**IN THE SUPREME COURT**
**STATE OF FLORIDA**

Supreme Court Case No.: SC11-2453
DCA Case No. 1D11-384
Lower Tribunal Case No.: 2007-CA-1818

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BOB GRAHAM; TALBOT "SANDY" D'ALEMBERTE; JOAN RUFFIER; BRUCE W. HAUPTLI; JAMES P. JONES; HOWARD B. ROCK; ERIC H. SHAW; and FREDERICK R. STROBEL,

*Petitioners*,

vs.

MIKE HARIDOPOLOS, President of the Florida Senate; and DEAN CANNON, Speaker of the Florida House of Representatives, on behalf of the Florida Legislature,

*Respondents.*

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# PETITIONERS' INITIAL BRIEF ON MERITS

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ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

ROBIN GIBSON
GIBSON LAW FIRM
299 E. Stuart Avenue
Lake Wales, FL 33853
863-676-8584 (Office)
863-676-0548 (Fax)
Florida Bar No. 028594
r.gibson@gibsonlawfirm299.com
Counsel for Petitioners

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## PREFACE

The parties will be referred to as "Plaintiffs" or "individual Plaintiffs" and "Legislature." The following symbols will be used:

- Amendment = Article IX, Section 7, Florida Constitution.
- R = Record on Appeal with cites to volume and pages: (R. 1: 3-5).
- A = Appendix to Brief of Appellant.

## QUESTION PRESENTED

WHETHER THE CONSTITUTIONAL AMENDMENT TRANSFERRING TO THE BOARD OF GOVERNORS THE POWER TO OPERATE, MANAGE AND CONTROL UNIVERSITIES NECESSARILY CARRIED WITH IT THE POWER TO CONTROL TUITION AND FEES

## STATEMENT OF THE CASE

This action was initially brought by the individual Plaintiffs before Judge Charles A. Francis in the Circuit Court for Leon County. (R. 1: 14). Shortly thereafter, the Board of Governors joined the action as Co-Plaintiff and an Amended Complaint was filed. (R. 1: 56).

For an extended period of time the parties filed, and the trial court considered and ruled upon, comprehensive motions that refined the issues

now appearing in Plaintiffs' Third Amended Complaint (R. 3: 502) and Defendants' Answer. (R. 4: 737).[1]

The trial court granted standing to the Board on all nine counts (R. 4: 720-23), and standing to the individual Plaintiffs on the appropriations issues alleged in four counts of the Third Amended Complaint. (R. 4: 723-26). Trial on all issues was set to begin in July of 2010.

In March of 2010 the Board of Governors filed a Notice of Voluntary Dismissal. (R. 6: 1117). The trial court thereafter confined the hearing to the appropriations issues and eliminated consideration of the non-appropriation counts where standing had been exclusive to the Board of Governors. (R. 9: 1737).

Both parties filed motions for summary judgment together with supporting legal memoranda, deposition testimony, affidavits, and documentary evidence in advance of the dispositive motions hearing. (R. 7: 1143-63, 1169-94; 8: 1396-1585; 9: 1586-1703, 1708-16).

Oral arguments were held June 18, 2010. Without objection from the parties, the court announced it could rule on all issues as a matter of law without the need for trial.

[1] This action was filed in 2007. At the time, the most recent financial figures were those of that year. The parties continued to use the 2007 figures throughout the litigation. The figures are illustrative of the same legal issues that exist presently.

The trial court entered its Final Summary Declaratory Judgment on December 30, 2010, granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment. (R. 9: 1755).

Plaintiffs appealed the trial court's ruling to the First District Court of Appeal, which affirmed. *Graham v. Haridopolos*, 75 So. 3d 315 (Fla. 1st DCA 2011). This court granted Plaintiffs' petition for discretionary jurisdiction on March 15, 2012.

Because the question concerns the constitutionality of legislative acts controlling tuition and student fees, the matter comes to this Court to be reviewed de novo. *See City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002).

## STATEMENT OF THE FACTS

### *Background*

Florida's university system traces its beginnings to the Legislature's 1905 Buckman Act, which consolidated scattered state schools into three institutions of higher learning. Governance of the system was placed with a statutory state agency known as the Board of Control.

