



**THE FLORIDA
SUPREME COURT:
JUDICIAL
ACTIVISM
& JUDICIAL
SELF-RESTRAINT –
SOME EXAMPLES**

Thomas C. Marks, Jr.

Pamela Buha





ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Society takes no position on particular legal or public policy questions, but is founded on the principles that the State exists to preserve freedom, that the separation of governmental powers is central to our Constitution and that it is emphatically the province and duty of the Judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce “white papers” on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.





The Florida Supreme Court: Judicial Activism & Judicial Self-Restraint— Some Examples

Thomas C. Marks, Jr.
Pamela Buha





The Florida Supreme Court: Judicial Activism & Judicial Self-Restraint—Some Examples

By Thomas C. Marks, Jr. & Pamela Buha*

This paper is about judicial activism and judicial self-restraint. These terms can mean different things to different people. However viewed, some approve of either or both and some do not; however, it is not the purpose of this paper to take sides in this age-old debate.¹

Activism waxes and wanes and can be traced back at least as far as Chief Justice John Marshall. If one considers what are probably his three most important opinions—*Marbury*,² *McCulloch*,³ and *Gibbons*⁴—each could easily be considered activist. Since this paper is about the Florida Supreme Court, let us take only the briefest of looks at Chief Justice Marshall’s approach in those three cases.

Marbury was activist for a very simple reason. It is a well-known rule of constitutional interpretation that if a statute can reasonably be read in a way that makes it constitutional, that is the way it should be read.⁵ This rule can be thought of as anti-activist since it results in the statute being found constitutional. Section 13 of the Judiciary Act of 1789⁶ could easily have been read as giving the U.S. Supreme Court the power to issue writs of mandamus when, and only when, that Court had jurisdiction under the U.S. Constitution. In fact, that is most likely the only reasonable way to read it. To view it as attempting to give the Court the power to issue

a writ of mandamus when the Court clearly had no jurisdiction under the Article III constitutional grant is arguably activist. In order to drive home the idea that the Court has the power to declare an act of Congress unconstitutional, a perfectly valid statute was struck down. In the earlier *Hylton*⁷ case, the Court had exercised judicial review and found an act of Congress constitutional. Surely, at some point, Congress would have enacted a law that was clearly unconstitutional, and the point Chief Justice Marshall wished to make could arguably have waited until then. Of course, there was the ongoing political battle with President Jefferson which, without a doubt, played a role.⁸

*McCulloch*⁹ was activist for a different reason. The word “necessary” in the Necessary and Proper Clause¹⁰ in its dictionary meaning¹¹ would have meant something like “essential” or “needed to achieve the result.” Marshall found it to mean something similar to “convenient.”¹² This, over time, proved to be an enormous source of Congressional power. In fact, it can be argued with some force that this was Marshall’s most important contribution to constitutional law.

*Gibbons*¹³ was activist for yet a third reason. Most readers will recall that the facts of the case involved Gibbons’ steam-powered vessel’s federal license to navigate in all the coastal waters of the United States. The principal question was whether Congress had the power to grant the license under its commerce power. Chief Justice Marshall was clearly within the facts of the case when he wrote that navigation is commerce.¹⁴ However, he went beyond those facts when he found that the “among the several States” portion of the Commerce Clause¹⁵ meant commerce that affects more than one state with the clear implication that a state line did not have to be crossed.¹⁶ The state line between New Jersey and New York was crossed, and his exposition on that part of the Commerce Clause arguably could have ended there.

* *Thomas C. Marks, Jr.* is Professor of Law at Stetson University. He wishes to thank his co-author for her contributions to this paper, and Valerie Dudley, of Faculty Support Services, for her help in typing it. *Pamela Buha* is a third-year law student at Stetson, and wishes to express her gratitude to Professor Marks for the opportunities which he has provided to her, including asking her to co-author this paper and accepting her offer to act as editor/proofreader for the Fourth Edition of his and Professor John F. Cooper’s text book, *Florida Constitutional Law* (Carolina Academic Press 2006).





As John Randolph, a political philosopher of the time, pointed out:

... A judicial opinion should decide nothing and embrace nothing that is not before the Court. If he [Marshall] had said that "a vessel, having the legal evidence that she has conformed to the regulations which Congress has seen fit to prescribe, has the right to go from a port of any State to a port of any other with freight or in quest of it, with passengers or in quest of them, *non obstante* such a law as that of the State of New York, under which the appellee claims," I should have been satisfied....¹⁷

The activist nature of *Gibbons* was, then, going beyond the facts of the case.

In a broader sense, however, all three opinions — *Marbury*, *McCulloch*, and *Gibbons* — were designed to give the United States a strong central government. And this, as Albert Beveridge, Chief Justice Marshall's principal biographer, has pointed out, was at least in part occasioned by Marshall's personal experiences with the failings of the states to support the Continental Army in the Revolutionary War.¹⁸

The activist proclivities of the U.S. Supreme Court have continued through *Dred Scott*¹⁹ — which while destroying the Missouri Compromise helped to propel the nation into civil war — to this summer's military tribunal decision,²⁰ which could very well have an adverse effect on yet another war. Obviously, however, not all federal judicial review is activist.²¹

Here, several decisions of the Florida Supreme Court, some of which can be described as activist and others which, on the other hand, exhibit judicial self-restraint, are compared. In this context, "activist" is that which overturns, without adequate reason, the will of the majority as represented by the Florida Legislature and laws that it has passed or something similar. For

the purposes of this paper, "self-restraint" is the avoidance of such activism.

Before delving into all of this, *two things should be made perfectly clear*. First, and most important, there has not been the slightest whiff of impropriety in any of these decisions, or indeed in the Florida Supreme Court's decisions overall. Over the years, the Florida Supreme Court has been a model of integrity.

