

IN THE SUPREME COURT OF FLORIDA

Case No. SC00-1998
Lower Tribunal No. 5D98-3178

MARY BARLEY, as Personal Representative
of the Estate of George M. Barley, Jr., et al.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent.

—
BRIEF OF AMICUS CURIAE
FLORIDA CHAMBER OF COMMERCE, INC.,
IN SUPPORT OF THE RESPONDENT

—
On Discretionary Review
From the District Court of Appeal, Fifth District

Roy C. Young
General Counsel
Young, van Assenderp,
Varnadoe & Anderson, P.A.
Post Office Box 1833
Tallahassee, FL 32302
(850) 222-7206

William H. Green
David L. Powell
Gary V. Perko
Special Counsel
Hopping Green Sams & Smith, P.A.
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500

TABLE OF CONTENTS

TABLE OF CITATIONS ii

GLOSSARY v

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE AND OF THE FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

THE FLORIDA CONSTITUTION IS THE SUPREME LAW OF
THIS STATE AND PROHIBITS THE JUDICIARY FROM
EXERCISING LEGISLATIVE OR EXECUTIVE POWERS TO
IMPLEMENT 1996 AMENDMENT 5. 6

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF CITATIONS

Judicial Decisions

<i>Advisory Opinion to the Attorney General -- Fee on Everglades Sugar Production</i> , 681 So.2d 1124 (Fla. 1996)	1-2
<i>Advisory Opinion to the Attorney General re People’s Property Rights Amendments</i> , 699 So.2d 1304 (Fla. 1997)	10
<i>Advisory Opinion to the Governor</i> , 276 So.2d 25 (Fla. 1973)	19
<i>Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)</i> , 706 So.2d 278 (Fla. 1997) [<i>1997 Advisory Opinion</i>]	passim
<i>Askew v. Cross Key Waterways</i> , 372 So.2d 913 (Fla. 1978)	10, 12
<i>Barley v. South Florida Water Management District</i> , 766 So.2d 433 (Fla. 5 th DCA 2000)	6
<i>Brewer v. Gray</i> , 86 So.2d 799 (Fla. 1956)	20
<i>City of Miami Beach v. Kaiser</i> , 213 So.2d 449 (Fla. 3 rd DCA 1968)	14
<i>Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles</i> , 680 So.2d 400 (Fla. 1996)	12, 15
<i>Dade County Classroom Teachers Association v. Legislature</i> , 269 So.2d 684 (Fla. 1972)	18, 19
<i>Fine v. Firestone</i> , 448 So.2d 984 (Fla. 1984)	16

<i>Lee v. Dowda</i> , 155 Fla. 68, 19 So.2d 570 (1944)	9
<i>Nielsen v. Connecticut</i> , 236 Conn. 1, 670 A.2d 1288 (1996)	15
<i>People Against Section 561.501, Inc. v. Department of Business Regulation</i> , 587 So.2d 644, 646 (Fla. 1 st DCA 1991)	20
<i>Pepper v. Pepper</i> , 66 So.2d 280 (Fla. 1953)	12-13
<i>Ray v. Mortham</i> , 742 So.2d 1276 (Fla. 1999)	9
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	20
<i>Satz v. Perlmutter</i> , 379 So.2d 359 (Fla. 1980)	18, 19
<i>Schmitt v. State</i> , 590 So.2d 404 (Fla. 1991), <i>cert. denied</i> , 503 U.S. 964 (1993)	12
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	20
<i>Weber v. Smathers</i> , 338 So.2d 819 (Fla. 1976)	16

Florida Constitution

Article I, Section 2	18
Article I, Section 3	18
Article I, Section 4	18
Article I, Section 5	18
Article I, Section 9	18
Article I, Section 12	18

Article I, Section 21	19
Article I, Section 23	19
Article II, Section 3	4, 7
Article II, Section 7(a)	14
Article II, Section 7(b)	14
Article III, Section 8(a)	13
Article IV, Section 1	13
Article VII, Section 2	9-10
Article VII, Section 9	9-10
Article XI, Section 3	16