University governance was stable until 1956, but has traveled a rocky road since. In that year, the Florida Senate created the Johns Committee which launched a legislative investigation of Florida's universities for

communists, subversives and homosexuals on the campuses. Thereafter, state business leaders and outside education consultants published a 1962 study critical of political interference in university matters. The study led the Legislature to redesign university governance and create the statutory Board of Regents to replace the Board of Control in 1965. [2]

The turmoil continued. In 1971, the Legislature attempted unsuccessfully to abolish the Board of Regents. The 1978 Constitution Revision Commission proposed a constitutional amendment granting the Board of Regents constitutional autonomy. The amendment failed. Stung by the attempt at independence, the Legislature attempted to abolish the Board of Regents in 1979 and 1980, but was unsuccessful. The 1980 measure passed both houses, only to be vetoed by the Governor.[3]

In 2001, the Legislature successfully abolished the Board. University governance was assigned to a legislative agency known as the "Florida Board of Education" (not to be confused with the constitutional agency known as the "Board of Education") that controlled universities under the Legislature's "K-20 Education Code."

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[2] Hendrix Chandler, Dreams and Political Realities: *A 20th Century History of Florida's University System* 26-28 (1983) (unpublished manuscript) (on file with Board of Governors, Tallahassee).

[3] *Id.*

***The Framers***

Thereafter, a collection of concerned citizens undertook an effort to de-politicize university governance through an amendment to the state's Constitution. The Amendment's framers were members of a state-wide steering committee for an entity known as Education Excellence for Florida. ("EEF") Ruffier Depo. pp. 40-41 (R. 8: 1471-72). EEF was concerned about the political turmoil and the resulting harm to Florida's universities. Graham Depo. pp. 15, 46 (R. 8: 1600, 1631); Shorstein Depo. p. 44 (R. 8: 1538).

EEF explored the possibility of constitutional status for university governance similar to the proven systems in Michigan, California and Minnesota. Graham Depo. pp. 29, 51- 52 (R. 9: 1614, 1636, 1637); Ruffier Depo. p. 21 (R. 8: 1452); Shorstein Depo. p. 44 (R. 8: 1538). The framers' intent was to align their efforts with the desires of the people who would ultimately be called upon to vote on an initiative to amend the state's Constitution. A comprehensive exploratory process ensued, involving public forums at university sites and across the state, four focus groups in two cities, and a statewide poll. The information gained was brought together for the drafting of a proposed amendment that was put forward for adoption. Graham Depo. p. 10 (R. 9: 1595).

***The Voters***

The voters heard advocacy from both sides. The efforts of EEF were opposed by an entity known as Floridians for Education Reform[4] ("FER") favoring the continued legislative control over universities. FER challenged the amendment before this Court and later at the ballot box. This Court, in *Advisory Opinion to the Attorney General re: Local Trustees,* 819 So. 2d 725 (Fla. 2002), unanimously approved the language of the proposed amendment for ballot inclusion. The Amendment was then debated publicly and considered by editorial boards across the state before the question went to the polls. Graham Depo. pp. 30, 34 (R. 9: 1615, 1619); Ruffier Depo. pp. 43-45 (R. 8: 1474-1476); Shorstein Depo. pp. 29, 66, 69 (R. 8: 1523, 1560, 1563). On election day of 2002, the electorate adopted the Amendment with a vote of greater than sixty percent,[5] evidencing that the effort of the framers to match their intent with the intent of the voters had been successful. The Amendment now appears as Article IX, Section 7 of the Florida Constitution. The full text is included in the Appendix to this brief. (A. 1).

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[4]Florida Division of Elections, Committee Tracking System, http://www.election.dos.state.fl.us/committees/ComLkupByName.asp

[5] Fla. Dept. of State Website, election.dos.state.fl.us/initiatives/initiativelist.asp. In 2002, constitutional amendments needed a vote of greater than 50% for adoption. Since then, the favorable vote must exceed 60%. The amendment succeeded under both standards.

## SUMMARY OF ARGUMENT

Public and private universities are both funded by the earnings of their corporate entities that receive monies from contracts, grants, tuition, fees, and the like in exchange for services provided by the universities. "Publics" receive a second source of funding from the state's general revenue as a subsidy designed to make higher education affordable for most of the state's citizens. An appreciation of the dual funding for public universities is important for the resolution of the issues in this action.

Article III of the Florida Constitution provides the Legislature with its power to legislate. Before the adoption of the university Amendment, the Article III power was the only basis for the Legislature's complete statutory control of universities, including the creation of a state agency as an operating entity along with the setting of tuition and student fees.

Article VII of the Constitution provides the Legislature with its power to tax and appropriate funds from general revenue. This is the authority for the subsidy from the state to its public universities.

The plain language of the university Amendment acted as a self-executing, all-inclusive transfer of the Legislature's Article III power to "govern," "operate," "manage," "control," "regulate" and be "fully responsible" for the "whole university system" to an independent

constitutional operating entity known as the Board of Governors. The transfer was without exception, qualification or diminishment and thereby included the Legislature's previous Article III power to operate universities along with the setting of tuition and fees.

