HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7143 PCB JU 06-06 Rules of Construction
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee	8 Y, 4 N	Hogge	Hogge
1)			
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SUMMARY ANALYSIS

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the application of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another." As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department…." This sentiment has been echoed in the courts of other states, although many appear to have permitted its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature. In a recent case, the Florida Supreme Court disapproved of a decision of the 1st District Court of Appeal by applying this maxim to declare Florida's school voucher program unconstitutional. The North Carolina Supreme Court and the California Court of Appeal appear to be examples of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances.

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power. Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated. The legislative branch looks to the Constitution not for sources of power but for limitations upon power.

In contrast, the federal constitution is a constitution of delegated powers, having only those specific powers given to it in the Constitution and those "necessary and proper" to carry out those powers. All other sovereign governmental powers are reserved to the States.

The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

This is a joint resolution which requires passage by a 3/5 vote of each chamber.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This proposal does not directly implicate the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Proposed Changes

This House Joint Resolution proposes to amend Article X, Section 12, of the State Constitution, relating to rules of construction, to prohibit the use of the maxim "expressio unius est exclusio alterius" in interpreting the extent of political power vested in the legislative branch by the people, unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision. This maxim holds that "the expression of one thing is the exclusion of another."

Background

Constitutional Power and Authority: Contrasting the Federal and State Constitutions

The federal constitution is a constitution of delegated powers, "having only those specific powers given to it in the Constitution,"[1] and those "necessary and proper" to carry out the enumerated powers. All other powers are reserved to the states.[2]

Within our constitutional framework, the people are sovereign and the source of all governmental power. The Florida Constitution (like other state constitutions) is the way in which the people have chosen to allocate and regulate their sovereign governmental power not exclusively granted to the federal government in the United States Constitution and acts as a limitation on governmental powers. This is accomplished primarily by "vesting" the legislative, executive and judicial powers in certain defined offices and collegial bodies. Most other constitutional provisions serve to direct and/or limit the application of these vested powers. Therefore, the bulk of powers exercised by the three branches of government are vested powers; they do not arise out of specific grants of power.

Through the Florida Constitution, the people have vested legislative authority in the Legislature with such exceptions as the people have clearly delineated.[3] "The legislative branch looks to the Constitution not for sources of power but for limitations upon power."[4] The authority of the legislative branch is "plenary" (i.e., "absolute") in the legislative field.[5] It is limited only by the "express and clearly implied provisions of the federal and state constitutions."[6] "In other words, the Legislature may exercise

[1] John Cooper and Thomas Marks Jr., eds., *Florida Constitutional Law: Cases and Materials, 2d Ed*. (1996), at 3.
[2] U.S. Const. art. X.
[3] Fla. Const. art. III, s. 1.
[4] *State ex. rel. Green v. Pearson*, 14 So.2d 565 (Fla. 1943).
[5] 6 Fla.Jur., s. 119. See also, *County Board of Education of Russell County v. Taxpayers and Citizens of Russell County*, 163 So.2d 629, 634 (Ala. 1964). ("There are no limits to the legislative power of state governments save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal, it has full power to do.")
[6] 6 Fla.Jur., s. 119.

any lawmaking power that does not either expressly or by necessary implication conflict with any other provision of the State or Federal Constitution."[7]

The Application of the Maxim *"Expressio Unius Est Exclusio Alterius"* in Constitutional Interpretation

It is a generally accepted principle that interpreting a constitution, as any written document, only becomes necessary when the plain meaning cannot be ascertained and the intent is ambiguous. Further, that in construing a constitution, effect should be given to every part of the document and every word and where possible, conflicting provisions should be harmonized. There are numerous rules of construction utilized by the courts. The Florida Constitution sets forth several of these such as "(t)itles and subtitles shall not be used in construction."[8]

One such rule of construction is *"expressio unius est exclusio alterius;"* that is, "the expression of one thing is the exclusion of another." For example, if the constitution included or "expressed" specific disqualifications for holding elective office, then applying this maxim, the exclusion of any other disqualifications would be implied. The Ohio Supreme Court used the following illustration to describe the way in which the rule operates when applied in this context:

> Thus, when the General Assembly has full power to legislate in a field that has natural subclasses (A, B, C, D, etc.) and a constitutional provision puts restrictions on subclasses A, B, and C, that does not mean (under application of the doctrine of expressio unius est exclusio alterius) that the constitutional provision has removed the power to legislate as to subclass D. Rather, it means the power to legislate as to subclass D is not restricted.[9]

This maxim generally does not apply with the same force to a constitution as to a statute ("it should be used sparingly" in construing the constitution)[10] and particularly in regards to the legislature.[11]

Florida

As far back as 1905, the Florida Supreme Court stated that the maxim should be applied "with great caution to the provisions of an organic law relating to the legislative department…."[12] This sentiment has been echoed in the courts of other states.[13]