Florida Statutes

Section 20.255, Florida Statutes (2000)	v
Section 373.0659(1)(e), Florida Statutes (2000)	v
Section 373.4592, Florida Statutes (2000)	v
Section 373.4592(1)(f), Florida Statutes (2000)	11
Section 373.4592(2)(e), Florida Statutes (2000)	v
Section 373.4592(2)(h), Florida Statutes (2000)	v
Section 373.4592(4)(a), Florida Statutes (2000)	8, 9
Section 373.4592(8)(a) Florida Statutes (2000)	9
Section 373.4592(15), Florida Statutes (2000)	v

Rules

Florida Rule of Appellate Procedure 9.210	22
Florida Rule of Appellate Procedure 9.370	2

Other Sources

Jose L. Fernandez, <i>State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?</i> , 17 HARV. ENVTL. L. REV. 333 (1993)	17, 19
Ellen A. Peters, <i>Getting Away from the Federal Paradigm: Separation of Powers in State Courts</i> , 81 MINN. L. REV. 1543 (1997)	14

GLOSSARY

In this brief, the following terms have the meanings set forth below:

- DEP Florida Department of Environmental Protection. *See* § 20.255, Fla. Stat. (2000).
- DISTRICT . . . South Florida Water Management District. *See, e.g.*, § 373.0659(1)(e), Fla. Stat. (2000).
- EAA "Everglades Agricultural Area" means those lands south of Lake Okeechobee described in section 373.4592(15), Florida Statutes. *See* § 373.4592(2)(e), Fla. Stat. (2000).
- EFA Everglades Forever Act. § 373.4592, Fla. Stat. (2000).
- EPA "Everglades Protection Area" means Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park. § 373.4592(2)(h), Fla. Stat. (2000).
- SFWMD South Florida Water Management District. *See, e.g.*, § 373.0659(1)(e), Fla. Stat. (2000).

STATEMENT OF INTEREST

Amicus Curiae Florida Chamber of Commerce, Inc. (Chamber), is a corporation organized and existing under the laws of the State of Florida. The Chamber includes approximately 6,000 members, including corporations, partnerships, sole proprietorships and other business entities that are regulated by and pay taxes to State, regional and local governments.

The Chamber's mission is "to be the leader in the formulation and advocacy of sound public policy for Florida business." Among the Chamber's specific concerns in carrying out its mission is to make State, regional and local government agencies accountable for their actions. The Chamber promotes governmental accountability in a number of ways, including the sponsorship of policy reviews and other studies; advocating changes in statutory law to streamline regulatory programs and make them more responsive to policymakers and the public; promoting predictable, stable, equitable and understandable fiscal policies; and appearing as amicus curiae in selected judicial proceedings which involve issues relating to governmental accountability.

The Chamber has appeared before the Court in two prior proceedings that directly relate to the issues presented in this proceeding. The Chamber appeared as an Interested Party in the matter of *Advisory Opinion to the Attorney General* --

Fee on Everglades Sugar Production, 681 So.2d 1124 (Fla. 1996), and as an Interested Party in the matter of *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)*, 706 So.2d 278 (Fla. 1997). Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, the Chamber requested leave to appear as amicus curiae in this proceeding in order to urge the Court again to promote governmental accountability through adherence to the separation of powers doctrine.

In this brief, the Chamber will address Point II of the Appellants' initial brief.

STATEMENT OF THE CASE AND OF THE FACTS

The Chamber adopts the Statement of the Case and of the Facts set forth in the Answer Brief of the Respondent South Florida Water Management District.

References to the Record on Appeal are denoted by brackets containing “R.” followed by the pertinent page number, or “[R.]”.