It goes beyond integrity. Up to and including now, the court has been a credit to the State of Florida. Also, as co-author Professor Marks has been a teacher of Federal and Florida constitutional law for over 30 years, reason to criticize, as well as praise, the Florida Supreme Court has arisen a number of times. But these criticisms involve issues upon which reasonable people can differ. Examples of judicial activism as well as judicial self-restraint will merely be analyzed here. The reader must decide for herself the appropriateness of the both of these conditions.

THE SCHOOL VOUCHER CASE: ACTIVISM IN ACTION²²

Florida's Opportunity Scholarship Program²³ was almost certainly doomed to the extent that those families eligible for the scholarships elected to use them in private, religiously affiliated schools. Such use would survive a First Amendment Establishment Clause challenge because of the U.S. Supreme Court's opinion in *Zelman v. Simmons-Harris*.²⁴ However, it would almost certainly have been held to violate the Florida Constitution's "Blaine Amendment,"²⁵ sometimes referred to as the "no aid" provision.²⁶ The Florida First District Court of Appeal had so held, *en banc*.²⁷

However, because the Opportunity Scholarship Program²⁸ had also been challenged as violative of article IX, § 1(a) of the Florida Constitution, the Florida Supreme Court managed to avoid the Blaine Amendment "no aid" provision of the Florida Constitution²⁹





while at the same time holding that the Opportunity Scholarship Program was unconstitutional when applied to *any* private school, not just those with a religious affiliation.³⁰

The differences between the majority³¹ and the dissent³² seem to come down to three related questions. First, are the second and third sentences of article IX, § 1(a) of the Florida Constitution sufficiently clear and lacking in ambiguity so as to preclude the use of any canon of interpretation?³³ Second, can those two sentences be read *in pari materia*?³⁴ Third, can the canon *expressio unius est exclusio alterius* be used, and if so, is the result that the *only way* to provide adequate education for children residing in Florida is through the public school system?³⁵ The majority's answer to these three questions was "yes"³⁶ while the dissent's was "no."³⁷

These brief comments will focus primarily on what can arguably be considered the ill-advised use of *expressio unius est exclusio alterius*. Of course, without finding the two sentences ambiguous there is no occasion to resort to *pari materia* or then *expressio unius*. In other words, as we understand it, *expressio unius* relies on the application of *pari materia* and both rely on the ambiguity question.

When discussing *expressio unius* in the Florida Constitutional Law classes that co-author Professor Marks teaches, he points out to the students that his view of the law is that the rule should be used if, and only if, the language in question is clearly intended as a limitation. Article III, § 1 of the Florida Constitution is the best example supporting the proposition that, but for a lack of ambiguity, no rule of interpretation should be used. That section provides, in pertinent part, that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate... and a house of representatives..."³⁸ Clearly, this allows no room for a unicameral legislature in Florida.

This is contrasted with article VI, § 5 of the 1885 Florida Constitution which directed the Florida Legislature to "enact the necessary laws to exclude from every office of honor, power, trust or profit" all persons who have been convicted of certain crimes. In *Nichols v. State ex rel. Bolon*,³⁹ it was argued that by operation of *expressio unius* the Florida Legislature was precluded from placing any other limit on those holding public office. Such a holding would have freed Mr. Nichols from the legislative mandate that he was ineligible to hold office as a city commissioner of the city of Melbourne, Florida because he had not been a registered voter in the city for at least a year before qualifying for office.⁴⁰

The Florida Supreme Court was not persuaded by this argument and instead held that the constitutional language was not intended as a limitation. More importantly, the court referred back to *State ex rel. Moodie v. Bryan*,⁴¹ where it said that *expressio unius* "should be applied with great caution to the provisions of an organic law relating to the legislative department..."⁴² Indeed, some courts, at least in the past, have refused to apply *expressio unius* to state constitutional interpretation at all.⁴³

Perhaps the most damning critique of *expressio unius* is found in *Legislation, Statutory Interpretation: 20 Questions*:

Max Radin ridiculed the basis for the rule that the expression of one thing is the exclusion of another, which, he said, "is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not." [Footnote omitted.] Radin continued, "It must be clear that the only value which such a maxim or axiom or rule could have would lie in the existence of an infallible or approximately infallible test of its applicability.... The question will accordingly be in every case, not whether or not the expression of one thing



excludes everything else, but whether we are to deny or affirm this rule in this particular case... for some other reason than its axiomatic force...." [Footnote omitted.]⁴⁴

That raises the question of just why the majority made such heavy use of *expressio unius*. In *Bush v. Holmes*, the court pointed out that in deciding the Opportunity Scholarship Program issue, "the justices emphatically are not examining whether the public policy decision made by the other branches is wise or unwise, desirable or undesirable."⁴⁵ Giving due deference to the undoubted integrity of the justices, the answer to Max Radin's comment about using the rule "for some other reason than its axiomatic force" must be found elsewhere. But where? One possibility is an incomplete understanding of, in Radin's words, "its [lack of] axiomatic force." In other words, an honest but misguided use of a virtually standardless rule to give the majority the result in light of its belief that the constitutional provision was ambiguous.

Why should a sentence requiring the state as "a paramount duty... to make adequate provision for the education of all children residing within its borders"⁴⁶ be *linked* with the public school sentence the way the majority did? The third sentence provides that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools..."⁴⁷ The majority found that:

The second sentence of article IX, section 1(a) provides that it is the "paramount duty of the state to make adequate provision for the education of all children residing within its borders." The third sentence of article IX, section 1(a) provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence "shall be made by law for a

uniform, efficient, safe, secure and high quality system of *free public schools*." (Emphasis supplied.) The OSP violates this provision by devoting the state's resources to the education of children within our state through means other than a system of free public schools. [Footnote omitted.]⁴⁸

The juxtaposition of the two sentences *in pari materia* is beguiling the way the majority did it. But the dissent maintained that the majority is not necessarily correct just because the juxtaposition is merely beguiling. The first sentence simply deals with educating Florida's children. The second sentence mandates a system of free public schools. For the dissent, it was quite a stretch to say that the second sentence is the only way to accomplish the goal set out in the first.

