without mentioning the stringent standard in *Marasso*,[54] the instant court determined that because § 1 specifically provides the manner of fulfilling the educational obligation, a free education through private schools conflicts with the express provisions of the constitution.[55]

In concluding that the OSP directly conflicts with § 1, the majority addressed the dissenters' application of *Taylor*.[56] Justice Bell, joined by Justice Cantero, asserted that the purpose of § 1 is to ensure that legislative action is taken to provide for an adequate public school system, but not to proscribe other methods of attaining adequate state-funded education.[57] However, the majority disagreed, and concluded that § 1 encompasses every state obligation concerning children's education.[58]

The dissent criticized the majority's failure to distinguish *Weinberger* from the instant case.[59] Justice Bell argued that the provision in *Weinberger* clearly prohibited any deviations from the payment schedule, whereas § 1 provided no such clarity.[60] Justice Bell further argued that "[t]he OSP bears a real relation to the subject and object" of § 1; thus, under *Marasso*, it should be exempt from *expressio unius* scrutiny.[61]

The instant court drastically minimized legislative discretion by abandoning precedential guidelines. In particular, the majority failed to

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> impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Id. (quoting Weinberger v. Bd. of Pub. Instruction, 112 So. 253, 256 (Fla. 1927)).

52. *Id.*

53. FLA. CONST. art. IX, § 1(a); *see also supra* note 9.

54. *See supra* note 23 and accompanying text (explaining that only absolute necessity triggers implied limits on legislative power).

55. *See Holmes III*, 919 So. 2d at 408. The majority emphasized that any alternatives were prohibited. *Id.*

56. *Id.* at 407-08.

57. *Id.* at 421 (Bell, J., dissenting).

58. *See id.* at 408 (majority opinion).

59. *Id.* at 421 (Bell, J., dissenting).

60. *Id.* The dissent distinguished *Weinberger* by reasoning that *expressio unius* was used in *Weinberger* "only because the constitution forbade any action other than that specified in the constitution." *Id.* (quoting Bush v. Holmes (*Holmes I*), 767 So. 2d 668, 674 (Fla. 1st DCA 2000), *rev'd en banc*, 886 So. 2d 340 (Fla. 1st DCA 2004)).

61. *See Holmes III*, 919 So. 2d at 421.

acknowledge the factual presentations offered by *Weinberger*.[62] Though basing most of its reasoning on excerpts from that opinion, the majority ignored *Weinberger*'s quantifiable distinctions. Apparent in *Weinberger* was the prerequisite of having a clear contradiction, perhaps a number falling outside prescribed bounds, in order to apply *expressio unius* to impliedly exclude a statutory provision.[63] The instant case contained no such numerical parallel. While taken cumulatively, *Weinberger*, *Taylor*, and *Marasso* might not preclude using *expressio unius* solely because no numerical base was present, the instant dissent's criticism of using the maxim suggests a minimum requirement of extreme ambiguity.[64]

By avoiding the distinction between not clear and clearly contrary, the majority raises the concern which *Marasso* attempted to resolve: transforming a remote implication into an expressly conclusive limitation. Without question, *Weinberger* naturally accommodated *Marasso*'s necessity theme by identifying a crystal-clear contradicting provision.[65] Other courts have also based the application of the clearly contrary standard where the constitution specifically provides a list of an affected class of individuals, or where it is explicitly stated that a certain number of requirements must be met.[66] However, the instant court subverts this theme, not only because of the mere fact that disagreement among the majority and dissent is indicative that the provision is not particularly clear,[67] but because a broad interpretation of implied limitations erodes the function of the state constitution: to limit, not grant, legislative power.[68]

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62. The majority used part of the law developed in *Weinberger*, but failed to mention any fact whatsoever relevant to that decision. *See id.* at 407 (majority opinion).

63. *See supra* note 37 and accompanying text.

64. *See supra* notes 22-23 and accompanying text. Interestingly enough, the majority acknowledged that the language of § 1 was *not* clear in order to resort to using maxims of statutory construction. *Holmes III*, 919 So. 2d at 408. The dissent argued that nothing in the provision "requires that public schools be the sole means by which the State fulfills its duty," since § 1 does not express "that the government's provision for education shall be 'by' or 'through' a system of free public schools." *Id.* at 415-16 (Bell, J., dissenting).

65. *See supra* notes 29-30 and accompanying text (discussing the provision involved in *Weinberger*).

66. *See, e.g.*, Sch. Bd. v. State, 353 So. 2d 834, 839 (Fla. 1977) (applying *expressio unius* where the statute *specifically enumerated* certain individuals that would be affected by a uniform salary requirement to prevent others from being affected); S & J Transp., Inc. v. Gordon, 176 So. 2d 69, 71-72 (Fla. 1965) (applying *expressio unius* to invalidate a statute which related only to Dade County, since the constitutional provision specifically stated that the statute shall relate to more than only Dade County); Chapman v. Reddick, 25 So. 673, 676-77 (Fla. 1899) (rejecting the application of *expressio unius* since it was not clearly contrary from the constitutional provision whether particular persons would be subject to extraterritorial jurisdiction by certain courts).