SUMMARY OF ARGUMENT

The relief requested by the Petitioners presents a political question that cannot be resolved by the Judiciary without violating the separation of powers doctrine of Article II, section 3 of the Florida Constitution. The courts below understood that the Petitioners are seeking a judicial ultimatum to the Legislative and Executive branches. Further, they understood that the Petitioners in effect have brought a facial challenge to the Everglades Forever Act and thus are directly challenging the Justices' 1997 advisory opinion to Governor Chiles regarding implementation of 1996 Amendment 5. Nothing on the face of this measure or in its meager legislative history provides a basis for the result urged by the Petitioners.

Governor Chiles and the Justices previously identified a number of legislative policy decisions that must be made in order to make 1996 Amendment 5 effective. Each of these issues requires factfinding and the exercise of discretion and judgment by the Legislative branch. It also requires the assent or acquiescence of the Governor under his limited by necessary role in the lawmaking process. By the relief they request, the Petitioners would have the Judiciary assume the roles of all three branches of government in violation of the separation of powers doctrine.

The relief requested is particularly disturbing in this case; the separation of powers doctrine takes on added importance in the context of a non self-executing

constitutional amendment adopted through the initiative process. The Court has exercised pronounced restraint when ruling on such measures and should do so again here. The Petitioners' contention that they only seek to use 1996 Amendment 5 as a "shield" is unpersuasive because the same terms that must be legislatively defined to make this measure effective as a "sword" also must be defined to give it meaning as a "shield."

Even if the Judiciary can enforce a non self-executing constitutional amendment without implementation by the Legislature, this would not be an appropriate case for doing so. Such an exception to the separation of powers doctrine must be narrowly limited to protection of certain fundamental rights that are widely acknowledged to be essential for the preservation of a free society. If a right exists under 1996 Amendment 5, it is not such a right and does not warrant disregard for the separation of powers doctrine that is also essential for the preservation of a free society.

The decision by the Fifth District should be affirmed.

ARGUMENT

II.

THE FLORIDA CONSTITUTION IS THE SUPREME LAW OF THIS STATE AND PROHIBITS THE JUDICIARY FROM EXERCISING LEGISLATIVE OR EXECUTIVE POWERS TO IMPLEMENT 1996 AMENDMENT 5.

The pivotal issue in this case is the relief requested by the Petitioners.

Simply put, its nature and scope are breath-taking. This requested relief was central to the decision by the Fifth District Court of Appeal that, based on the pleadings, the Petitioners failed to state a cause of action. *See Barley v. South Florida Water Management District*, 766 So.2d 433 (Fla. 5th DCA 2000). *See also* [R. 434].

The court in essence decided the Amended Complaint presents a political question which, if resolved by the Judiciary, would violate the separation of powers doctrine. This decision was correct, well-reasoned and should be affirmed.

In their initial brief, the Petitioners assert that “[t]he District Court mistakenly viewed this action as an attempt to ‘force the legislature to pass’ implementing legislation.” Initial Brief of Petitioners, at 20 n.5. A review of the Amended Complaint filed by the Petitioners – and signed by the very counsel that submitted their initial brief to this Court – proves the opposite. The District Court, like the Trial Court before it, made no mistake at all. The court understood that the Petitioners are seeking a judicial ultimatum to the Legislative and Executive

branches. The Fifth District correctly concluded such an action would violate the separation of powers doctrine in Article II, section 3 of the Florida Constitution.

The Petitioners' Amended Complaint requests:

- ❑ A judicial declaration that ad valorem taxes levied by the District pursuant to the District's general ad valorem taxing authority are unconstitutional as applied "because the polluters within the EAA as a group are presently not paying for 100% of the cost to abate the pollution they cause[.]" [R. 203]
- ❑ A judicial declaration that the Everglades Forever Act is facially unconstitutional "because it prohibits the SFWMD from raising additional revenues from EAA polluters, who are not currently paying for 100% of the cost to abate the pollution they cause[.]" [R. 203-04]
- ❑ A judicial declaration that the Legislature "is granted a 'reasonable period of time' to reallocate the relative contribution of innocent ad valorem taxpayers and EAA polluters toward the funding of the Everglades Construction Project[.]" [R. 204] The time period would run only through the next legislative session and "the period of time in which the Governor must review bills passed by both houses." [R. 204]
- ❑ By implication, a judicial declaration that the Governor approve or acquiesce in such a legislative enactment. [R. 204]

