DOES DIRECT DEMOCRACY THREATEN CONSTITUTIONAL GOVERNANCE IN FLORIDA?

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In a recent advisory opinion pertaining to the legal sufficiency for ballot placement of a citizen's initiative to amend the Florida Constitution, Justice Grimes remarked, "I personally believe that constitutional amendment by initiative is being overused."[1] Although one may look askance at such a patently political evaluation in judicial discourse of a purely legal question, especially in a state in which "all political power is inherent in the people"[2] and in which the people have explicitly reserved the constitutional prerogative "to propose the revision or amendment of any portion or portions of this constitution by initiative,"[3] Justice Grimes' lamentation should nevertheless prompt us to examine the causes of his concerns.

No Florida Constitution prior to the revised version adopted in 1968 contained a provision permitting amendment by a popular initiative.[4] Consequently, the 1968 Florida Constitution broke new ground in prescribing a limited method of proposing constitutional amendments by initiative. Specifically, the 1968 revised constitution

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1. Advisory Op. to Att'y Gen. re: Stop Early Release of Prisoners, 642 So. 2d 724, 728 (Fla. 1994) (Grimes, J., dissenting).

2. FLA. CONST. art. I, § 1.

3. *Id*. art. XI, § 3.

4. The first 1838 Florida Constitution indicates that it might be amended either by a convention called by the legislature or by a supermajority vote of two-thirds of each house of the legislature. *See* FLA. CONST. of 1838, art. XIV. Apparently, no popular approval was required. *See id*. The 1861 Florida Constitution permitted amendments by a convention called by the legislature. FLA. CONST. of 1861, art. XIV. Again, no popular vote seemed to have been required. *See id*. The 1865 constitution continued the amendment approach of the 1861 constitution. *See* FLA. CONST. of 1865, art. XIV. The 1868 constitution permitted the legislature to propose amendments by a two-thirds vote of each house and also by calling a convention. FLA. CONST. of 1868, art. XVII. All proposals were to be submitted to the people for a vote. *Id*. The 1885 Florida Constitution, as amended, prescribed three means for the legislature to propose amendments and also permitted the legislature to call a convention. FLA. CONST. of 1885, art. XVII, § 1 (amended 1948); *id*. art. XVII, § 3 (1942); *id*. art. XVII, § 4 (1964); *id*. art. XVII, § 2 (amended 1966). All proposals required an approving vote of the people. *Id*.

reserved to the people the "power to propose amendments to *any section* of this constitution."[5] Applying this formulation, the Florida Supreme Court invalidated a 1970 initiative that would have amended article III to substitute a unicameral legislative body (i.e., the Senate) in the place of the orthodox two house body.[6] The court relied primarily on its assessment that the initiated proposal was not an amendment, but was instead a *revision* of the constitution masquerading as an amendment.[7] According to the court, the people had reserved the power only to *amend* and not to *revise* by initiative.[8] Secondarily, the court found fault with the proposed amendment because it expressly anticipated the legislature's need to propose additional amendments to conform the remainder of the constitution to the unicameral legislature; thus, the proposed amendment was not complete within itself.[9]

Thus, in its first decision pertaining to people's initiatives, the supreme court sent out a strong signal that it would interpose itself between initiative petitioners and the ballot to assure that the people never get the chance to approve misguided amendments. Defenders of the court would argue that it merely applies legal tests imposed by the constitution[10] and laws[11] and does not concern itself with the substance or merits of the proposals. This defense will not ring true to those initiative sponsors who have seen demanding petition drives[12] rendered futile by judicial decisions that apply erratically shifting judicial standards to bar their proposals. On occasion, the supreme court itself has openly acknowledged that the standard it imposed to defeat an initiative drive was a retreat from earlier standards upon which the current petitioners had relied.[13]

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5. FLA. CONST. art. XI, § 3 (amended 1972) (emphasis added).
6. Adams v. Gunter, 238 So. 2d 824 (Fla. 1970).
7. *Id*. at 831.
8. *Id*.
9. *Id*. at 832.
10. *See* FLA. CONST. art. XI, § 3. In 1986, the constitution was amended to authorize the attorney general to petition the justices of the Florida Supreme Court for an advisory opinion pertaining to the legal sufficiency of initiatives to amend the constitution. *Id*. art. IV, § 10 (amended 1986).
11. *See* FLA. STAT. § 101.161 (1993).
12. To obtain ballot position, an initiative must be supported by petitions signed by eight percent of the number of voters who participated "in the last preceding election in which presidential electors were chosen." FLA. CONST. art. XI, § 3. The same provision imposes geographic collection requirements. *See id*.
13. *See, e.g.*, Fine v. Firestone, 448 So. 2d 984, 988–90 (Fla. 1984). In *Fine*, the

Despite this, the shifting judicial standards phenomenon is only a side issue. If the court had been more successful in prescribing a comprehensive set of relatively immutable criteria, it may have bounced fewer initiatives from the ballot. Without the pall of uncertainty created by ill-defined and shifting legal standards, even more initiatives might have been attempted. In short, the lack of stable legal standards seems more likely to have diminished, rather than enlarged, the number of petitions.