## ARGUMENT

### I. The Power to Control the Management and Operation of Universities Necessarily Carried With it the Power to Control Tuition and Fees

### A. Article III Legislative Power

A founding principle of our constitutional government is that the people, as an attribute of sovereignty, retain the power to regulate their own conduct. As a result, Article III, Section 1, is a unique provision in the Florida Constitution. Even though the provision vests "[t]he legislative power of the state" with the Legislature, it is not a grant of power. *Crist v. Florida Assoc. of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 141 (Fla. 2008). The Legislature is allowed to exercise its legislative authority on behalf of the people only up to the time that the people decide for themselves how they wish for a given activity to be carried out. *Amos v. Mathews*, 126 So. 308, 315 (Fla. 1930). When that time comes, the people express themselves by amending their constitution. The constitution is therefore said to be a limitation by the people upon what would otherwise be the Legislature's

absolute power to make laws. *Amos*, 126 So. at 315. Stated differently, the Legislature is free to make any law that is not forbidden by organic law. *Crist*, 978 So. 2d at 141.

The Article III power provided the pre-Amendment authority for the Legislature to create its own state agency as a "body corporate" with an appointed board to manage Florida's university system. (Board of Control, 1905-1965; Board of Regents, 1965-2001; Florida Board of Education, 2001-2003).

The key fiscal distinction is between: 1) the general revenue distributed pursuant to the Article VII power to appropriate, and 2) the university funds generated pursuant to the Article III power to manage the corporate enterprise. Appropriations are made from funds generated by mandatory payments of taxes and fees. Management handles funds generated from voluntary payments for services. Generally speaking, one controls funds from taxation, while the other controls funds from contract.

In constitutional systems, these voluntary, contractual revenues have included research grants, tuition and student fees, endowments for universities, income from management of investments, and private monies and contracts. *See* Amended Complaint in this action, with citations (R. 1: 27).

As a governance mechanism in public higher education, constitutional autonomy has produced universities acknowledged to be among the most distinguished in the country. Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L 271. The intent of the framers and voters was to achieve the same for Florida. Subsection (a) of the Amendment states that its purpose is to "achieve excellence through the teaching of students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies . . . ."

**B. Transfer of Legislature's Power to Independent Constitutional Entities**

The people are free to transfer what would otherwise be the Legislature's power to other constitutional entities besides the Legislature. *Sylvester v. Tindall*, 18 So. 2d 892, 900 (Fla. 1944). Indeed, Florida has a comprehensive, seventy-year body of law to that effect. In 1942, the people adopted Section 30 to Article IV of the state's Constitution. *Id*. at 894. The amendment created the Florida Game and Fresh Water Fish Commission as an independent constitutional entity. *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, 497 (Fla. 2003). The amendment transferred the Legislature's authority to provide for the

"management, restoration, conservation and regulation" of the state's game and fresh water fish to the Commission in its capacity as a constitutional entity. *Sylvester*, 18 So. 2d at 896.

Where one method or means of exercising a power is prescribed in the constitution, that prescription acts to deny the exercise of that power to others. *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006). Accordingly, the effect of a transfer of a portion of legislative authority to an independent constitutional entity divests the Legislature of that authority, *Beck v. Game and Fresh Water Fish Commission*, 33 So. 2d 594, 595 (Fla. 1948), while vesting that authority in the recipient constitutional entity. *State ex rel. Griffin v. Sullivan*, 30 So. 2d 919, 920 (Fla. 1947). Because of its "independent constitutional stature," the entity assumes the authority the Legislature had prior to the transfer. *Caribbean Conservation,* 838 So. 2d at 497. The rules adopted by the constitutional entity are then tantamount to legislative acts, *Airboat Assoc. of Florida, Inc. v. Florida Game and Fresh Water Fish Commission,* 498 So. 2d 629, 630 (Fla. 3rd DCA 1986), and become the governing law. *Griffin,* 30 So. 2d at 920. Any and all statutes in conflict with the purpose and intent of the transfer are repealed. *Sylvester v. Tindall,* 18 So. 2d 892, 900 (Fla. 1944).

The same basic, fundamental constitutional principles apply to the university Amendment at issue. Before 2002, the people had not expressed in

their constitution how public universities were to be "governed," "operated," "managed," "controlled," or "regulated." No corporate entity had been created by the people to be "fully responsible" for the "whole university system." Since the constitution placed no limit upon the Legislature concerning the governance of public universities, the full responsibility for the whole university system properly fell to the Legislature's Article III authority.