□ A judicial declaration that, upon the failure of the Legislature to act or of the Governor to approve or acquiesce in such mandated legislative action, the Trial Court would impose unspecified “supplemental relief[.]” [R. 204-05]

Contrary to the Petitioners’ assertions in their initial brief, these claims are not a simple “as applied” constitutional challenge to someone’s ad valorem tax bill. They are a frontal challenge to the Justices’ prior opinion that the Everglades Forever Act is consistent with 1996 Amendment 5 and therefore a constitutionally valid enactment. *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)*, 706 So.2d 278, 282 (Fla. 1997) [hereinafter *1997 Advisory Opinion*].

They are a challenge to the sound judgment that this measure requires legislative implementation. *Id.*

By virtue of prosecuting a class action on behalf of all ad valorem taxpayers within the SFWMD’s Okeechobee Basin, the Petitioners seek to prohibit the District from utilizing its uniform ad valorem taxing power to partially finance the Everglades Construction Project.¹ Despite their contention that this action is only

¹ The Everglades Forever Act is not the authorization for the imposition of ad valorem taxes to finance the Everglades Construction Project. Rather, it allows the District to utilize no more than 0.1 mill of its pre-existing ad valorem taxing power for this multi-faceted program. *See* § 373.4592(4)(a), Fla. Stat. (2000). Thus, the Everglades Forever Act should be properly understood as including a legislatively imposed protection for the interests of ad valorem taxpayers outside the EAA in the financing of the multi-faceted Everglades Construction Project. *See infra note 3.*

an as applied challenge, it is tantamount to a facial challenge to the constitutionality of the Everglades Forever Act, an issue which the Justices previously addressed. If the Trial Court were to hold that ad valorem taxes could not be imposed on any member of the class, it would in effect negate that portion of the Everglades Forever Act which allows limited use of the District's ad valorem taxing authority for partial financing of the Everglades Construction Project. *See* § 373.4592(4)(a), Fla. Stat. (2000). Petitioners have offered no reason to overturn or ignore the Justices' 1997 opinion regarding the validity of the Everglades Forever Act. The Justices explicitly addressed this issue in their 1997 advisory opinion; it is "very persuasive" and should be dispositive.² *Lee v. Dowda*, 155 Fla. 68, 73, 19 So.2d 570, 572 (1944). *See also Ray v. Mortham*, 742 So.2d 1276, 1285 (Fla. 1999) ("[O]nly under *extraordinary* circumstances will we revisit an issue decided in our earlier advisory opinions." (emphasis in original)).

Nothing on the face of 1996 Amendment 5 or in its limited history provides a basis for the sweeping result urged here by the Petitioners. For this amendment to be given the meaning they suggest would require this measure to be interpreted as a direct limitation on the underlying ad valorem tax provisions in Article VII, sections

² As noted above, *see supra page 7*, the Petitioners in effect are requesting that subsection 8(a) of the Everglades Forever Act, § 373.4592(8)(a), Fla. Stat. (2000), be declared unconstitutional even though the statute was previously determined to be constitutional by the Justices.

2 and 9. And yet the Court has held an initiative must “identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to understand the contemplated changes in the constitution and to ensure that the initiative’s effect on other unnamed provisions is not left unresolved and open to various interpretations.” *Advisory Opinion to the Attorney General re People’s Property Rights Amendments*, 699 So.2d 1304, 1307 (Fla. 1997). No effects of 1996 Amendment 5 on these or other constitutional provisions were identified in proceedings leading up to its adoption by the electors, so none should be found now.