At any rate, in the wake of that first initiative decision, the 1972 legislature adopted a joint resolution to propose an amendment to the constitution to enlarge the scope of the people's amending power by initiative.[14] This amendment, approved by the people in 1972, introduced the "one subject and matter directly connected therewith" content test, which has thereafter remained the constitutional standard for people's initiatives.[15] Although the supreme court has explicitly acknowledged that in approving the amendment the people intended to "enlarge the right to amend the Constitution by initiative petition,"[16] it has also construed the constitutional "single-subject" standard to be a substantive buffer against ballot access by what the court deems to be proposals of "precipitous change."[17] Hence, the 1972 amendment enlarged access, but not without a hurdle.

In addition, deficiencies in numerous procedural niceties lurk as a separate barrier. The potential of having an initiative come to a vote creates the need to place descriptive words on the ballot to inform the voters about the issue. Even before amendment by initiative was introduced in 1968, the legislature had prescribed criteria as to what should appear on the ballot in regard to legislatively pro-

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court "receded" from at least three prior standards. *Id*.

14. The legislature proposed the following changes:

> SECTION 3. Initiative.—The power to propose *the revision or amendment of any portion or portions* ~~amendments to any section~~ of this constitution by initiative is reserved to the people, *provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith*.

H.R.J. Res. 2835, 2d Leg., Reg. Sess., 1972 Fla. Laws 1665.

15. *See* FLA. CONST. art. XI, § 3 (amended 1994).

16. Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 340 (Fla. 1978) (quoting Weber v. Smathers, 338 So. 2d 819, 823 (Fla. 1976) (England, J., concurring)).

17. Advisory Op. to Att'y Gen. re: Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994).

posed constitutional amendments.[18] The first statute required only that the substance of the amendment be printed on the ballot with a place provided for the voter to mark either "for the amendment" or "against the amendment."[19] This worked satisfactorily so long as the legislature held the only key to proposing constitutional amendments.

After the 1968 constitution introduced four separate means of proposing constitutional changes,[20] including the original initiative process, the legislature amended the statute to require sponsors to embody ballot language of the substance of each amendment as an integral part of the proposal. Initially, the legislature imposed this requirement only upon itself, the Constitution Revision Commission, and constitutional conventions.[21] In 1979, the legislature extended it to people's initiatives by requiring that the sponsor prepare the ballot language and the secretary of state approve it.[22] This requirement provided a statutory basis for judicial review of whether or not the ballot statement of a people's initiative fairly embodied the substance of the amendment.

In 1980, the legislature expanded these standards to require that an initiative's sponsors prepare a ballot summary, stating the initiative's substance and chief purpose in "clear and unambiguous language."[23] The sponsors are also required to prepare a ballot title of not more than fifteen words to "consist of a caption . . . by which the measure is commonly referred to or spoken of."[24] These more detailed statutory criteria create additional risks for petition sponsors.

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18. Even apart from statutory prescription, the supreme court has long held that in voting upon proposed amendments, "the voter should not be misled and . . . [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote." Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954).

19. FLA. STAT. § 101.161 (1971). This was amended in 1973 to require the legislature to include the "exact wording" of the substance of the measure to be "embodied in the enabling legislation." *Id*. (1973). This means that the sponsor of the proposal, i.e., the legislature, prepares the ballot language, thus setting up the potential for judicial review of its effectiveness and clarity.

20. FLA. CONST. art. XI, § 1 (joint legislative resolution); *id*. art. XI, § 2 (periodic constitutional revision commission); *id*. art. XI, § 3 (people's initiative); *id*. art. XI, § 4 (people's constitutional convention). A fifth means, proposals by the Taxation and Budget Reform Commission, was added in 1988. *Id*. art. XI, § 6, *proposed by* H.R.J. Res. 1616, 10th Leg., Reg. Sess., 1988 Fla. Laws 2435.

21. 1977 Fla. Laws ch. 175, § 13.

22. 1979 Fla. Laws ch. 365, § 16.

23. 1980 Fla. Laws ch. 305, § 2 (amending FLA. STAT. § 101.161 (1971)).

24. *Id*.

The more plentiful and exact the requirements, the more numerous the opportunities for mistake.

Initially, challenges of either the single-subject substance of an initiative or the sufficiency of the ballot statement ordinarily were made by petitioning a court to issue a writ of mandamus to the secretary of state. The petition sought orders to the secretary to strike initiatives from the ballot after they had been assigned ballot position. In 1984, opponents successfully employed this approach in *Fine v. Firestone* to have an aggressive, government revenue limiting proposal struck from the ballot.[25] *Fine* eliminated a threatening amendment, but it also stimulated further reform. Sponsors of an initiative proposal may consume thousands of hours and perhaps hundreds of thousands of dollars to obtain the signatures required to qualify an initiative for a ballot position. They are understandably anguished and angered when their initiatives are yanked off the ballot at the back end of an extended process.