A literal reading of the majority's venture into *pari materia* and *expressio unius* could arguably mean that there could be no private schools in Florida. The second sentence, comprised of the education mandate, could *only* be met by the public school system set up by the third sentence. The majority is, of course, forced to concede that such a result, even if desirable, is prevented by the U.S. Supreme Court's decision in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*.⁴⁹ It thus must fall back upon the ruling that state dollars must be limited to the public schools because they are the constitutionally-favored method of educating our children.⁵⁰

The requirement of a quality education followed by the setting up of free public schools arguably does not necessarily make the latter a limitation upon the way the former is accomplished. The warning from the court's past that *expressio unius* should be "applied with great caution" should arguably have been enough to steer the majority away from the course it took.



Apart from what some consider as the misfortune of the loss, for now, of the Opportunity Scholarship Program, the majority's arguably cavalier use of *expressio unius* in this case makes it less likely that the maxim will be strictly limited in the future. Instead of "being applied with great caution," future courts may well look at the arguably casual way in which it was applied here and feel free, if not actually required, to do likewise.

Justice Bell, joined by Justice Cantero, pointed out what they considered to be the flaws in the majority opinion:

The majority's reading of article IX, section 1 is flawed. There is no language of exclusion in the text. Nothing in either the second or third sentence of article IX, section 1 requires that public schools be the sole means by which the State fulfills its duty to provide for the education of children. And there is no basis to imply such a proscription.⁵¹

In summary, the dissent believed that it is not reasonable to conclude that the third sentence mandates that it is the only way the second sentence can be accomplished. The majority was, according to some, in error – well-intentioned error, but error nonetheless.

JUDICIAL SELF-RESTRAINT & MODIFICATION OF THE COMMON LAW

One area where judicial self-restraint by the Florida Supreme Court is very evident is when it is asked to modify the common law. Much of our law has its beginning in the common law of England – so called because it was the first legal system to be common to the entire country.⁵² By July 4, 1776 – the effective date of the common law as adopted in Florida⁵³ – it had been evolving for centuries. Common law was "judge-made" law. It was a system where judges made new law to deal with new problems.⁵⁴ Florida adopted it subject to change

by constitution or statute.⁵⁵ While we do not suggest that judges in Florida have never modified the common law,⁵⁶ in general the Florida Supreme Court has tended to leave changes up to the legislature.

Two cases dealing with the common law doctrine of necessities will illustrate the point.⁵⁷ Chief Justice Grimes, writing the opinion for the court in the second of those two cases, has described the common law doctrine of necessities:

... At common law, a married woman's legal identity merged with that of her husband, a condition known as coverture. She was unable to own property, enter into contracts, or receive credit. A married woman was therefore dependent upon her husband for maintenance and support, and he was under a corresponding legal duty to provide his wife with food, clothing, shelter, and medical services. The common law doctrine of necessities mitigated the possible effects of coverture in the event a woman's husband failed to fulfill his support obligation. Under the doctrine, a husband was liable to a third party for any necessities that the third party provided to his wife. Because the duty of support was uniquely the husband's obligation, and because coverture restricted the wife's access to the economic realm, the doctrine did not impose a similar liability upon married women.⁵⁸

By 1986, the date of the first of these two cases, *Shands Teaching Hospital and Clinics, Inc. v. Smith*,⁵⁹ the legal status of married women had changed to the point where the Florida Supreme Court recognized that "it is an anachronism to hold the husband responsible for the necessities of the wife without also holding the wife responsible for the necessities of the





husband.”⁶⁰ By the time the *Smith* case reached the Florida Supreme Court, two district courts of appeal had held that the doctrine of necessities should run both ways – husband to wife and wife to husband – thus modifying the common law.⁶¹ Shands had sued Smith for the unpaid medical bills of her late husband upon the same theory.⁶² Smith had signed no agreement to pay for them.⁶³ The First District Court of Appeal refused to follow the other two district courts⁶⁴ because a very early Florida Supreme Court decision⁶⁵ recognized the doctrine of necessities and that decision had never been changed. The First District certified direct conflict between its decision and that of the other two district courts and Shands sought Florida Supreme Court review, thus vesting jurisdiction over the case in that court.⁶⁶

The Florida Supreme Court recognized that there were strong policy reasons both for and against the doctrine of necessities.⁶⁷ It was for that very reason that it refused to modify the doctrine, thus upholding the decision of the First District Court of Appeal and striking the decisions of the other two.⁶⁸

As Justice Shaw, for the Florida Supreme Court, explained:

... Two conclusions are apparent from the decisional quandary. The first is that the issue is one of broad social implications, the resolution of which requires input from husbands, wives, and the public in general. The second conclusion is that, of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.⁶⁹

These two conclusions led the Florida Supreme Court to conclude that it is “wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause.”⁷⁰

The second case, *Connor v. Southwest Florida Regional Medical Center, Inc.*,⁷¹ was similar to the

earlier *Shands* case,⁷² except that the constitutional equal protection question of treating men and women differently was properly before the court where it had not been in *Shands*.⁷³ In *Shands*, the choice the court faced was to make the doctrine reciprocal or leave it the way it was so the legislature could fix it, if it was decided it needed to be fixed.⁷⁴ The court in *Connor* could not leave it alone, however, since in its original form it amounted to unconstitutional gender discrimination. As such, the *Connor* court faced two different choices: it could fix the gender discrimination problem by modifying the doctrine of necessities so that it applied to both spouses,⁷⁵ or it could declare the doctrine in its original form constitutionally invalid and let the legislature enact a statute creating the doctrine in reciprocal, and thus constitutional, form.⁷⁶ The former, of course, it had refused to do in *Shands*. The *Connor* court chose the latter alternative for the reasons expressed in its *Shands* opinion⁷⁷ – that the legislature was the proper branch of government to make the choice between no doctrine of necessities on the one hand and a reciprocal doctrine of necessities on the other.⁷⁸

The fact that the temptation to judicially “fix” the problem had led some district courts to modify the common law doctrine makes clear the judicial self-restraint on the part of the Florida Supreme Court when it refused to do so in both *Shands* and *Connor*.