More importantly to the Chamber, the Petitioners’ Amended Complaint is a naked request for the Trial Court to serve as Judge, Legislature and Governor in violation of “Florida’s unique constitutional directive that governmental powers should not be aggregated in one branch, by usurpation, inadvertence or knowing delegation[.]” *Askew v. Cross Key Waterways*, 372 So.2d 913, 926 (Fla. 1978) (England, C.J., concurring). The modern separation of powers doctrine is particularly robust in Florida and an important means for ensuring that government remains accountable to the people.

Governor Chiles and the Justices previously identified some of the legislative policy judgments that must be made to implement 1996 Amendment 5 “because it

fails to lay down a sufficient rule for accomplishing its purpose.” *1997 Advisory Opinion*, 706 So.2d at 281. Among the questions left unanswered by this constitutional initiative are the definition of “pollution”, the regulatory standards to determine “abatement”, whether comparative fault principles apply to polluters and non-polluters alike, and the administrative means for assessing the cost of pollution abatement.

Each of these issues – as well as many others that inevitably would have to be addressed in order to have a complete and enforceable enactment – requires fact-finding and the exercise of discretion and judgment by the Legislative branch in order to continue the Everglades Construction Project.³ “Law giving, the power involved here, is a responsibility assigned to the legislature[.]” *Cross Key Waterways*, 372 So.2d at 925 (England, C.J., concurring). In the absence of such

³ The Everglades Construction Project is a legislatively balanced attempt to address multiple causes for the environmental degradation of the Everglades. Remedial steps include reductions in phosphorous loads due to farm runoff from the EAA as well as “improving water quantity reaching the Everglades, correcting long-standing hydroperiod problems, increasing the total quantity of water flowing through the system, providing water supply for the Everglades National Park, urban and agricultural areas, and Florida Bay, and replacing water previously available from the coastal ridge in areas of southern Dade County.” § 373.4592(1)(f), Fla. Stat. (2000). The Petitioners acknowledge as much by noting in their Amended Complaint that only a portion of the cost of the Everglades Construction Project is for pollution abatement. Their lawsuit asks the Judiciary to second-guess a legislative allocation of costs for this multi-faceted water quality/water quantity program. [R. 200-02]

legislative policy decisions, the Petitioners' Amended Complaint is no more than an invitation for the Judiciary to encroach upon the powers of the political branches.

The Petitioners in effect ask the Judicial branch to perform the legislative factfinding and policymaking functions to implement 1996 Amendment 5 despite the prohibitions of Article II, section 3. "Florida's strong adherence to a strict separation of powers doctrine . . . has led this Court to repeatedly warn against judicial legislation." *Schmitt v. State*, 590 So.2d 404, 414 (Fla. 1991), *cert. denied*, 503 U.S. 964 (1993). And yet that is exactly what the Petitioners ask the Court to do, because the Court could not give effect to 1996 Amendment 5 without defining "pollution", establishing standards for "abatement", addressing comparative fault issues, and crafting an administrative means for assessing pollution abatement costs to replace those adopted by the Legislature. For the Judiciary to address these issues would "present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature[.]" *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 408 (Fla. 1996).

As this Court reasoned before when asked to engage in judicial lawmaking:

The courts have been diligent in striking down acts of the Legislature which encroached upon the Judicial or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive Department upon the Legislative or Judicial Departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the

Legislature from encroachment by the Judicial branch of the Government.

Pepper v. Pepper, 66 So.2d 280, 284 (Fla. 1953).

By implication, the Petitioners would have the Judiciary usurp the Executive power as well. The Florida Constitution establishes a role for the Governor in the lawmaking process. He or she must either approve or veto legislation passed by both houses of the Legislature, or acquiesce to it during a prescribed time period. *See Fla. Const., Art. III, § 8(a).*⁴ The Executive has a limited but important role in the lawmaking process because the Governor is charged with seeing that the “laws be faithfully executed.” Art. IV, § 1, Fla. Const. In the context of the longstanding controversy over the Everglades, there is no better illustration of the Governor’s role than the fact that it was Governor Chiles who asked the Justices for guidance on the meaning of this provision in 1997. *See 1997 Advisory Opinion*, 706 So.2d at 208 (letter to the Justices from Governor Chiles).