Hence, in the aftermath of *Fine*, the legislature proposed an amendment to provide a constitutional framework for review nearer to the beginning of the process. This amendment, adopted in 1986, authorizes the attorney general to petition the justices of the supreme court for an advisory opinion as to "the validity of any initiative petition" under conditions prescribed by general law.[26] To execute the provision, the legislature enacted a statute directing the secretary of state to submit an initiative petition to the attorney general after the sponsors have obtained ten percent of the number of verified petitions needed to obtain ballot position.[27] The statute also directs the attorney general to request an advisory opinion from the justices as to the compliance of the initiative with the constitutional single subject standard and the statutory ballot title and summary standards.[28] The direct purpose is to make an early test of the technical compliance of an initiative's substance and ballot language. Presumably, the overarching purpose is to open the initiative

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25. Fine v. Firestone, 448 So. 2d 484 (Fla. 1984).

26. FLA. CONST. art. IV, § 10, *proposed by* H.R.J. Res. 71, 9th Leg., Reg. Sess., 1986 Fla. Laws 2281. The same measure added § 3(10) to article V of the Florida Constitution, providing the supreme court with jurisdiction to accept the petitions for advisory review.

27. *See* FLA. STAT. § 15.21 (originally enacted as 1987 Fla. Laws 363, § 1). This section also contains the other necessary criteria for ballot position. *Id*.

28. FLA. STAT. § 16.061 (1993) (originally enacted as 1987 Fla. Laws ch. 363, § 2).

process for greater use by reducing the risk of costly and irretrievable mistakes.

To what extent has the Florida initiative power posed a threat to the stability of the Florida Constitution at any time since it was first reserved to the people in the 1968 constitution? In examining this issue, the reader must distinguish between people's initiatives that are burdened with laborious and costly petition gathering requirements[29] and proposals submitted by a joint resolution of the legislature.[30] Legislatively sponsored proposals require no petitions and are not lumbered with the single-subject requirement. Indeed, they may embrace an "[a]mendment of a section or revision of one or more articles, or the whole."[31]

The supreme court has explained that the constitution gives legislative proposals greater latitude in content than it gives people's initiatives because legislative proposals are publicly and deliberately formulated in the legislative process. The need for a single-subject limitation to avoid poorly considered, precipitous changes in the constitution is therefore lessened.[32] Although the theory appears sound, the practice of the legislature refutes it. An examination of the amendments proposed by the legislature reveals that many simply constitutionalize points of law that could have been enacted by statute. That is, the legislature tends to use its

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29. FLA. CONST. art. XI, § 3.

30. *Id*. art. XI, § 1.

31. *Id*.

32. Fine v. Firestone, 488 So. 2d 984, 989 (Fla. 1984). The court stated:

> [W]e find that we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative.

Id. Justice Roberts once expatiated on this difference more sharply:

> Where an amendment is by Legislative Resolution or Resolution of a Constitutional Convention, there are always public hearings, committee studies, and public debate in developing the format of the proposal, whereas, under the initiative section involved here, it only takes one person, not even required to be a resident of the State, nor learned in the law, to pencil an amendment, giving it a popular name, get the signatures, and place it on the ballot without any such committee action, study or debate.

Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976) (Roberts, J., dissenting), *overruled in part by* Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

power to propose constitutional amendments as a means to move contentious, legislative proposals to a vote of the people in the guise of amending the constitution. I have severely criticized the practice of introducing non-constitutional content into the constitution[33] and still see the practice as an abuse of the amending process.[34]

Similarly, the impetus of several people's initiatives has been their sponsors' frustrations arising from perceived failures of the legislature to address certain issues through legislation. As a means to an end, disappointed citizens turn to the initiative process to circumvent the legislature.[35] Recent initiatives exemplifying this behavior include proposals to prohibit the use of certain kinds of fishing nets,[36] to provide a financing source for restoring the Everglades,[37] to require convicted felons to serve most of their prison sentences,[38] and to provide a secure source of funding for criminal justice measures.[39]

In the sixteen years that elapsed between the introduction of

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33. *See* Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, FLA. B.J., Jan. 1986, at 43.

34. A similar criticism can be made of the initial proposals of the Taxation and Budget Reform Commission pursuant to article XI, § 6 of the Florida Constitution. The two amendments to the Florida Constitution resulting from that mechanism are not of constitutional substance. *See* FLA. CONST. art. I, § 26; *id*. art. III, § 19.

35. In Coleman v. State *ex rel.* Race, 159 So. 504, 506 (Fla. 1935), the Florida Supreme Court acknowledged that the people might establish "law" by constitutional amendment, but envisioned that constitutional laws would pertain to matters that the legislature was disempowered to enact:

> By the adoption of constitutional amendments the people may establish the law which the Legislature is inhibited to enact by other provisions of Constitution. By such procedure . . . 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.

Id. at 507.

36. Advisory Op. to Att'y Gen. re: Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993) (permitting initiative to remain on ballot). Although he concurred, Justice McDonald expressed the view "that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution." *Id*. at 1000 (McDonald, J., concurring).

37. Advisory Op. to Att'y Gen. re: Save Our Everglades Trust Fund, 636 So. 2d 1336 (Fla. 1994) (excluding proposed amendment from ballot on both single-subject and ballot language grounds).

38. Advisory Op. to Att'y Gen. re: Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994) (excluding proposed amendment from ballot).