That all changed in 2002, when the people amended the Florida Constitution and expressed for themselves how they wished for their universities to be governed. Following the political turmoil impacting universities (*See* pp. 1-2, above), the people decided to de-politicize university governance by transferring the "full responsibility" for the operation of the "whole university system" to a citizen board they created as a separate, independent constitutional entity. Article IX, Section 7, Fla. Const.

**C. Florida's Independent Constitutional Entities**

The Board of Governors joins other Florida entities that have been assigned portions of the Article III Legislative authority by the people for the purpose of carrying out specific state functions. These independent entities are separate and distinct from the branches of government and from each other. The other entities include the Florida Wildlife and Conservation Commission (formerly the Florida Game and Fresh Water Fish Commission)

created by Article IV, Section 9, and the Judicial Qualifications Commission, created by Article V, Section 12 of the Florida Constitution. *See Inquiry Concerning Judge John R. Sloop*, 946 So. 2d 1046, 1049 (Fla. 2006) (holding that, "Under the Constitution, the Judicial Qualifications Commission (JQC) is an independent entity . . . .").

As long as such entities operate within the scope of their constitutional authority, they stand as co-equals to the legislative branch of government. *Sylvester v. Tindall*, 18 So. 2d 892, 900-01 (Fla. 1944). This is because each entity has been created and can be abolished by the sovereign authority, the same authority that has created and has the power to abolish the Legislature itself. *Coleman v. State ex rel. Race*, 159 So. 2d 504, 507, (Fla. 1935) ("By the adoption of constitutional amendments . . . . By such procedure not only may valid law be established without legislative act, but the Legislature may be abolished and some other lawmaking power set up in its place. The Legislature is the creature of the Constitution and can never be superior in powers to the will of the people as written by them in the Constitution.").

**D. Other States' Constitutional Entities are Consistent with Florida Law about its Independent Constitutional Entities**

Constitutions of other states have also created independent constitutional entities. The best known of these are the entities that manage, operate, and control their public universities. In drafting the Amendment, the

framers sought to de-politicize universities and obtain advantages that had benefitted other states. They analyzed the governance structures for some of the more distinguished public universities in the country, and focused on the states of Michigan, Minnesota and California. Ruffier Depo. pp. 21, 40-41 (R. 8: 1452, 1471-72); Graham Depo. pp. 15, 29, 46, 51-52 (R. 9: 1600, 1614, 1631, 1636-37); Shorstein Depo. p. 44 (R. 8: 1538). Each of those states has a 150-year body of law concerning constitutional university governance.[6] At least one state supreme court has credited the replacement of political control with constitutional governance as a major factor for university achievement. *Sterling v. Regents of the University of Michigan*, 68 N.W. 253, 266 (Mich. 1896).

The framers authored Florida's amendment so that it would constitute the broadest and most all-inclusive conveyance of university governance authority in the country. None of the other state constitutions conveys self-executing and unqualified corporate powers that are as broad and as all-inclusive as the powers to "govern," "operate," "regulate," "manage,"

[6] California: *Royers Estate*, 56 P. 461 (Cal. 1899) (Board of Regents created as corporation in Constitution of 1849); Michigan: *Federated Publications, Inc. v. Board of Trustees of Michigan State University*, 594 N.W. 2d 491, 496 (Mich. 1999) (Board of Regents created as corporation in Constitution of 1850); Minnesota: *State v. Chase*, 220 N.W. 951, 954 (Minn. 1928).

"control," and be "fully responsible" for the "whole university system."[7] With such an all-inclusive transfer of what was previously legislative prerogative, Florida joined the ranks of states enjoying the benefits of constitutional university governance:

> [T]he governing boards of public institutions, such as colleges and universities, are corporations, and, while functioning within the scope of their authority, are not subject to the control or supervision of any other branch or department of the state government, but are regarded as independent legal entities with the general powers ordinarily possessed by such entities. The status of the governing board of a public university may be that of the highest form of juristic person known to law, the constitutional corporation of independent authority, which, within the scope of its functions, is a co-ordinate with and equal to that of the legislature.

14A *C.J.S. Colleges and Universities* § 14 (2009) (internal footnotes omitted).