OPEN PROFANITY STATUTES & JUDICIAL SELF-RESTRAINT

In 1976, Brown was arrested and charged with “open profanity” under § 847.04, Florida Statutes (1975),⁷⁹ after saying the word “mother-f” and other “offensive” and “distasteful” remarks in the presence of a policeman, but twenty-five feet away from anyone else.⁸⁰ None of Brown’s statements were directed personally at the police officer.⁸¹ This same statute had been previously upheld in *State v. Mayhew*⁸² as a “valid exercise of the State’s police power” and





“reasonably related to the public safety, public welfare and public morals.” The Florida Supreme Court, in *Mayhew*, also upheld the statute against challenges that it was “vague and overbroad” by construing it to only be regulating speech “likely to cause a breach of the peace.”⁸³ In considering *Mayhew*, the court declared that:

... [I]n appropriate instances a court may authoritatively construe a statute so that it does not conflict with the federal or state constitution, [but] cannot condone judicial excision of [a] statute’s overbreadth or clarification of its ambiguities where, as here, there is no statutory language to support judicial restructuring.⁸⁴

Ultimately, the court found this open profanity statute “violative of Article I, Section 4, [of the] Florida Constitution” and “incapable of redemption.”⁸⁵ As written, the statute “impermissibl[y] chill[ed]... constitutionally protected speech.”⁸⁶

The *Brown* court went on to discuss two other U.S. Supreme Court cases, *Chaplinsky v. New Hampshire*⁸⁷ and *Gooding v. Wilson*,⁸⁸ where the constitutionality of similar profanity statutes was addressed. In *Chaplinsky*, the original statute had been severed and what remained was able to be saved by being “narrow[ly] interpret[ed].”⁸⁹ Similarly, in *Gooding*, the U.S. Supreme Court stated that “an authoritative construction could have redeemed the [profanity statute]” because, as the Florida Supreme Court recognized, “the statutory language necessary [to do so] was present.”⁹⁰ This was not the case, however, for the Florida profanity law under which Brown was charged.⁹¹ The Florida Supreme Court found that the statute “contain[ed] no language to support the restrictive interpretation placed on

the statute” as it was in *Mayhew*.⁹² According to the court:

As Justice Ervin stated eloquently in dissenting from the majority opinion in *Mayhew*:

There are no saving words in our statute upon which this Court can honestly state it is inoffensive to the First and Fourteenth amendments. There was such a basis in [*Chaplinsky*] and [*Gooding*]. Only by a bald judicial amendment similar to a legislative enactment can the statute be said not to violate freedom of speech.⁹³

The court stressed, however, that “all doubts as to the validity of a statute are to be resolved in favor of constitutionality when reasonably possible” and expresses its concern to not “invad[e] the province of the legislature.”⁹⁴ Moreover, it explains that “[i]n accordance with [a] court’s duty to construe [statutes] so as not to conflict with the Constitution, the overbroad language [may] be excised” as opposed to having the complete statute declared invalid.⁹⁵ The court acknowledged: “When the subject statute in no way suggests a saving construction, *we will not abandon judicial restraint* and effectively rewrite the enactment.”⁹⁶

**TWO EQUAL PROTECTION CASES:
ACTIVISM V. JUDICIAL SELF-RESTRAINT**

*Hechtman v. Nations Title Insurance of New York*⁹⁷ illustrates judicial self-restraint. Here, the Florida Supreme Court was faced with a statute that made title insurance companies responsible for thefts committed by their agents, unless the agents were lawyers and thus subject to regulation by the Florida Bar. This statute thus created two classes of agents. The triggering event for a claim of violation of equal protection begins with the creation of a classification system such as this. The agent of Nations Title used by the Hechtmans was a lawyer.





As the Florida Supreme Court pointed out, “in the absence of a fundamental right or a protected class, equal protection requires only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose.”⁹⁸

Since the two classes of agents created by statute involved neither a “fundamental right” nor a “protected class,” the minimal sentencing rational basis test applied. The court, in applying this test found a “legitimate state purpose”:

... [T]he Legislature reasonably distinguished between those title insurance agents doing business pursuant to a license issued by the Department of Insurance and those doing business pursuant to a license to practice law. The Department of Insurance does not have the authority to regulate attorneys and may not oversee or enforce the trust account requirements mandated by the Rules Regulating the Florida Bar. Furthermore, to allow the Department of Insurance access to attorney trust accounts would jeopardize the attorney-client privilege and infringe upon this Court’s authority to regulate the practice of law in Florida. Additionally, victims of those lawyers who are exempt from the Department of Insurance licensing requirements, such as the Hechtmans, may seek compensation from the Clients’ Security Fund offered through The Florida Bar.