39. Advisory Op. to Att'y Gen. re: Funding for Criminal Justice, 639 So. 2d 972 (Fla. 1994).

people's initiatives in 1968 and the *Fine v. Firestone*[40] decision in 1984, only four people's initiatives were reviewed by the supreme court. Two of these were of genuine constitutional substance: the first proposed a unicameral legislature,[41] and the second, which led to *Fine*, proposed an elaborate scheme to inhibit the power of governments to raise revenues by imposing new taxes and fees.[42] The supreme court struck both these measures, the first because it sought to amend more than one section of the constitution, thus taking it beyond the purview of the initiative power as originally reserved.[43] The supreme court struck down the second because it violated the single-subject limitation of the enlarged initiative power.[44] The other two initiatives were of marginal constitutional stature. One was the so-called "Sunshine Amendment" which constitutionalized ethical and financial disclosure standards for certain elected officials.[45] The second was a proposal to legalize casino gambling.[46]

The Sunshine Amendment was of marginal constitutional stature because the legislature possessed ample authority to impose the measures by law.[47] The constitutional effect of the adoption was to deprive the legislature of the power *not* to impose the measures. The same argument applies to casinos. Although the Florida Constitution prohibits lotteries (i.e., deprives the legislature of the authority to legalize them),[48] it does not prohibit all forms of gam

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40. Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

41. *See* Adams v. Gunter, 238 So. 2d 824 (Fla. 1970).

42. *See Fine*, 448 So. 2d at 984.

43. *Adams*, 238 So. 2d at 831 (applying § 3, article XI of 1971 Florida Constitution). The stricken measure was invalidated before it was placed on the ballot. The secretary of state declined to approve the petition for circulation and the supreme court upheld the action. *Id*. at 828–30.

44. *Fine*, 448 So. 2d at 986 (applying § 3, article XI of 1977 Florida Constitution).

45. For a discussion of the Sunshine Amendment, see Weber v. Smathers, 338 So. 2d 819, 820–21 (Fla. 1976), *overruled in part by* Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

46. *See* Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

47. The legislative character of this amendment was apparent at the time the supreme court reviewed it. Justice Roberts said, "We can well take judicial notice that there is already on the statute books of this State, a law recently enacted by the Legislature, after committee study, public hearings, and floor debate, which is as protective of the people as the proposed amendment." *Weber*, 338 So. 2d at 824 (Roberts, J., dissenting).

48. FLA. CONST. art. X, § 7. *But see id*. art. X, § 15 (allowing state-operated lotter-

bling. Consequently, the legislature possesses the power to legalize some forms of casino gambling.[49] Hence, the true effect of the casino amendment was merely to repeal statutes outlawing gambling. Of these two, the voters adopted the "Ethics in Government" measure[50] and rejected casinos.

In 1984, the Florida Supreme Court also struck an initiative from the ballot that, among other things, sought to place a cap on noneconomic damages recoverable in tort actions.[51] According to the court, this measure not only embraced multiple subjects, but also suffered from a misleading ballot title.[52] In total, through the end of 1984, the supreme court had jettisoned three of the first five people's initiatives; the voters had rejected a fourth.

In 1986, two more people's initiatives survived court challenges to remain on the ballot.[53] Both pertained to gambling. The voters approved a measure to authorize state-operated lotteries,[54] but again rejected casinos. Also in 1986, the people adopted the legislatively sponsored amendment, referred to previously, to provide for early advisory review of initiatives by the justices of the supreme court.[55]

Of the first group of four initiatives subjected to advisory review through the 1992 election, all survived to be voted upon. The voters approved three: one making English the official language of Florida,[56] a second restricting incumbents of certain elective offices

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49. Lee v. City of Miami, 163 So. 486 (Fla. 1935), examined the history of the lottery prohibition in the Florida Constitution. Like various other provisions in state constitutions, the lottery prohibition was stimulated by abusive governmental practices in the 1800s, particularly disastrous adventures with state lotteries. Given this history, the supreme court concluded that "while the Legislature cannot legalize any gambling device that would in effect amount to a lottery, it has inherent power to regulate or to prohibit any and all other forms of gambling." *Id*. at 490.

50. *See* FLA. CONST. art. II, § 8.

51. 48. *See* Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984).

52. *Id*. at 1354–55.

53. *See* Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986) (seeking to remove existing constitutional prohibition on state-operated lotteries); Watt v. Firestone, 491 So. 2d 592 (Fla. 1st Dist. Ct. App.) (seeking to permit casino gambling), *rev. denied*, 494 So. 2d 1153 (Fla. 1986).

54. *See* FLA. CONST. art. X, § 15.

55. *See id*. art. V, § 3(10); *id*. art. IV, § 10, *proposed by* H.R.J. Res. 71, 9th Leg., Reg. Sess., 1986 Fla. Laws 2281.

56. FLA. CONST. art. II, § 9; *see* Advisory Op. to Att'y Gen. re: English — The Official Language of Florida, 520 So. 2d 11 (Fla. 1988).

to no more than two consecutive terms,[57] and the third placing a three percent per year limit on the amount the tax valuation of homestead property may be increased.[58] Although perhaps important as a nationalistic statement, the official language measure is of doubtful constitutional stature. By contrast, the term limits and homestead valuation measures place firm limits on legislative power and, consequently, are of undeniable constitutional stature. Term limits are also of constitutional character because of Florida's rule that the legislature cannot add qualifications for offices created by the constitution.[59] The fourth initiative was a second attempt to place a cap on the recovery of noneconomic damages in tort actions. Although it survived the justices' advisory review,[60] the voters rejected it.