[7] *Compare:* ALA. CONST. §§ 264, 266; ALASKA CONST. art. 11, §§ 5-6; ARK. CONST. art. 14, §§ 12-13; CAL. CONST. art. 9, § 9; COLO. CONST. art. 10§ 5; CONN. CONST. art. Eighth, § 2; GA. CONST. § IV, ¶ 1; HAW. CONST. art. X, § 5; IDAHO CONST. art. IX, § 10; IOWA CONST. art. 2d, § 2; KAN. CONST. § 2; LA. CONST. art. VII, § 5; ME. CONST. art. VII, § 1; MASS. CONST. ch. V, § 1; MICH. CONST. art. VIII, § 5; MINN. CONST. art. VII, § 3; MO. CONST. art. IV, § 9(b); MONT. CONST. art. X, § 9; NEB. CONST. art. VII, §§ 10-14; NEV. CONST. §§ 4, 8; N.M. CONST. § 11; N.Y. CONST. art. V, § 4, and art. XI, § 2; N.C. CONST. § 8; N.D. CONST. art. VII, § 6; OKLA. CONST. § XIII; TENN. CONST. § 12; TEX. CONST. art. 7, §§ 10, 13, 17-18; UTAH CONST. art. X, § 4; WIS. CONST. § 6; WYO. CONST. 97-7-015.

## E. Separation of Powers

With the advent of the Board of Governors as a co-equal constitutional entity and the transfer of all-inclusive power over universities to that entity, the separation of powers with regard to universities took on a new configuration:

CONSTITUTION
OF THE STATE OF FLORIDA
ARTICLE IX
EDUCATION

SECTION 7. State University System.—

* * *

**[*Powers, Co-Equal Entity*]**

(b) STATE UNIVERSITY SYSTEM. . . . a board of governors shall **govern** the state university system.

* * *

(d) STATEWIDE BOARD OF GOVERNORS. The board of governors shall be a **body corporate** consisting of seventeen members. The board shall **operate, regulate, control, and be fully responsible** for the **management** of the **whole university system.** These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs.

**[*Powers, Legislative*]**

The board's management shall be subject to the powers of the **legislature to appropriate for the expenditure of funds**, and the board shall account for such expenditures as provided by law . . . . The appointed members shall be

**confirmed** by the senate and serve **staggered terms** of seven years **as provided by law.**

**[*Powers, Executive*]**

The **governor shall appoint** to the board fourteen citizens dedicated to the purposes of the state university system.

(emphasis added).

The plain language of the Amendment confirms the First District's earlier pronouncement that the only authority remaining for the Legislature with respect to universities is the "authority to appropriate funds, to confirm the Board's appointed members, and to set members' staggered terms." *NAACP, Inc. v. Florida Board of Regents,* 876 So. 2d 636, 640 (Fla. 1st DCA 2004).

## F. Transfer of Power to Control the Management and Operation of the Business of Universities Included the Power to Control Tuition and Fees

The plain language of the Amendment demonstrates that the transfer of authority was self executing, *NAACP,* 876 So. 2d at 636, 640, and without exclusion or exception. Art. IX, § 7(d), Fla. Const. Since the transfer was all-inclusive and did not require legislative implementation, simply recognizing the legislative authority that existed prior to the Amendment goes a long way toward identifying the authority that was transferred from the Legislature and now resides with the Board of Governors.

Prior to the Amendment, the only basis for the Legislature's control over tuition and fees was its Article III authority to legislate. Tuition and fees were: a) set according to statute, § 1009.24 Fla. Stat. (2002); b) collected by the state agency (university system) created by statute, Part IV, Chapt. 1001, Fla. Stat. (2002); and c) deposited into the Education and General Student and Other Fees Trust Fund, also created by statute, Section 1011.4106 Fla. Stat. (2002). The Legislature also required that the moneys in the Education and General Student and Other Fees Trust Fund (along with moneys in the other trust funds) be "segregated for a purpose *authorized by law*." Section 215.32(2)(b) Fla. Stat. (2002) (emphasis added).

The Legislature correctly "segregated" the Article III funds from the Article VII funds throughout the legislative process. Even the Appropriations Act made separate and distinct appropriations. For example, with respect to the particular year at issue (*See* footnote 1, above), Appropriation 156 of the 2007 Appropriations Act made a "Specific Appropriation" for universities from General Revenue, and a separate and distinct "Specific Appropriation" for universities from the Education and General Student and Other Fees Trust Fund. Appropriation 156, Appropriations Act, Ch. 2007-72, Laws of Florida; (A. 2-3).

The point in time where the appropriation is made is also the point where the outcome of this case becomes clear. The fact that the Legislature made the proper segregation of the Article VII funds from the Article III funds readily identifies the Article III funds and makes the transfer to the Board of Governors simple to implement.

The general revenue funds remained Article VII funds throughout the process: They were raised with the Article VII taxing power, placed in the Article VII general revenue fund, and later distributed by the Article VII appropriations power. The Amendment had no impact on Article VII or its funds.