It is reasonable to conclude that by enacting section 627.792, the Legislature intended to create an avenue of relief for victims of nonattorney title insurance agents that otherwise did not exist. It is not within our authority to pass upon the wisdom of the Legislature’s classification. We must only consider whether there are any reasonable facts to support the classification attempt made by the Legislature. See *Gallagher v. Motors Ins. Corp.*, 605 So.2d 62, 69 (Fla.1992)

(holding that an equal protection challenge must be rejected if there is a “plausible reason for the classification.”) . . . In this case, section 627.792 serves the legitimate governmental purpose of providing an avenue of civil relief for a certain class of victims of defalcation, conversion, or misappropriation of funds held in escrow accounts pursuant to section 626.8473, as this particular class would not otherwise have a civil remedy. Further, it is reasonable for the Legislature to believe that exempting title insurers from liability for certain acts committed by attorneys who act pursuant to their license to practice law would promote that purpose because the victims of these attorneys have other avenues for relief.⁹⁹

The comparison of *Hechtman* to *Rollins v. State*¹⁰⁰ places judicial self-restraint and judicial activism into stark contrast in the equal protection rational basis test context. *Rollins* involved a challenge to a Florida Statute that precluded (with certain exceptions) persons under the age of 21 from “visit[ing] or frequent[ing] or play[ing] in any billiard parlor in the state.”¹⁰¹ The statute made an additional exception that allowed persons under 21 to play billiards in a “bona fide” bowling alley, defined as one with at least 12 lanes.¹⁰² The obvious purpose recognized by the court was to keep those under 21 from those “undesirable characters” that “frequent billiard parlors.”¹⁰³ While apparently conceding the legitimacy of the statute’s purpose to protect young people, the Florida Supreme Court found that the distinction between billiard parlors and “bona fide” bowling alleys was either “irrational”¹⁰⁴ or “unreasonable”¹⁰⁵ because “undesirables are just as likely to frequent a bowling alley offering billiards as they are a billiard parlor, particularly where the bowling alley serves alcoholic beverages and the billiard parlor does not.”¹⁰⁶





In *Hechtman*, the Florida Supreme Court had quoted with approval the definition of the rational basis test used by the First District Court of Appeal in the *State Department of Insurance v. Keys Title and Abstract Co., Inc.*¹⁰⁷ Moreover, the Florida Supreme Court in *Hechtman* quoted *Keys Title*, which was quoting *North Ridge General Hospital v. City of Oakland Park*,¹⁰⁸ and said:

... “[I]t would be proper to sustain an equal protection challenge to a statute only if ‘the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.’ ”¹⁰⁹

Consider also the definition of the rational basis test from *Gallagher v. Motors Insurance Corporation*,¹¹⁰ cited with approval by the court: “an equal protection challenge must be rejected if there is a ‘plausible reason for the clarification’.”¹¹¹

Using these descriptions of the rational basis test, it just does not seem possible to say that the legislative distinction drawn between bowling alleys and billiard parlors in order to protect young people from “undesirables” is not supported by “reasonable grounds” or “plausible reasons.” In effect, the Florida Supreme Court in *Rollins* substituted its judgment of what is wise in place of the legislature.

JURISDICTION CREEP¹¹²

Prior to 1957, when Florida was far less populous than it is today, the Florida Supreme Court heard appeals from Florida’s principal trial courts, the circuit courts.¹¹³ As such, it was both a “law declaring court” and an “error correcting court.”¹¹⁴ In 1956, the judicial article of the Florida Constitution was amended to create the district courts of appeal which, when they opened for business in 1957, would be the state’s principal error correcting courts.¹¹⁵ At the

same time, the judicial article was amended to limit the Florida Supreme Court’s jurisdiction to reflect its new role as, for the most part, a law declaring court.¹¹⁶

From that point and for many years thereafter, there began what one of the authors of this paper has described elsewhere as “jurisdiction creep,”¹¹⁷ as the Florida Supreme Court seemed to have difficulty in separating itself from its former error correcting role. In what some view as its instinct to continue to correct errors, the court used three tactics. First, it held that a lower court¹¹⁸ could “inherently” rule on the validity of a state statute without mentioning the statute, if it could not have made the decision it did without having thought the statute in question was constitutional.¹¹⁹ This became known as the “inherency doctrine”¹²⁰ and lasted until stopped by a constitutional amendment in 1980.¹²¹ Second, there was another related branch of this doctrine which was soon abandoned by the Florida Supreme Court.¹²² This branch held that a lower court could *inherently* construe a provision of the Florida or federal constitution.

The effect of the inherency doctrine to the Florida Supreme Court’s new role, as almost solely a law declaring court, was minor compared to the third tactic which came to be known as the “record proper” doctrine.¹²³ As a law declaring court, the Florida Supreme Court was allocated authority by the Florida Constitution to hear cases where there was conflict between a district court decision and an earlier decision of the Florida Supreme Court or another district court.¹²⁴ This is clearly a law declaring function. In *Lake v. Lake*,¹²⁵ the Florida Supreme Court was asked for the first time¹²⁶ under its newly allocated conflict jurisdiction to find conflict when the district court decision read in its entirety “per curiam, affirmed”¹²⁷ without a written opinion.¹²⁸

After acknowledging its conflict jurisdiction, the Florida Supreme Court refused





to use it in the situation where the district court had written no opinion (the “PCA” situation):

It is another matter, however, for the Supreme Court to dig into a record to determine whether or not a per curiam affirmance by a district court of appeal conflicts with the interpretation the petitioner’s counsel has placed upon former decisions in advancing his client’s cause. By such procedure the safeguard intended by the pertinent provision would be distorted so that a suitor who had had one day in the appellate court would have a second.¹²⁹

However, the Florida Supreme Court, in keeping with its former error correcting role, continued by saying:

There may be exceptions to the rule that this court will not go behind a judgment per curiam, consisting only of the word “affirmed” which does not reflect a decision that would interfere with settled principles of law, rendered by a district court of appeal, but the present case cannot be considered one. Conceivably it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen *with resulting injustice to the immediate litigant*. In that event the exception, not the rule, would apply....¹³⁰