67. *See supra* note 64 and accompanying text.

68. It is useful to view the logic of this statement in three scenarios. If scenario 1 assumes that the constitution functions as a grant of power, then logically the legislature has power to enact only what is provided for in the constitution. Scenario 2 assumes that the constitution functions

Logic dictates that if the constitution functioned as a power grant, then the instant court would be correct in its analysis. Thus, solely not mentioning private schools in the constitution would automatically proscribe any legislation funding them. However, this is not the case, and as a result, a sweeping application of *expressio unius* to curtail legislation by essentially implying debatable conclusions is incompatible with *Marasso* and *Weinberger*.

Furthermore, the instant court departs from *Taylor* by glossing over *Taylor's* willingness to defer to the legislature whenever possible.[69] *Taylor* proposed two theories on interpreting the primary purpose of a constitutional enactment: either to bring attention to the legislature on specific matters, or to provide a comprehensive manner of resolving an objective.[70] That interpretive decision came with the primer of a presumption of constitutionality in favor of the legislation.[71] Indeed, the instant court mentions legislative deference, but virtually ignores it.[72]

Instead, the instant court focuses on the breadth of the provision's purpose rather than on the drafters' intent to provide a comprehensive

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purely as a limitation on power, therefore the legislature has the power to enact laws, unless prohibited by it. Scenario 3 results from the instant court decision: the constitution is essentially functioning as a grant of power, because any enactment not covered in the constitution, whether *clear or not*, is prohibited *unless* the court rules to permit it. Essentially, scenario 3 explains the reasoning behind the following statement: "The Constitution of this State is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid." Savage v. Bd. of Pub. Instruction, 133 So. 341, 344 (Fla. 1931).

69. *See supra* notes 48-49 and accompanying text. *Taylor* is one of many decisions affording deference to the legislature. *See, e.g.*, Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 51 (Fla. 2000) (reaffirming that a statute should be construed as constitutional whenever possible and citing VanBibbler v. Hartford Accident & Indem. Ins. Co., 439 So. 2d 880, 883 (Fla. 1983)); Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (holding that the Florida Constitution gave the legislature "enormous discretion" to provide for an adequate system of free public schools); State *ex rel.* Crim v. Juvenal, 159 So. 663, 664 (Fla. 1935) (emphasizing that courts may "declare laws unconstitutional *only* as a matter of imperative and unavoidable necessity . . . .") (emphasis added). In fact, lawmakers have relied on deference as a norm. *See, e.g.*, S.V. Date, *Governor's Power Can't Save Vouchers*, PALM BEACH POST, Jan. 7, 2006, at A7 (illustrating how Governor Jeb Bush relied on "built-in deference" to push the OSP for five years in spite of adverse court rulings).

70. *See supra* note 46 and accompanying text.

71. *See supra* note 48 and accompanying text; *see also* State *ex rel* Moodie v. Bryan, 39 So. 929, 956 (Fla. 1905) (stating that *expressio unius* should be used with great care). Some courts have even rejected the use of *expressio unius* altogether. *See, e.g.*, Penrod v. Crowley, 356 P.2d 73, 80 (Idaho 1960) (stating that *expressio unius* does not apply when construing the state constitution); Baker v. Martin, 410 S.E.2d 887, 891 (N.C. 1991) (suggesting that the reason why *expressio unius* has not been used in interpreting the state constitution is because it "flies directly in the face" of the principle of legislative power).

72. *See supra* note 50 and accompanying text.

manner of effectuating adequate education.[73] The majority's methodology supports the idea that by having a broad objective, the measures of executing the constitutional provisions must be an all-inclusive set.[74] Thus, the majority's interpretation would lend to the conclusion that if the purpose of a constitutional provision was to establish adequate healthcare, for example, then that enactment would necessarily have to include every manner of fulfilling that responsibility.[75] Clearly then, the instant court has placed legislative power at the mercy of a wide-ranging objective, thus creating more statutory conflict.[76]

Moreover, the majority's decision disrupts the consistency towards legislative deference in not only *Taylor*, but *Marasso* as well. In particular, the court's exclusion of private schools cannot be squared with the incredible legislative leeway evident in *Marasso*.[77] In fact, a plausible fit to the model developed by *Marasso* was demonstrated in the dissenting opinion.[78]

Most importantly, the instant court's approach has severe implications for separation of powers.[79] Clearly, a noticeable shift of power from the

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73. *See Holmes III*, 919 So. 2d 392, 407-08 (Fla. 2006). The majority fails to support the assertion that the intent of the drafters of the constitution was to provide for a "comprehensive statement of the state's responsibilities." *Id.* at 408.