The Article III funds were different. Prior to the Amendment, they were raised with the Article III power to legislate by statute for the corporate management of the business of the university system. When it came time for distribution, the Legislature had the power to require its state agency to bring the Article III funds to where the Article VII power could make the distribution as an appropriation.

After the Amendment, the Legislature was divested of its Article III power to operate, manage and control the business of universities. That power, without exception, qualification or diminishment, was totally vested in the Board of Governors. As a result, the Article III funds produced by

managing the business of universities were placed in the hands of the Board of Governors as an independent constitutional agency. Since the Legislature no longer controls the funds, it is without the authority to bring the funds to where the Article VII power can make the distribution as before. In short, the Legislature no longer has the Article III funds to appropriate.

Any effort by the Legislature to reach across the divide between itself and the constitutionally-independent Board of Governors to try to take control of the university-generated funds amounts to a violation of the separation of powers as laid out in the university Amendment.

## II. The First District Over-Extended the Appropriations Power and Misapplied Constitutional Power

### A. The People have Decided to Limit the Legislature by Divesting it of the Power to Manage, Operate and Control Universities

The legislative power inherently resides with the people, and was not a grant to the Legislature. *Crist v. Florida Assoc. of Criminal Defense Lawyers, Inc*., 978 So. 2d 134, 141 (Fla. 2008). Thus, while legislative authority is in the hands of the Legislature, it is, by its very nature, subject at any time to preemption by the people. *Amos v. Mathews,* 126 So. 308, 315 (Fla. 1930).

The First District's opinion below missed the whole point of what happens when the people decide to amend the state's paramount law and

thereby limit the Legislature's legislative authority. The following key sentence in the First District's opinion demonstrates a lack of understanding as to the effect of the Amendment: "We are unaware of any entity other than the Legislature in the history of our state that has been authorized by the Florida Constitution to exercise the quintessential legislative power of raising and appropriating state funds." *Graham v. Haridopolos,* 75 So. 3d 315, 320 (Fla. 1st DCA 2011).

If the "history of the state" could act to make constitutional law immune from amendment, Florida appellate judges would still be required to run in political races similar to the members of the Legislature. Moreover, "it is not for [the Court] to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation." *Florida Hospital Waterman, Inc. v. Buster,* 984 So. 2d 478, 495 (Fla. 2008).

As for the "quintessential legislative power of raising and appropriating state funds," the statement implies that "state funds" for universities are all the same and are subject to the same legislative power to raise and appropriate those funds.

In reality, state funds for universities come from two different sources. The statement is correct as to only one of the two sources. The Article VII general revenue funds that supply the subsidy for state universities are still raised and appropriated by the Legislature.

The statement is incorrect as to the operating funds that were previously subject to Article III legislative power. The people have transferred the Legislature's authority over universities to the constitutional entity known as the Board of Governors. The transfer included the power to operate, manage and control universities along with the institutional funds they generate.

The funds remain state funds and are still controlled by the same power. It is just that the people have now placed that power in the hands of a constitutionally-independent public entity that they created for the purpose. Control of tuition and fees is a necessary and inescapably inherent part of the corporate power to govern universities that was transferred by the people to the Board of Governors by the Amendment.

The Minnesota Supreme Court has written an oft-cited judicial analysis of a university's constitutionally independent power to govern as it relates to the branches of state government. With regard to legislative and executive efforts to encroach on university-generated finances, the court pointed out that: "[t]he right so to control University finances is the power to dictate

academic policy and direct every institution activity." *State v. Chase*, 220 N.W. 951,952 (Minn. 1928). In short, whoever controls the money controls the activity. Notably, *Chase* is the only opinion cited to the 1978 Florida Constitution Revision Commission by its Education Committee when that Committee recommended constitutional governance for Florida's universities. (A. 13).

One thing is for certain: a constitution is a living document that enables the people to articulate their desires to effect change for what they perceive to be the better. In this instance, the people decided to de-politicize university governance and make an all-inclusive transfer to appointed citizen control. The established branches of government are free to question the wisdom of such a constitutional amendment, but they cannot alter or subvert it. *Amos v. Mathews*, 126 So. 308, 315 (Fla. 1930); *Browning v. Florida Hometown Democracy, Inc., PAC, et al.*, 29 So. 3d 1053 (Fla. 2010) *citing Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960) ("constitutional provisions are presumed self-executing to prevent the Legislature from nullifying the will of the people as expressed in their Constitution").