The Petitioners acknowledge the Executive’s constitutionally required role by proposing that the “reasonable period of time” for enactment of judicially required implementing legislation would include “the period of time in which the Governor must review bills passed by both houses.” [R. 204] Thus, in the Petitioners’

⁴ The Governor’s integral role in the lawmaking process is perhaps best symbolized by the fact that these powers are set forth not in the Executive article, but rather in the Legislative article. *See Art. III, § 8(a), Fla. Const.*

scheme of things, a failure by the Legislature to pass implementing legislation or a failure by the Governor to approve or acquiesce to such legislation becoming law would result in judicially imposed “supplementary relief” that would take the place of such a law. [R. 205] So it is that the Petitioners ask the Judiciary to arrogate unto itself the powers of all three branches of government.

In the context of this particular constitutional measure, such a scheme offends the separation of powers doctrine. The issues which the drafters of 1996 Amendment 5 left unaddressed are ones for which “elected officials, rather than judges, can better determine the precise contours of the appropriate policy response.” Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558 (1997). The electors intended as much because 1996 Amendment 5, when read *in para materia* with the pre-existing Article II, section 7(a), clearly consigned the new section 7(b) to the Legislature for implementation. *See 1997 Advisory Opinion*, 706 So.2d at 281. By now urging the Judiciary to encroach upon the powers of the Legislature, the Petitioners ask this Court to discard the time-honored judicial assumption “that elected officials will perform their duties in a proper and lawful manner.” *City of Miami Beach v. Kaiser*, 213 So.2d 449, 453 (Fla. 3rd DCA 1968).

These issues were consigned to a political branch for a reason.⁵ Without the constraints of formal judicial proceedings, the Legislative and Executive branches are better able to fashion the needed policy decisions. Those decisions require “legislative value judgments” which judges should not make. *Coalition for Adequacy and Fairness in School Funding, Inc.*, 680 So.2d at 407. The Amended Complaint “inextricably presents a political question not amenable to judicial resolution and . . . seeks relief that a court cannot provide without an impermissible intrusion upon the prerogatives and functions of the coordinate branches of government.”⁶ *Nielsen v. Connecticut*, 236 Conn. 1, 9, 670 A.2d 1288, 1292 (1996).

⁵ The Justices previously recognized that, by enacting 1996 Amendment 5 while rejecting the proposed “sugar tax” in Amendment 4, the voters evidenced their intent to have the Legislature answer these policy questions. *See 1997 Advisory Opinion*, 706 So.2d at 282.

⁶ This case satisfies at least four of the six criteria used by this Court to determine the existence of a political question. *See Coalition for Adequacy and Fairness in School Funding*, 680 So.2d at 408. Applying established criteria, (a) the case involves “a textually demonstrable commitment of the issue to a coordinate branch” insofar as 1996 Amendment 5 requires the Legislature to provide by statute for the abatement of air and water pollution; (b) the Court lacks “judicially discoverable and manageable standards”; (c) the Court would be required to make “initial policy determinations of a kind clearly for non-judicial discretion”; and (d) the Court cannot resolve this case without “expressing a lack of respect” for the Legislature’s allocation of costs for the Everglades Construction Project. *Id.* at 408.

The relief requested by the Petitioners would be disquieting in any context, but it is especially disturbing here. The separation of powers doctrine takes on added importance in the context of a non self-executing constitutional provision adopted through the initiative process. *See* Art. XI, § 3, Fla. Const. This Court has long recognized the wisdom of not exercising “broad discretionary authority in determining the effect of a proposed amendment or revision” proposed by initiative, in part because there is no official detailed, legislative history on the meaning of the measure. *Fine v. Firestone*, 448 So.2d 984, 989 (Fla. 1984). To do otherwise would put the Court in the position of “redrafting” portions of the Constitution through judicial construction. *Id.* That is in effect what the Petitioners have asked the Court to do here – to fill in the many missing details which the drafters of 1996 Amendment 5 left to legislative discretion – with the only justification being “the popular name of a popular subject[.]” *Weber v. Smathers*, 338 So.2d 819, 824 (Fla. 1976) (Roberts, J., dissenting).