74. *See id.* at 407-08. In *Taylor*, the purpose of the provision was analyzed in concluding whether *expressio unius* was applicable. *See* Taylor v. Dorsey, 19 So. 2d at 876, 882 (Fla. 1944). The instant court never explicitly mentioned the drafters' intent. Therefore, one possible explanation is that the majority inferred intent from applying *expressio unius*. But if that is the case, then not only did the instant court employ the approach in *Taylor* backwards, but constructed a method where a broad purpose is the only requirement to form a comprehensive set of responsibilities.

75. *See supra* note 74 and accompanying text. Moreover, this particular purpose would be even more problematic, since technological advances would necessitate the constant updating of manners of fulfilling adequate health.

76. *See supra* notes 74-75 and accompanying text.

77. *See supra* note 21 and accompanying text (explaining that a statute that "has a real relation to the subject and object" of the constitutional provision is "suitable law").

78. The dissent asserted that the OSP bears a relationship to the objective of § 1, since private schools do not prevent the legislature from ensuring an adequate public school system. *Holmes III*, 919 So. 2d at 421 (Bell, J., dissenting). Furthermore, the intermediate appellate court's majority panel opinion also justified advancing the objective of § 1. *See Holmes I*, 767 So. 2d 668, 676 (Fla. 1st DCA 2000), *rev'd en banc*, 886 So. 2d 340 (Fla. 1st DCA 2004) (recognizing that the legislature sought to increase expectations and foster "competition among [public] schools" by allowing private schools).

79. The instant court did not address the separation of powers doctrine, the idea behind which is that "no branch may encroach upon the powers of another." *See* Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991). This same position on the role of the legislature was given attention in major headlines. *See, e.g.*, Sam Dillon, *Florida Supreme Court Blocks School Vouchers*, N.Y. TIMES, Jan. 6, 2006, at A16 (quoting Governor Bush, who referred to the instant decision as "'challeng[ing] the power of the Florida Legislature to decide as a matter of public policy the best way to improve our educational system.'"). Furthermore, the Supreme Court of

legislature to the courts occurs by applying *expressio unius* in less than exceptionally transparent circumstances.[80] In so doing, a standard exposed to ambiguity, at least in this context, has considerable potential for abuse,[81] especially in a highly-politicized issue.[82] In sum, even where judicial minds differ, legislative discretion may be virtually non-existent because of the capability of courts to materialize remote implications and turn them into forceful limitations without even focusing on the substantive effect of the original exclusion.[83]

Prior to the instant decision, a meaningful nexus, characterized by unclouded necessity and a presumption of constitutionality, seemed to be well-established. While subtle distinctions helped to guide the fragile maxim's application, the instant decision ignores these, and instead marks a victory for judicial supremacy by constructing a novel tool from bits and pieces of a superficial overview of *expressio unius*. As a result, the legislature is left with the support of the voters, but at the will of seven individuals. Whether the new standard of employing *expressio unius* spurs extreme judicial activism is an answer dependent on the future self-restraint of the Florida courts. Until then, the maxim is certain to unveil itself in partisan disputes, and the only remedy for enforcing the OSP will be through a constitutional amendment.[84]

Florida has historically been a guardian of separation of powers. *See* State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000) ("This Court . . . in construing the Florida Constitution, has traditionally applied a strict separation of powers doctrine.").

80. *See supra* notes 68, 76 and accompanying text.

81. *See, e.g.*, John Tierney, *Black Students Lose Again*, N.Y. TIMES, Jan. 7, 2006, at A11 (quoting Clark Neily of the Institute for Justice as stating that "'[t]he judges decided what they wanted to reach and worked backward from there'").

82. *See id.* (suggesting that Democrats in Florida are attempting to remove black students from integrated schools). The author contends that the instant decision was a "politically creative solution to a delicate problem." *Id.* Furthermore, he suggests that the instant decision was "legally incoherent" given that "[t]he dissenters argue[d] persuasively that nothing in the Constitution forbids the Legislature" from allowing a program outside of the public school system. *Id.*

83. Given that the instant court was dealing with a facial challenge, it stated that § 1 "does not authorize additional equivalent alternatives" to public education before even analyzing whether the OSP prevents public schools from attaining adequate education. *Holmes III*, 919 So. 2d at 408 (majority opinion).

84. Governor Bush contended that the state will consider "amending the Florida Constitution." Dillon, *supra* note 79, at A16; *see also* Date, *supra* note 69, at A7 (quoting Senate President Tom Lee, who stated that although "[t]he court ruling may not have left a lot of latitude," the Florida Senate may "attempt[] to amend [the constitution]").