But as pointed out in the above noted *Jurisdiction Creep and the Florida Supreme Court*:¹³¹

“Injustice to the immediate litigant”? Correcting injustice in this context is an “error correcting” function, not a “law declaring” one. In spite of the verbal support for the district court of appeal to perform its more traditional role of a court of last resort, the supreme court had perched itself on the edge of a very slippery slope.¹³²

In *Foley v. Weaver Drugs, Inc.*, the Florida Supreme Court arguably hit the bottom of the slippery slope with these words:

... [W]e hold that this court may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal.¹³³

Justice Campbell Thornal dissented in *Foley*. He pointed out that what the court allowed in *Foley* “simply means that the District Court decisions are *no longer final* under any circumstances.”¹³⁴ Thus, Justice Thornal opined that if he were practicing law in Florida he would never again accept the finality of a district court decision.¹³⁵ By allowing itself to wander at will through the entire record, excepting only the transcript of testimony,¹³⁶ a conflict with an earlier decision could almost surely be found. After *Foley*, a lawyer asking the court to review the district court decision could, with colorable justification, make such a claim.

Opposition on the court and off to the record proper doctrine began to build. One of the chief proponents of change was Justice Arthur England:

. . . Since *Foley*, as I have attempted to point out, the district courts have more and more been regarded by a majority of this Court simply as inconvenient rungs on the appellate ladder. The high cost of *Foley* in dollars and time to litigants and to the judiciary of Florida now demands that the majority decision there be reconsidered. My own conviction is that *Foley* should be scrapped, along with the stillborn traces of decisional control which were conceived in the *Lake* decision. To my mind, there is no possible way that a district court’s affirmance



without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention. The foul assumption which underlies any review is that the district court perpetrated an injustice which it could not explain away in an opinion. I refuse to indulge that assumption.

An honest analysis by my colleagues would compel them to admit that decisional conflict in this class of cases exists today solely on the grounds that we say it does. This is, of course, contrary to our recognition that the reasons for the district courts' decisions in such cases are not capable of being discovered. The only rationale for our continued search of a basis for review in non-opinion decisions, then, is an unarticulated notion that we should, when necessary, give "justice" not provided by the lower courts. That notion is simply not good enough for me since the Constitution was amended to assign that responsibility to the district courts.¹³⁷

In 1980, one of the changes to the Florida Supreme Court's jurisdiction was to add the word "expressly" before the word "directly," so that conflict had to be both express and direct.¹³⁸ In two cases,¹³⁹ the Florida Supreme Court made it quite clear that the word "expressly" had changed everything. No longer could the court hear district court decisions that were either PCA's¹⁴⁰ or citation PCA's.¹⁴¹

The court also held that the addition of the word "expressly" in another part of the judicial article destroyed the inherency doctrine. At that point, most legal scholars agreed that the court was pretty well within its constitutionally allocated jurisdiction. Then, in a case where the word "expressly" would cause peculiar hardship to a litigant, the court, according to Justice Boyd, either rediscovered or made up¹⁴² the rule that if a case cited in a citation PCA was pending review in the Florida Supreme Court or had been revised by that court, the court

would review the otherwise nonreviewable citation PCA. Jurisdiction creep had returned.

Critics of this decision argue that there is simply no excuse for the court ignoring the word "expressly" and the clear intent with which it was put into the Florida Constitution. They claim that this is a flagrant violation of the very limited allocation of power to the Florida Supreme Court as an error correcting court.

CONCLUSION

The appropriateness of judicial activism and self-restraint will remain a point of contention among many, regardless of political leanings, for years to come. Citizens should become informed about their judiciary and decide for themselves the proper role of the courts. Based on that decision, they should be able to identify when a court goes outside of the bounds of that role. Clearly, when the meaning of the constitution is distorted, representative government pays the price. According to Justice Holmes, only when the most fundamental of rights are involved should a court seriously question legislative judgment.

ENDNOTES

¹ With minor variations here and there the terms "activism" and "activist" are used to mean *either* overturning a statute because of conflict with the constitution when the conflict does not really exist *or* an over expansive reading of a constitution, i.e., reading into it that which is not there. The two can obviously overlap.

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁵ *See e.g. Brown v. State*, 358 So. 2d 16 (Fla. 1978).

⁶ The Act conferred upon the U.S. Supreme Court the power "to issue writ of *mandamus*, in cases warranted by the principles and usages of law,



...” *Supra* note 2, at 148. It is common knowledge, requiring no citation, that a writ of mandamus is an order from a court to a government official to carry out a nondiscretionary duty.

⁷ *Hylton v. U. S.*, 3 U.S. (Dall.) 171 (1796).

⁸ See generally CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*, vol. I, 163–230 (Revised ed., Little, Brown & Company 1926).

⁹ 17 U.S. (4 Wheat.) 316.

¹⁰ U.S. CONST. art I, § 8, cl. 18 reads “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

¹¹ In *The American Heritage Dictionary* 834 (2d College ed., Houghton Mifflin 1991), “absolutely essential; indispensable” is the first definition of “necessary.”

¹² As described in *McCulloch*, Chief Justice Marshall describes “necessary” as meaning that “which might be appropriate, and which were conducive to [Congress’ end purpose].” *Supra* note 3, at 415.

¹³ 22 U.S. (9 Wheat.) 1.

¹⁴ *Id.* at 190.

¹⁵ U.S. CONST. art. I, § 8, cl. 3.

¹⁶ *Supra* note 4, at 194.

¹⁷ John Randolph to Dr. Brockenbrough, (March 3, 1824) (*Supra* note 8, at 611–612).

¹⁸ ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* vol. I, 146–147 (Houghton Mifflin Company 1916).

¹⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

²⁰ *Hamdan v. Rumsfeld*, __ U.S. __, 2006 U.S. LEXIS 5185 (June 29, 2006).