After 1992, the supreme court's workload with regard to people's initiatives increased. In 1993, the justices reviewed only one initiative — a measure to restrict the use of certain kinds of fish nets in Florida waters — and approved it.[61] In the following year, however, a spate of nine measures confronted the justices for advisory opinions:[62] one restricting the power of government to enact anti-discrimination laws,[63] one imposing a tax to restore the Ever-

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57. FLA. CONST. art. VI, § 4 (limiting terms of state representatives and senators, Florida's lieutenant governor, state cabinet officers, and United States senators and representatives from Florida); *see* Advisory Op. to Att'y Gen. re: Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991).

58. FLA. CONST. art. VII, § 4(c). This measure survived both an early advisory opinion test, Advisory Op. to Att'y Gen. re: Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991), and a later mandamus action seeking to remove it from the ballot, Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992).

59. *See* State *ex rel.* Askew v. Thomas, 293 So. 2d 40 (Fla. 1974). "We have consistently held that statutes imposing additional qualifications for office are unconstitutional where the basic document of the constitution itself has already undertaken to set forth those requirements." *Id*. at 42.

60. Advisory Op. to Att'y Gen. re: Limitation on Non-Economic Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988).

61. Advisory Op. to Att'y Gen. re: Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993).

62. In addition, three other measures were referred to the justices in 1994, but were not given review on the merits. *See* Florida Locally Approved Gaming, Inc. v. Smith, 642 So. 2d 746 (Fla. 1994) (mandamus denied); Advisory Op. to Att'y Gen. re: Authorization for and Regulation of Statewide System of Limited Access Riverboat Gambling Casinos, No. 84,065 (Fla. dismissed Dec. 15, 1994) (unpublished order on file clerk of Florida Supreme Court); Advisory Op. to Att'y Gen. re: Casino Authorization, Taxation and Regulation, No. 84,064 (pending).

63. Advisory Op. to Att'y Gen. re: Restricts Laws Related to Discrimination, 632

glades,[64] one requiring all felons to serve at least eighty-five percent of their prison sentences,[65] another denominating a particular tax to fund "criminal justice"[66] yet another to permit casinos,[67] one to relax the single-subject limitation on the content of initiatives,[68] one to require voter approval of all new taxes in the state,[69] one to require government compensation for harm done to vested property rights by regulations,[70] and the last to require that any constitutional amendment adding a new tax be approved by not less than two-thirds of the electors voting in the election.[71] Of these, the justices approved three — the criminal justice funding, limited casinos, and revenue limits initiatives — and rejected the remainder. Of the three that reached the ballot, two were adopted by the voters and the third rejected.[72]

Among the nine proposals reviewed in advisory opinions, only four were of genuine constitutional stature in that they placed an important limit on governmental, especially legislative, power. These were the proposals to limit the power to enact anti-discrimination laws,[73] to enlarge the initiative power[74] (and this only

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So. 2d 1018 (Fla. 1994). The court disapproved the proposal on single-subject grounds. *Id*. at 1021.

64. Advisory Op. to Att'y Gen. re: Save Our Everglades Trust Fund, 636 So. 2d 1336 (Fla. 1994). The court disapproved the proposal on both single-subject and ballot language grounds. *Id*. at 1339.

65. Advisory Op. to Att'y Gen. re: Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994). The court disapproved the proposal based upon the ballot language. *Id*. at 727.

66. Advisory Op. to Att'y Gen. re: Funding for Criminal Justice, 639 So. 2d 972 (Fla. 1994). The court approved the proposal. *Id*. at 974.

67. Advisory Op. to Att'y Gen. re: Limited Casinos, 644 So. 2d 71 (Fla. 1994). The court approved the proposal. *Id*. at 75.

68. League of Women Voters v. Smith, 644 So. 2d 486 (Fla. 1994) (revenue limits). The court approved the proposal. *Id*. at 496.

69. *Id*. at 486 (voter approval of new taxes). The court disapproved the proposal based upon the ballot language because it substantially affected "specific provisions of the constitution without identifying those provisions for the voters." *Id*. at 492, 494.

70. *Id*. at 486 (property rights). The court disapproved the proposal on both single-subject and ballot language grounds. *Id*. at 495.

71. *Id*. at 486 (tax limitation). The court disapproved the proposal on single-subject grounds. *Id*. at 491.

72. The initiatives regarding limited marine net fishing and revenue limits were adopted; limited casinos was rejected. The criminal justice funding measure has not yet attained ballot position.

73. *See* Advisory Op. to Att'y Gen. re: Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994); *supra* note 63.

74. *See* League of Women Voters v. Smith, 644 So. 2d 486 (Fla. 1994) (revenue lim-

because the limit is in the constitution), to prohibit new taxes absent voter approval,[75] and to limit the power of government to enforce regulations that damage vested property interests.[76] The measure to require a supermajority vote of the electorate to add a tax through the constitution is not of constitutional stature because imposing a specific tax is not a proper function of the constitution.[77] Furthermore, the measures to stop early release of prisoners, to fund the criminal justice system, and to impose a tax to restore the Everglades were all within the power of the legislature to enact. They should not be imposed by the constitution. Consequently, much of the "overuse" lamentation stems from the failure of the justices and the supreme court to articulate appropriate standards as to what is a fit subject — "single" or otherwise — for inclusion in the constitution. Also, neither the constitution nor the laws provide a relief mechanism to permit popular adoption of statutes that the legislature does not see fit to enact.