Although Florida courts, like those of other states, have cautioned against its use, they have not prohibited its outright use in construing provisions of the Florida Constitution.[14] Most recently, the

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[7] *Id.*
[8] Fla. Const. art. X, s. 12(h).
[9] *State ex. rel. Jackman v.Court of Common Pleas of Cuyahoga County*, 224 N.E.2d 906, 910 (Ohio 1967). ("The judiciary must proceed with much caution in applying the…maxim (expressio unius est exclusio alterius) to invalidate legislation."
[10] 6 Fla.Jur., s. 69.
[11] *Id.*
[12] *State ex. rel. Moodie v. Bryant,* 39 So. 929, 956 (Fla. 1905). See also, *Marasso v. Van Pelt*, 81 So. 529, 530 (Fla. 1919) (Per *Marasso*: "Organic limitations upon the authority of the Legislature to exercise the police power of the state…should not be implied by invoking the rule of construction "Expressio unius est exclusion alterius," or otherwise, unless it is necessary to do so in order to effectuate some express provision of the Constitution."); *Pine v. Com.*, 93 S.E.2d 652 (Va. 1917) ("The principle of the maxim…should be applied with great caution to those provisions of the Constitution which relate to the legislative department.")
[13] *State ex. rel. Jackman, supra* note 9, at 910 (Per State ex. rel. Jackman, "The judiciary must proceed with much caution in applying the…maxim (expressio unius est exclusio alterius) to invalidate legislation."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) and 16 Am.Jur.2d Constitutional Law s. 69.
[14] The Florida Supreme Court has stated that "the principle is well established that, where the Constitution expressly provides the manner of doing a thing, it 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 a 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

Florida Supreme Court, over sharp dissent, disapproved of a decision of the 1st District Court of Appeal[15] by applying this maxim to declare legislation creating a school voucher program unconstitutional.[16] The Supreme Court read the constitutional provision as a limitation on the power of the Legislature—as an exclusive means for accomplishing a duty contained in the Constitution. The majority defended its use of this maxim, believing the constitutional provision at issue "provides a comprehensive statement of the state's responsibilities regarding the education of its children."[17] In dissent, Justice Bell found the language of the constitutional provision at issue to be "plain and unambiguous" and, therefore, "wholly inappropriate for (the) court to use a statutory maxim such as *expressio unius est exclusio alterius* to imply such a proscription."[18] He believed its use in this case "significantly expands this Court's case law in a way that illustrates the danger of liberally applying this maxim."[19] He wrote:

> In accord with courts across this nation, this Court has long recognized that the *expressio unius* maxim should not be used to imply a limitation on the Legislature's power unless this limitation is absolutely necessary to carry out the purpose of the constitutional provision….We have repeatedly refused to apply this maxim in situations where the statute at issue bore a "real relation to the subject and object" of the constitutional provision.[20]

Other States

As mentioned previously, like Florida, virtually all states appear to caution against the use of this maxim in constitutional construction,[21] although many appear to permit its application in various circumstances such as qualifications for election to a constitutional office but not in others such as regulating the taxing power of the Legislature.[22] For example, the Colorado Supreme Court, while accepting the principle that "all power which is not limited by the constitution is vested in the people and may be exercised by them via their elected representatives so long as the constitution contains no prohibition against it," nonetheless applied the maxim as the rationale for the rule that "the fact that the framers of the state constitution chose to specify the qualifications for this office limits, by implication, the legislature's power to impose additional qualifications."[23] The Louisiana Supreme Court has held that

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constitutional provision. See *Weinberger v. Board of Public Instruction*, 112 So. 253, 256 (Fla. 1927). In *Holmes I*, *infra* note 15, the 1st DCA distinguished *Weinberger* in that the constitution forbade any action other than that specified in the constitution, and the action by the Legislature defeated the purpose of the constitutional provision….(here the court said) in this case, nothing in (the constitutional provision at issue) prohibits the Legislature from allowing the well-delineated use of public funds for private school education…." In *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), the Florida Supreme Court found the principle enunciated in *Weinberger* inapplicable because the statutory provision did not violate the "primary purpose" of the constitutional provision. See *infra*, note 16.

[15] *Bush v. Holmes (Holmes I)*, 767 So.2d 668 (1st DCA 2000).

[16] *Bush v. Holmes,* 919 So.2d 392 (Fla. 2006). The court declared s. 1002.38, F.S. (2005), unconstitutional. The voucher program is entitled the "Opportunity Scholarship Program." In doing so, the majority distinguished the case of *Taylor v. Dorsey*, 19 So.2d 876 (Fla. 1944), cited by Justice Bell in his dissent in opposition to the application of "expressio unius est exclusio alterius" in this case.

[17] *Bush, supra* note 16, at 408.

[18] *Id.,* at 415.

[19] *Id.,* at 420.

[20] *Id.,* at 422. Citing *Marasso v. Van Pelt*, 81 So.529, 530 (Fla. 1919) and *Taylor v. Dorsey*, *supra* note 16.