²¹ See e.g. *Nebbia v. New York*, 291 U.S. 502 (1934).

²² *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) [*hereinafter Holmes*].

²³ Fla. Stat. § 1002.38 (2005).

²⁴ 536 U.S. 639 (2002); *Holmes*, 399.

²⁵ FLA. CONST. art. I, § 3.

²⁶ *Holmes*, 399.

²⁷ *Id.*

²⁸ Fla. Stat. § 1002.38 (2005).

²⁹ *Holmes*, 399, 413.

³⁰ *Id.* at 412–413.

³¹ *Id.* at 397–413.

³² *Id.* at 413–425.

³³ FLA. CONST. art. IX, § 1(a), in relevant part, provides:

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. . . .*

Emphasis has been added to the second and third sentences for the reader’s convenience. As to the ambiguity *vel non* of that part of article IX, § 1(a), see *Holmes*, 408.

³⁴ *Holmes*, 406–407.

³⁵ *Id.* at 407–408.

³⁶ *Id.* at 408.

³⁷ *Id.* at 414–425 (Bell, J., dissenting).

³⁸ FLA. CONST. art. III, § 1.

³⁹ 177 So. 2d 467, 468 (Fla. 1965).

⁴⁰ *Id.*

⁴¹ 39 So. 929 (Fla. 1905).

⁴² *Nichols*, 177 So. 2d at 468.

⁴³ See e.g. *Eberle v. Nielson*, 306 P.2d 1083 (Idaho 1957).

⁴⁴ Kent Greenawalt, *Legislation, Statutory Interpretation: 20 Questions* 203–204 (Foundation Press 1999) (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873–874 (1930)).

⁴⁵ 919 So. 2d at 398.

⁴⁶ FLA. CONST. art. IX, § 1(a).

⁴⁷ *Id.*

⁴⁸ *Holmes*, 407.

⁴⁹ *Id.* at 408, n. 11.

⁵⁰ *Id.* at 408–409.

⁵¹ *Id.* at 415 (Bell, J., joined by Cantero, J., dissenting).

⁵² See M. M. KNAPPEN, *CONSTITUTIONAL & LEGAL HISTORY OF ENGLAND* 169–170 (Harcourt, Brace & Company 1942).

⁵³ Fla. Stat. § 2.01 (2006), in its entirety, reads as follows:

Common law and certain statutes declared in force. – The common and statute laws of England which are of a general and not a local



nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

⁵⁴ As Oliver Wendell Holmes said in *The Common Law*, 5 (Little, Brown & Co. 1963):

The life of the [common] law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

⁵⁵ See *supra* note 53.

⁵⁶ See e.g. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 n. 2 (Fla. 1986) [*hereinafter Shands*].

⁵⁷ *Id.* and *Connor v. S.W. Fla. Regl. Med. Ctr., Inc.*, 668 So. 2d 175 (Fla. 1995) [*hereinafter Connor*].

⁵⁸ *Connor*, at 175-176.

⁵⁹ 497 So. 2d 644 (Fla. 1986).

⁶⁰ *Id.* at 645.

⁶¹ *Parkway Gen. Hosp., Inc. v Stern*, 400 So. 2d 166 (Fla. 3d Dist. App. 1981) and *Manatee Convalescent Ctr., Inc. v. McDonald*, 392 So. 2d 1356 (Fla. 2d Dist. App. 1980).

⁶² *Shands*, 497 So. 2d at 645.

⁶³ *Id.*

⁶⁴ See *supra* note 61.

⁶⁵ *Shands*, 497 So. 2d at 645; *Phillips v. Sanchez*, 17 So. 363 (Fla. 1895).

⁶⁶ *Shands*, at 645.

⁶⁷ *Id.* at 645-646.

⁶⁸ *Id.* at 646.

⁶⁹ *Id.*

⁷⁰ *Id.* (quoting *Zorzos v. Rosen*, 467 So. 2d. 305, 307. (Fla. 1985)).

⁷¹ 668 So. 2d 175 (Fla. 1995).

⁷² *Id.* at 176.

⁷³ *Id.*

⁷⁴ *Shands*, at 645-646.

⁷⁵ *Connor*, 668 So. 2d at 177.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Open profanity – Whoever, having arrived at the age of discretion, uses profane, vulgar and indecent language, in any public place; or upon the private premises of another, or so near thereto as to be heard by another, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083; but no prosecution for any such offense shall be commenced after 20 days from the commission thereof.

⁸⁰ *Brown v. State*, 358 So. 2d 16, 17 (Fla. 1978) [*hereinafter Brown*].

⁸¹ *Id.*

⁸² 288 So. 2d 243 (Fla. 1973).

⁸³ *Brown*, at 17.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 315 U.S. 568 (1942).

⁸⁸ 405 U.S. 518 (1972).

⁸⁹ *Brown*, at 19.

⁹⁰ *Id.* at 20.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (quoting *State v. Mayhew*, 288 So.2d at 252).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (Emphasis added.)

⁹⁷ 840 So. 2d 993 (Fla. 2003).

⁹⁸ *Id.* at 996.

⁹⁹ *Id.* at 997.

¹⁰⁰ 354 So. 2d 61 (Fla. 1978).

¹⁰¹ *Id.* at 62.

¹⁰² *Id.* at 62.

¹⁰³ *Id.* at 63.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 840 So. 2d at 996 (citing to *Keys Title*, 741 So. 2d 599, 602 (Fla. 1st Dist. App. 1999)).

¹⁰⁸ 374 So. 2d 461, 465 (Fla. 1979).

¹⁰⁹ *Hechtman*, 840 So. 2d at 997.

¹¹⁰ 605 So. 2d 62, 69 (Fla. 1992).

¹¹¹ *Supra* note 109, at 997.