The Petitioners here seek to negate the separation of powers doctrine by claiming they are merely invoking 1996 Amendment 5 as a “shield” which requires no implementing legislation. This argument is specious for at least two reasons. First, 1996 Amendment 5 does not contain both a “sword” and a “shield.” It establishes the principle that “those within the EAA who are determined to be

responsible must pay their share of the costs of abating that pollution.” 1997 *Advisory Opinion*, 706 So.2d at 283. Second, even if deemed a “shield,” 1996 Amendment 5 still requires “supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected.” *Id.* at 282. The very same issues that would have to be addressed to implement this measure as “sword” must also be addressed to implement it as a “shield.”

Thus, the “shield” and “sword” dichotomy posited by the Petitioners is meaningless. “It is inconsistent to hold a provision to be non-self-executing because the language requires legislative definition, while postulating that the same provision would be self-executing if expressed as a prohibition.” Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 373 (1993). By concluding in their response to Governor Chiles that 1996 Amendment 5 was not self-executing, the Justices disposed of the Petitioners’ claim before they even filed it: The Legislature must implement this provision “to make it effective[.]” 1997 *Advisory Opinion*, 706 So. 2d at 282.

Even if the Court can enforce a non self-executing constitutional amendment without the necessary legislative enactment, this would not be an appropriate case

for doing so. The Petitioners appear to have crafted their claims to invoke *Dade County Classroom Teachers Association v. Legislature*, 269 So.2d 684 (Fla. 1972). There, the Court addressed the issue of collective bargaining rights guaranteed to public employees by the Declaration of Rights in the 1968 Revision. Without citation to authority, the Court referred there to an exception to the separation of powers doctrine for the enforcement of “basic rights” where the Legislature has not implemented a non self-executing constitutional amendment. *Id.* at 686.

As illuminated by that decision and others, *see Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980), such an exception must be limited to the enforcement of basic human rights like religious freedom,⁷ free speech and free press,⁸ the right to assemble,⁹ the right to due process of law,¹⁰ the right to equal protection of the law,¹¹ the right to be free from unreasonable searches and seizures,¹² the right of

⁷ Art. I, § 3, Fla. Const.

⁸ Art. I, § 4, Fla. Const.

⁹ Art. I, § 5, Fla. Const.

¹⁰ Art. I, § 9, Fla. Const.

¹¹ Art. I, § 2, Fla. Const.

¹² Art. I, § 12, Fla. Const.

access to the courts,¹³ the right to privacy,¹⁴ and other time-honored guarantees essential for a free society. Such an exception must be narrow because this Court’s teachings make clear that “preservation of the inherent powers of the three branches of government, free of encroachment or infringement by one upon the other, is essential to the effective operation of our constitutional system of government.”¹⁵ *In re Advisory Opinion to the Governor*, 276 So.2d 25, 30 (Fla. 1973).

Here, the Petitioners ask the Judiciary to upend our basic structure of government, with all its checks and balances, in order to vindicate an asserted right that can hardly be classified as “basic.” *Dade County Classroom Teachers Assoc.*, 269 So.2d at 686. Even assuming that 1996 Amendment 5 granted a right to the Petitioners, it does not guarantee any fundamental freedom.¹⁶ If such a right

¹³ Art. I, § 21, Fla. Const.

¹⁴ Art. I, § 23, Fla. Const.

¹⁵ Even where fundamental rights are at issue, the Court has preferred legislative implementation of complex questions because “fact-finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized.” *Satz*, 379 So.2d at 360.