In sum, from 1968 through 1994, only twenty-one separate people's initiatives were subjected to judicial review to test their compliance with content and ballot-language standards.[78] Of these, twelve were held to be in compliance with statutory requirements,[79] and seven were adopted by the people.[80] As noted, nine of these measures were presented for review in 1994, including a package of four

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its); *supra* note 68.

75. *See id*. (voter approval of new taxes); *supra* note 69.

76. *See id*. (property rights); *supra* note 70.

77. However, to the extent this measure proposed to place a limit on the legislature's power to propose a tax, it is of constitutional stature.

78. One measure was reviewed twice. *See* Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992); Advisory Op. to Att'y Gen. re: Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991). In addition, another question pertaining to the initiative process, but not involving content or ballot language, was reviewed in State *ex rel.* Citizen's Proposition for Tax Relief v. Firestone, 386 So. 2d 561 (Fla. 1980).

79. The court held that the following twelve initiatives complied with the statutory requirements: ethics in government; casinos (1978); noneconomic damages limitation; English as the official language of Florida; state-operated lotteries; casinos (1986); homestead valuation limitation; limited marine net fishing; criminal justice funding; limited casinos; revenue limits; and limited political terms in certain elective offices. Criminal justice funding has not yet been certified for ballot position.

80. The voters adopted the following amendments: ethics in government; state-operated lotteries; English as the official language of Florida; homestead valuation limitation; limited political terms in certain elective offices; limited marine net fishing; and revenue limits.

tax limitation initiatives submitted by a single sponsor.[81]

Contrasted to proposals submitted from other sources, the people's initiative production has been paltry. The 1978 Constitution Revision Commission[82] proposed eight amendments or revisions to be voted upon in a single election. All were rejected by the voters. The 1990 Taxation and Budget Reform Commission had more success. It proposed four amendments for the 1992 election. The supreme court removed one from the ballot because of invalid ballot language;[83] of the remaining three amendments, the voters approved two, neither of which is of constitutional stature.[84]

Even the efforts of these commissions are diminutive by contrast to those of the legislature. Between 1968 and the end of 1994, the legislature proposed seventy-six amendments by joint resolution,[85] only three of which were subjected to judicial challenges. The supreme court struck one from the ballot.[86] Of the two that survived judicial review, the people approved one.[87] Nevertheless, seventy-three proposals went directly to the ballot with no judicial review, and the voters approved fifty-nine of them.

The following table summarizes the proposals to amend the

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81. *See* League of Women Voters v. Smith, 644 So. 2d 486 (Fla. 1994) (including initiatives concerning revenue limits, voter approval of new taxes, property rights, and tax limitations, all of which were sponsored by Tax Cap Committee).

82. The commission was created pursuant to § 2 of article XI of the Florida Constitution.

83. *See* Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992).

84. The "Taxpayer's Bill of Rights," § 26 of article I of the Florida Constitution, is a constitutional travesty because it places no substantive limit on governmental power. Section 19 of article III of the Florida Constitution, pertaining to budgeting and appropriations processes, is properly a statutory measure, with the possible exception that it may permit greater legislative control over judicial budgets than would otherwise be allowable under Chiles v. Children A, B, C, D, E & F, 289 So. 2d 260 (Fla. 1981). The voters rejected a local option sales tax.

85. A compilation of constitutional amendments is maintained in the office of the secretary of state (listing of amendments on file with author).

86. *See* Askew v. Firestone, 421 So. 2d 151 (Fla. 1982) (removing proposed amendment to § 8, article II of the Florida Constitution from ballot on grounds of deceptive ballot language).

87. The people approved an amendment to article I, § 12 of the Florida Constitution. However, a proposed amendment to article I, § 18 of the Florida Constitution was rejected. *See* Smathers v. Smith, 338 So. 2d 825 (Fla. 1976); *see also* Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).

constitution, commencing with the adoption of the 1968 Florida Constitution and ending with the 1994 election.

What is to be gleaned from this history? To evaluate complaints about overuse of the amending process, the critic must pinpoint the likely harm from overuse, should it occur. To that end, I have identified three potential kinds of harm: overworking the courts, overworking the voters, and misusing the constitution.

A. Overworking the Courts

In the quarter century covered by this study, only twenty-five amendments have been subjected to pre-vote judicial scrutiny.[88]

88. Of these, 24 were reviewed by the supreme court and one was reviewed by a district court of appeal. *See* Watt v. Firestone, 491 So. 2d 592 (Fla. 1st Dist. Ct. App.), *rev. denied*, 494 So. 2d 1153 (Fla. 1986). One case, State v. Firestone, 386 So. 2d 561 (Fla. 1980), dealt with a collateral issue other than substance or ballot language.