## B. Appropriations is the Power to Authorize Expenditures, but Does Not Include the Power to Raise Revenue

The First District's opinion retained for the Legislature the authority for tuition and fee-setting by finding that the appropriations power was a "plenary power" to both "raise and appropriate state funds." *Graham v. Haridopolos,* 75 So. 3d 315, 318 (Fla. 1st DCA 2011). As a basis for the finding, the court euphemistically referred to the Legislature's overall "power of the purse." *Id.*

The court overlooked the fact that the "power of the purse" is not a single overall function, but two separate functions. It is more accurately defined as the Legislature's Article VII power to both tax and spend. The tax and spend power involves: 1) what goes into the purse, and 2) what comes out of the purse. In contrast, the power of appropriations has nothing to do with what goes in the purse, but everything to do with what comes out of it.

The Legislature itself has clearly defined the power of appropriations. Florida Statute 216.011(1)(b) (2011) states that "'Appropriation' means a legal authorization to make *expenditures* for specific purposes within the amounts authorized by law." (emphasis added). The Legislature's own definition provides no basis for the assertion the Legislature is now making in this action that the power of appropriations includes the additional authority to raise money.

The Legislature's definition, of necessity, is derived from constitutional authority. The word "appropriation" appears in only one subsection of Article VII of the Florida Constitution. Section 1(c) states that "No money shall be *drawn from the treasury* except in pursuance of *appropriation* made by law." (emphasis added). The other provisions address the raising of revenue, without any mention of appropriations.

The university Amendment, while not in any way creating or altering the power of appropriation, refers to the appropriations power, stating in subsection (d) that the "board's management is subject to the powers of the legislature to appropriate *for the expenditure of funds.*" (emphasis added). Nothing in the language of the university Amendment would authorize the appropriations power to be utilized to raise funds, such as tuition and fees.

**C. Accountability Disrupted by First District Opinion**

The structure of the Amendment is designed to provide for direct lines of accountability.

*Accountability for the Appropriation*. So there would be no confusion about the role of the appropriations power, the framers adopted the language of a proposed amendment to the Florida Constitution put forward in 1978 to the Florida Constitution Revision Commission by its Education Committee. *Education Committee Report*, 1978 Constitution Revision Commission. (A.

7). The language of the amendment proposed by the Committee addressed the Legislature's appropriation of the state subsidy to universities, stating that: "the board shall account for such expenditures as provided by law." With that language, the proposed amendment made it "explicit" that the university system was required to "account for the expenditure of the funds vis-à-vis the postaudit process." *Id.*

*Accountability to the People*. Before the Amendment, the Legislature's state agency created to manage and operate the university system had to account back to the Legislature for the performance of universities. The legislators were thereafter accountable to the people. But legislative accountability to the people for university performance was confusing, because it was mixed in with a variety of other distracting political pressures. Things are different now.

Today the Board of Governors is a single-purpose entity charged with acting in the best interests of public universities. The Board is directly accountable to the people for the performance of those universities. As the constitutional experience of high-speed rail can attest, the people are capable of being critical and changing course.

If the First District's opinion is allowed to stand, control over tuition and fees would remain with the Legislature. The Board of Governors would

be responsible for delivering the service while the Legislature would be responsible for pricing the service it had nothing to do with delivering. No constitutional university system in the country contains such a dysfunctional structure. (*See* footnote 8, below).

**D. Retention of Fee-Setting for Legislature would have Required a Constitutional Exception**

If the Legislature were to lawfully keep the authority to set tuition and fees, that authority would have to appear in the form of a constitutional exception to that effect. *Florida Department of Natural Resources v. Florida Game and Fresh Water Fish Commission*, 342 So. 2d 495, 497 (Fla. 1977). The exception would have had to specifically carve out the control over tuition and fees from the otherwise all-inclusive transfer of authority to the Board of Governors.

Indeed, Florida's extensive body of law on constitutional transfers contains just such an exception. The constitutional amendment creating what is now known as the Fish and Wildlife Conservation Commission explicitly provides that the setting of fees for hunting and fishing licenses and penalties for violations of Commission regulations "shall be prescribed by general law." Art. IV, § 9, Fla. Const. The exception was necessary in order to keep the fee-setting authority from passing to the Commission.

Thus, if the framers of the university Amendment had intended to retain for the Legislature the control over tuition and fees, they would have been required to provide the necessary language for such an exception. The framers were certainly cognizant of the concept. They opted to provide for the setting of staggered Board terms "as provided by law," but opted not to utilize the language for the setting of tuition and fees. Consequently, control over tuition and fees passed to the Board of Governors as part of the all-inclusive transfer of control over the university system.