¹⁶ This distinction is a compelling rationale for judicial restraint when analyzing provisions similar to 1996 Amendment 5. “Not all rights are equally well-grounded in social consensus. Such long-established rights as due process and freedom of speech, for example, have a far more secure historical foundation than recently developed rights such as the right to a clean environment.” Jose L.

exists at all, it is not a right “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Reno v. Flores*, 507 U.S. 292, 303 (1993) (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987)). Rather, it was added to the Constitution by initiative at the behest of a group of taxpayers whose members now seek its refuge to avoid otherwise lawful taxes. “Clearly, the court has a limited role in reviewing a tax, particularly where the tax does not on its face impede a basic constitutional freedom or guarantee.” *People Against Section 561.501, Inc. v. Department of Business Regulation*, 587 So.2d 644, 646 (Fla. 1st DCA 1991). Accordingly, even where the Judiciary might impose a scheme to implement a non self-executing constitutional provision, this is not such a case.

As the Justices concluded previously, the electors committed 1996 Amendment 5 to the Legislative branch for implementation. The separation of powers doctrine compels the Court to abide by their wishes and to defer to legislative implementation of the amendment “to make it effective[.]” *1997 Advisory Opinion*, 706 So.2d at 282. “The Legislature is a coordinate branch of the government and even though the performance of a duty is required by the Constitution, the courts, being another coordinate branch of the government, are

Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. at 377.

not authorized to compel the Legislature to exercise a purely legislative prerogative.” *Brewer v. Gray*, 86 So.2d 799, 803 (Fla. 1956).

CONCLUSION

The Fifth District correctly determined that the Amended Complaint presents a question that cannot be resolved by the Judiciary without violating the separation of powers doctrine. For the reasons of law and policy discussed above, the decision below should be affirmed.

Respectfully submitted on this 25th day of April, 2001.

William H. Green (Fla. Bar No. 168276)
David L. Powell (Fla. Bar No. 656305)
Gary V. Perko (Fla. Bar No. 855898)
Special Counsel
Hopping Green Sams & Smith, P.A.
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500

and

Roy C. Young (Fla. Bar No. 098428)
General Counsel
Young, van Assenderp, Varnadoe &
Anderson, P.A.
Post Office Box 1833
Tallahassee, FL 32302
(850) 222-7206

Attorneys for Amicus Curiae

Florida Chamber of Commerce, Inc.

154234.11

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure as the type style utilized is 14-point New Times Roman.

Certified by: _____
William H. Green (Fla. Bar No. 168276)
David L. Powell (Fla. Bar No. 656305)
Gary V. Perko (Fla. Bar No. 855898)
Special Counsel
Hopping Green Sams & Smith, P.A.
Post Office Box 6526
Tallahassee, FL 32314
(850) 222-7500

and

Roy C. Young (Fla. Bar No. 098428)
General Counsel
Young, van Assenderp, Varnadoe &
Anderson, P.A.
Post Office Box 1833
Tallahassee, FL 32302
(850) 222-7206

Attorneys for Amicus Curiae
Florida Chamber of Commerce, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this “Brief of Amicus Curiae Florida Chamber of Commerce, Inc., in Support of Respondent” was furnished by United States Mail, postage prepaid, on this ____ day of April, 2001, to the following:

Ruth P. Clements
Assistant General Counsel
South Florida Water
Management District
Post Office Box 24680
West Palm Beach, FL 33416

E. Thom Rumberger
Christopher T. Hill
Suzanne Barto Hill
Rumberger, Kirk & Caldwell
201 South Orange Ave., Suite 300
Orlando, FL 32802

Paul L. Nettleton
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
4000 Nationsbank Tower
100 S.E. Second Street
Miami, FL 33131

Jon Mills
Timothy McLendon
Post Office Box 2099
Gainesville, FL 32602

William L. Hyde
Gunster, Yoakley,
Valdes-Fauli & Stewart, P.A.
215 S. Monroe Street, Suite 830
Tallahassee, FL 32301

Attorney