That hardly constitutes an overworking of the judiciary, especially when the fundamental importance of these issues is kept in mind. Of course, twenty-one of the judicial proceedings have involved people's initiatives, and nine of those were reviewed within 1994. The super-abundance of people's initiatives among those reviewed, especially since 1986, is attributable to the fact that the constitution and laws virtually mandate that the supreme court render an advisory opinion as to each of them. In fact, no people's initiative, including those proposed prior to the adoption of the advisory review process, has ever been voted upon without prior judicial review. Moreover, the advisory review is purely one of law and imposes no burden of reviewing compendious trial records. Much of the judiciary's grief in this regard is self-imposed by virtue of the failure to prescribe a stable set of criteria as to what is valid substance for an amendment to the constitution.

The most fundamental point is this: undertaking to amend the constitution by initiative is an elemental exercise of the inherent sovereignty of the people. If this exercise creates an inconvenience or even a burden for the courts, the courts are bound to suffer it. If the burden becomes too great to bear, the people themselves can prescribe remedies. Historical practices do not remotely approach the need for change on that account.

B. Overloading the Voters

Overloading the voters is a genuine concern. In my estimation, the voters should not be asked to vote on more than three or four amendments in any one election. The "upper limit" of four has been exceeded eleven times[89] since the 1968 constitution was adopted, and most of this overload is attributable to the legislature. In 1978, the Constitution Revision Commission's proposals caused the overload, and in 1994, two amendments proposed by joint resolution were added to three proposed by people's initiatives.[90] In short, the legislature was responsible for the overload in nine of the eleven

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89. Overload occurred in the years 1970, 1972, 1974, 1976, 1978, 1980, 1984, 1986, 1988, 1992, and 1994. A compilation of constitutional amendments is maintained in the office of the secretary of state (listing of amendments on file with Author).

90. Amendments to article III, § 1 and article VII, § 1 of the Florida Constitution were proposed by the legislature. See *supra* note 72 and accompanying text for the proposals made by initiative.

years.

In an earlier article, I proposed the following measures to reduce the number of legislatively sponsored proposals:

1. The two houses of the legislature must sit together to adopt a joint resolution to propose a constitutional amendment.

2. The joint resolution must be approved by not less than three-fifths of the membership of each house in two successive regular sessions with an intervening election of the House of Representatives.

3. The legislature may place no more than three proposals on the ballot for any election.[91]

If this proposal were adopted, the need for further correction might dissipate. Although the Constitution Revision Commission and the Taxation and Budget Reform Commission should be modest in the volume of their productions, the infrequency of their convenings dilutes the overload they cause.[92] Nevertheless, a modest change in the timing of the voting may be worthy of consideration. For example, the constitution might profitably be amended to require that the commissions' proposals be scheduled over successive general elections, with no more than three proposals on the ballot per election.

Unless, and until, historical practice establishes that the people will continue to produce initiatives for ballot position at a sustained high rate (more than three per election), then no limit on people's initiatives should be considered. If such a high rate is sustained, then the people might be offered an opportunity to constrain the production to three per election with latecomers placed first in line for the next election.

C. Misusing the Constitution

The greatest danger of the outpouring of proposals to amend the Florida Constitution is from their content. As previously discussed, many of the proposals threaten to lard the constitution with nonconstitutional substance.

Consistent with the basic theory of state constitutional law, the

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91. Little & Medenblik, *supra* note 33, at 45–46.

92. The Constitution Revision Commission convened in 1978 and will meet once every 20 years. FLA. CONST. art. XI, § 2. The Taxation and Budget Reform Commission convened in 1990 and will meet once every 10 years. *Id*. art. XI, § 6.

Florida Constitution is a document with two primary purposes. The first purpose, and by far the greater, is to impose limitations upon the power of government to protect the people from political and governmental oppression.[93] As expressed by the Florida Supreme Court, "[t]he Constitution of Florida is a document of limitation by which the people of the state have restricted the forces of government in the exercise of dominion and power over their property, their rights and their lives."[94] It is this aspect of American (and Floridian) constitutionalism that historically sets governance in the United States of America apart from all governments that preceded it. Indeed, much of the extra-American political history of the nineteenth and twentieth centuries has involved attempts to import and implement the American experience into other lands.

The second purpose of our Florida Constitution is to define the structure of government and allocate functions and powers among the various branches.[95] Indeed, because a primary purpose of this specification of branches of government, and separation of their powers, is to deny to any department or government official plenary governmental power over the people, this second aspect may properly be seen as a subsidiary of the first — one of the vital, constitutional hedges on governmental power.[96]

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93. The earliest judicial expression of this point is unknown to me. In 1839, the Illinois Supreme Court deemed it to be a settled maxim: "No proposition is better settled, than that a state constitution is a limitation upon the powers of the legislature, and that the legislature possesses every power not delegated to some other department, or expressly denied to it by the constitution." Field v. People *ex rel.* McClernand, 3 Ill. (3 Scam.) 79, 96 (1839).

94. Smathers v. Smith, 338 So. 2d 825, 827 (Fla. 1976); *see* Stone v. State, 71 So. 634, 635 (Fla. 1916) ("The Constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature . . . ."); City of Jacksonville v. Bowden, 64 So. 769, 771 (Fla. 1914) ("The lawmaking power of the Legislature of a state is subject only to the limitations provided in the state and federal Constitutions . . . .").