[21] See *supra* note 13.

[22] *Mercantile Incorporating Co. v. Junkin*, 123 N.W. 1055 (Neb. 1909) ("The maxim…does not apply in the construction of constitutional provisions regulating the taxing power of the Legislature.") See also, *Kramar v. Bon Homme County*, 155 N.W.2d 777 (S.D. 1968);

[23] *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994). The court placed great weight on the characterization of the right involved as a "fundamental right reserved to the people—the right to vote for representatives of their choice—(and that the right) would hinge not on constitutional guarantees, but on the General Assembly's willingness to abstain form imposing additional qualifications or holding constitutional offices." Also, in Colorado, the framers of the constitution "did express their intent to permit the legislature to fix additional qualifications for certain offices…." However, the dissent noted that where the constitution strips the General Assembly of power, it does so expressly. The Court sided with the majority of states that had held that "where the Constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive.") In this regard, see also *Thomas v.* State, 58 So.2d 173 (Fla. 1952). (Per *Thomas*: "The principle is well established that where the Constitution expressly provides the manner of doing a thing, it 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

"(i)n construing a Constitution, resort may be had to (the) well-recognized rule of construction contained in the maxim "expressio unius est exclusio alterius…."[24]

In contrast, the North Carolina Supreme Court and the California Supreme Court[25] appear to be examples[26] of courts that have refused to apply this doctrine when interpreting their constitution if not in all cases, then in all but what appear to be very rare circumstances. As stated by the North Carolina Supreme Court in embracing the California rationale:

> This doctrine flies directly in the face of one of the underlying principles of North Carolina constitutional law. As Justice Mitchell himself stated for the Court in (the) *Preston* (case):
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> > "[I]t is firmly established that our State Constitution is not a grant of power…. All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution….This fundamental concept, that a state constitution acts as a limitation, rather than a grant of power, is certainly not unique to North Carolina. The California Court of Appeal, for example, recently reviewed the basic principles of California constitutional law as set out in previous decisions of the California Supreme Court. [27] The following passage from that opinion could serve just as easily as a primer for North Carolina constitutional law: Unlike the federal Constitution, which is a grant of power to Congress, the California [North Carolina] Constitution is a limitation or restriction on the powers of the Legislature. Thus, the courts do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Further, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." Consequently, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. In other words, the doctrine of *expressio unius est exclusio alterius*…is inapplicable."[28]

C. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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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.") Regarding the application of the maxim for a different policy area, see *State v. Gilman*, 10 S.E. 283 (W.Va.) in which the West Virginia Supreme Court applied the doctrine in invalidating a statutory law relating to the sale of liquor.

[24] *Stokes v. Harrison*, 155 So.2d 373 (La. 1959). See also, *Collingsworth County v. Allred*, 40 S.W.2d 13 (Tx. 1931).

[25] *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951) ("Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.").

[26] See also, *Eberle v. Nielson*, 306 P.2d 1083, 1086 (Idaho 1957) ("There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of expressio unius est exclusio alterius has no application to the provisions of our State Constitution."); *Penrod v. Crowley*, 356 P.2d 73, 80 (Idaho 1960) ("The rule…does not apply to provisions of the state constitution."); *State ex. rel. Attorney General v. State Board of Equalization*, 185 P. 708, 711 (Mont. 1919) ("The maxim…cannot be made to serve as a means to restrict the plenary power of the Legislature, nor to control an express provision of the Constitution."); *Earhart v. Frohmiller*, 178 P.2d 436 (Az. 1947) ("(i)t cannot be made to restrict the plenary power of the Legislature."); *State ex. rel. McCormack v. Foley*, 118 N.W.2d 211 (Wis. 1962); *Cathcart v. Meyer*, 2004 WY 49 (Wyo. 2004) (rule is "inapplicable in construing constitutional provisions.")

[27] *County of Fresno v. State*, 268 Cal.Rptr. 266, 270 (Cal. Ct. App. 1990).

[28] *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Art. XI, s. 5, of the Florida Constitution, requires that each proposed amendment to the Constitution be published in a newspaper of general circulation in each county two times prior to the general election. The Division of Elections within the Department of State estimates that the cost of compliance for a proposal with a ballot summary of 75 words or less would be approximately $50,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The mandates provision does not apply to House Joint Resolutions.

2. Other:

   Article XI, Section 1 of the State Constitution provides the Legislature with the authority to propose amendments to the State Constitution by joint resolution approved by three-fifths of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or may be placed at a special election held for that purpose.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Not applicable.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Judiciary Committee adopted one amendment and reported the bill favorably as a CS. The CS differs from the original bill in that the CS qualifies the prohibition against court use of the *expressio unius* maxim by permitting it when “absolutely necessary to unless the limitation is absolutely necessary to carry out the purpose of the constitutional provision and without regard to the comprehensiveness of the constitutional provision.