¹¹² This term, which may or may not be original to Professor Marks, was taken from the similar “mission creep,” a military term. “Jurisdiction creep” is the judicial version of it.

Originating in Somalia in 1993, the modern term “mission creep” became part of official U.S. Army vocabulary a decade later. [The Army] Field Manual 3-07, *Stability Operations and Support Operations* . . . acknowledges two types of mission creep. The first occurs when “the unit receives shifting guidance or a change in mission for which the unit is not properly configured or resourced.” The second occurs “when a unit attempts to do more than is allowed in the current mandate and mission.” [Footnote omitted.] . . .

Charles E. White, *Mission Creep During the Lewis and Clark Expedition*, http://www.army.mil/cmhp/pg/LC/The%20Mission/mission_creep.htm (last visited Aug. 31, 2006) (quoting Headquarters, Department of the Army, Field Manual 3-07 (FM 100-20), *Stability Operations and Support Operations* (February 2003), 1-17.

Another longer work of Professor Marks’ – *Jurisdiction Creep and the Florida Supreme Court*, 69 ALB. L. REV. 543 (2006) – expands upon this concept.

¹¹³ See FLA. CONST. art. V (1885) (prior to the 1956 amendment creating the district courts of appeal).

¹¹⁴ A “law declaring court” is usually the state’s highest court and, in at least most instances, its jurisdiction is limited to cases where important issues of law are involved. An “error correcting court” is, as the name suggests, a court whose function it is to hear the one appeal usually accorded as of right from a trial court and consider the errors alleged to have been committed by the trial court. See generally *State v. Grawien*, 123 Wis. 2d 428, 367 N.W.2d 816 (Wis. App. 1985), and *State v. Grawien*, 121 Wis. 2d 710, 362 N.W.2d 428 (Wis. 1985).

¹¹⁵ In 1957, Florida was divided into three appellate districts. Today there are five. At present, Florida’s principal trial court, the circuit court, also serves as an appellate court, hearing appeals from Florida’s other, and lower, trial court, the county court. See generally FLA. CONST. art. V, §§ 4-6.

¹¹⁶ See generally the various versions of article V in the Florida Constitution since the 1956 amendment.

¹¹⁷ See *supra* note 112.

¹¹⁸ Until 1980, the Florida Supreme Court could review certain decisions from either the circuit court or the district court of appeal. See the various

versions of the Florida Supreme Court’s jurisdiction in article V of the Florida Constitution prior to the 1980 amendment.

¹¹⁹ See *Harrell’s Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 441 (Fla. 1959).

¹²⁰ *Id.*

¹²¹ The addition of the word “expressly” to this part of the Florida Supreme Court’s jurisdiction finished this type of “jurisdiction creep” because since the Florida Supreme Court is now limited to discretionary review of those district court decisions that “expressly” hold valid a state statute. A decision that does so inherently is not reviewable. See FLA. CONST. art. V, § 3(b)(3).

¹²² See *Ogle v. Pepin*, 273 So. 2d 391 (1973). Some have characterized this rule—which found that a court could “construe” a constitutional provision without talking about it—as outrageous and foolish.

¹²³ See *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 222 (Fla. 1965).

¹²⁴ FLA. CONST. art. V, § 3(b)(3).

¹²⁵ 103 So. 2d 639 (Fla. 1958).

¹²⁶ See *supra* note 123.

¹²⁷ *Lake*, 103 So. 2d at 640.

¹²⁸ *Id.* It is the purpose of such “PCA’s” to allow an affirmance without the necessity of writing an opinion when the law involved in the appeal is well settled. The petitioner, the losing party in the PCA, sought review by the Florida Supreme Court on the basis of similar facts between the case that had suffered the PCA and an earlier decision of the court that, so the argument went, ran counter to the outcome in the PCA.

¹²⁹ *Id.* at 643.

¹³⁰ *Id.* (emphasis added).

¹³¹ See *supra* note 112.

¹³² *Id.* at 546. It had taken about 7 years for the court’s slide down the slippery slope to bottom out: 1958-1965. However, in reality, in *Foley* the court merely acknowledged its location at the bottom of the slope. The court confessed that in every PCA case since *Lake*:

... [S]ome members of the court have examined the “record proper” – meaning the written record of the proceedings in the court under review except the report of the testimony – to

determine the probable existence of a direct conflict *and whether such conflict resulted in "injustice to the immediate litigant"* sufficient to invoke the exercise of our power of review under the exception noted in the Lake case....[Emphasis added.]

Foley, at 223.

¹³³ *Id.* at 225.

¹³⁴ *Id.* at 234 (Thornal, J., dissenting) (emphasis in original).

¹³⁵ *Id.*

¹³⁶ *Id.* at 223.

¹³⁷ Fla. Greyhound Owners & Breeders Assn, Inc. v. W. Flagler Assocs., Ltd., 347 So. 2d 408, 411 (Fla. 1977) (England, J., concurring) (footnotes omitted).

¹³⁸ Cf. FLA. CONST. art. V, § 3(b)(3) with FLA. CONST. art. V, § 3(b)(3) (amended 1980).

¹³⁹ *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Dodi Publishing Co. v. Editorial America, S. A.*, 385 So. 2d 1369 (Fla. 1980).

¹⁴⁰ *Jenkins*, 385 So. 2d 1356.

¹⁴¹ *Dodi*, 385 So. 2d 1369.

¹⁴² The majority opinion says that even before *Foley v. Weaver Drugs, Inc.*, a district court decision without opinion but citing a case that had been reversed by the supreme court provided prima facie ground for the exercise of conflict certiorari jurisdiction. I have been unable to find any decisional or documentary authority for that statement. The majority cites only "common sense" ... *Jollie v. State*, 405 So. 2d 418, 423 (Boyd, J., dissenting).





The Federalist Society
for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036