### E. Control of Tuition and Fees in Other Constitutional Governance States

As for control over tuition and fees in other states, it has hardly been an issue. This is because the corporate power to contract, operate, manage and control universities necessarily carries with it the authority to generate and spend institutional funds. The key is to determine what constitutes state revenues distributed pursuant to the power of appropriation and what constitutes institutional funds that are within the governing board's power to manage. The basic distinction is between public funds involuntarily exacted through taxation and mandatory fees, as against private funds voluntarily paid to universities pursuant to contract. *See* Amended Complaint in this action with citations (R. 1: 14).

In constitutional systems across the country, voluntary payments subject to the management of boards include research grants, tuition and fees, endowments for universities, management of university investments, private monies and contracts, and even the collection of on-campus parking fines. *Id.*

There is no reported case in the country to support the Legislature's contention in this case. Not one case holds that a legislature has the power to set tuition and fees for universities governed by a constitutionally established board. Every reported case in the country either holds or acknowledges that power of a constitutional entity to operate and control universities carries with it the authority to control tuition and fees.[8]

**F. Control of Tuition and Fees Brings Financial Stability**

It is noteworthy that the balance between the constitutional board's authority to control tuition and fees and the Legislature's authority to appropriate the public subsidy can be helpful tools for obtaining stable funding for universities. The parties in the more-experienced constitutional

[8]*See: Phillips v. Minnesota State University Mankato,* Civil No. 09-1659 (BSD/FLN) 2009 WL 5103233, at *3 (D. Minn. Dec. 17, 2009); *Spielberg v. Board of Regents, University of Michigan,* 601 F.Supp. 994 (D. Mich. 1985) (citing *Lister v. Hoover,* 706 F.2d 796 (7th Cir,1983); *Knowalski v. Board of Trustees of Macomb County Community College,* 204 N.W.2d 272 (Mich. App. 1976); *Schmidt v. Regents of University of Michigan,* 233 N.W.2d 855 (Mich. App. 1975); *Regents of University of Michigan v. State,* 208 N.W.2d 871 (Mich. App. 1973).

governance states have been able to negotiate as co-equals to arrive at formulas to lower tuitions in exchange for higher appropriations, and reverse the formula when state revenues are down.[9] In this way, states with constitutional governance have been able to stabilize the volatile funding variations that have plagued higher education in Florida.

## CONCLUSION

Prior to the Amendment, the only authority for the Legislature's control of tuition and fees was the Article III power to legislate. The all-inclusive transfer of legislative power to the Board of Governors as an independent constitutional entity was self-executing and occurred without exception, qualification or diminishment. The effect of the transfer was to divest the Legislature of its statutory control over tuition and fees and vest that authority in the Board of Governors.

The statutes presently on the books purporting to exercise legislative authority over universities, including the authority to control tuition and fees,

[9] *See e.g.*, California's "Higher Education Compact" attached as Exhibit C to the original Complaint for Declaratory Judgment in this action (R. 1: 37-46); Affidavit of Deborah Obley, filed as Exhibit B to Plaintiff's Motion for Summary Judgment: ("The state governor and legislature are informed of proposed fee levels during the negotiation process on the annual state budget. They do not approve fee levels, but take into account the University's fee proposals in making determinations of state support.") Obley affidavit, p. 3 (R. 8:1413).

are unconstitutional as a violation of the separation of powers. Those statutes have been repealed by operation of constitutional law, are invalid, and should no longer be included among the operative Florida Statutes.

Respectfully submitted,

(Signature on Original)
Robin Gibson, FBN 02849
Gibson Law Firm
299 E Stuart Avenue
Lake Wales, FL 33853
(863) 676-8584 (Office)
(863) 676-0548 (Fax)
r.gibson@gibsonlawfirm299.com
Attorney for Petitions

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and eight copies of Petitioner's Brief on Jurisdiction was sent by overnight mail to attorney John K. Aurell in Tallahassee to be hand delivered to the Clerk on Friday, December 30, 2011 and a copy of the Petitioners' Brief on Jurisdiction has been furnished to Daniel C. Brown, Esquire, Carlton Fields, P.A., 215 South Monroe Street, Suite 500, Tallahassee, FL 32301 by e-mail and U.S. Mail this 5th day of April, 2011.

(Signature on Original)
Robin Gibson, Esquire
Attorney for Petitioners

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, and is double spaced and formatted with Times New Roman 14-point font. In compliance with Administrative Order No. AOSC04-84, a Word copy has been provided by e-mail to the Clerk at e-file@flcourts.org.

(Signature on Original)
Robin Gibson, Esquire
Attorney for Petitioners