95. *See* State v. Atlantic Coast Line R.R., 47 So. 969, 974 (Fla. 1908) ("The purpose of the Constitution is to secure efficient government by the harmonious co-operation of the separate, independent departments.").

96. In *Sylvester v. Tindall*, the supreme court acknowledged the importance of the separation of powers:

> It is true that this separation of the powers of government is fundamental to the very existence of our form of state and Federal governments and is one of the most important principles of government guaranteeing the liberty of the people. While we have held that there may be a certain blending of powers in administrative boards and commissions, in a broad sense we have preserved these separations of the powers of government, and the independence of each

In sum, the Florida Constitution is a defining and power-limiting document. It is not a mere statute with the purpose of regulating some aspect of private behavior, and it is not an instrument for implementing some desired public works program.[97] Under our form of government, these instrumental functions are to be accomplished through the agencies of representative government as the constitution created, defined, and limited them.

Accordingly, the constitution is not a vehicle for making positive law, but it is an instrument to limit and control what laws the government shall have the authority to make and what powers the government shall be permitted to exercise. This being true, to burden the constitution with provisions that are merely legislative in character (i.e., to impose a particular tax, to authorize a particular form of gambling, or to prohibit a particular kind of fishing) is a misuse of the document and of the principle of American state constitutionalism.

The legislature has abused the constitution in this regard.[98] Similar abuse came from the first Taxation and Budget Reform Commission proposals[99] and a substantial number of the people's initiatives. The cure to these inappropriate practices is easily stated: No amendment to the constitution may be placed upon the ballot to accomplish a purpose that is within the power of the Florida Legislature to accomplish by law.

This rule would secure the constitution its rightful status as the basic defining and power-limiting instrument under which state government functions. Under this rule, every amendment to the constitution would either change the definition of the constitutional structure of government or change the limits on governmental

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> department, which is so vital to the freedom of our people from tyranny and oppression. This separation of powers, coupled with the fundamental individual rights which are guaranteed by our bill [of] rights, prevents the exercise of autocratic power and is essential to the perpetuity of our form of government. "Thus no department, not even the legislative, has unlimited power under our system of government."

Sylvester v. Tindall, 18 So. 2d 892, 899 (Fla. 1944) (en banc) (citations omitted).

97. "We must bear in mind that we are dealing with provisions of the Constitution and not with statutes. We are dealing with the supreme law as adopted by the people and not with legislative enactments." Coleman v. State *ex rel.* Race, 159 So. 504, 506 (Fla. 1935).

98. *See* Little & Medenblik, *supra* note 33, at 43.

99. *See* FLA. CONST. art. I, § 26; *id*. art. III, § 19.

power. Every amendment proposed, whether by the legislature, a commission, or people's initiative, should be tested against this standard before being permitted on the ballot.

Some may criticize this proposal as depriving the people of an established means of "going over the head of the legislature" in order to constitutionalize laws or programs that the legislature declines to enact. Similarly, defenders of the legislature may complain that the measure would deprive the legislature of the power to let the people decide whether to adopt laws or programs upon which the population is deeply divided.

The second of these concerns is of lesser consequence than the first, and it has a ready solution. The constitution now permits the legislature to prescribe for referenda by law.[100] The legislature also has the power to condition the effectiveness of any law it enacts upon some stated contingency, including the approval of the law by a vote of the electors.[101] Although the legislature should be discouraged from using this power willy-nilly, it should be encouraged to use the power as an alternative to proposing a constitutional amendment in order to test public acceptance of a non-constitutional measure.

One weakness of submitting statutes to popular approval in a referendum is that the legislature possesses the power to repeal those statutes the voters ultimately adopt whenever it chooses to do so. Although the politics of the matter suggest that the legislature would use its power to repeal or amend voter-approved statutes sparingly, the power could be positively limited by placing a restriction in the constitution. For example, these constitutional limits might be suitable: No general law approved by the electorate of the state may be repealed or amended, except by law approved by the state electorate or by an act of the legislature that is (1) approved by four-fifths of the membership of each house of the legislature, if enacted within five years of the effective date of the act to be repealed or amended; or (2) approved by two-thirds of the membership of each house of the legislature, if enacted within ten but not five years of the effective date of the act to be repealed or amended; or (3) approved by a majority of the membership of each house of the legislature, if enacted more than ten years after the effective date of

100. *Id*. art. VI, § 5.

101. City of Winter Haven v. State, 170 So. 100, 103 (Fla. 1936).

the act to be repealed or amended. This model gives substantial sanctity to general laws approved by the people without falsely and unnecessarily enshrining them in constitutional garb. The model also permits the people themselves (or if the urgency is deemed to be great enough, the legislature) to amend or repeal general laws approved by the electorate.

This proposal needs but slight modification to provide a model for the initiation of statutes by the people. The proposal would provide the people with recourse against the legislature when it declines to enact desired legislation. To effectuate this proposal would itself require a constitutional amendment, as the existing constitution vests "*the* legislative power" of the state in the legislature only.[102] There is no latitude for lawmaking by initiative. Consequently, to claim the power to initiate statutes without any assistance from the legislature, the people must amend the constitution appropriately. The amendment should include these elements: (1) a modification of the legislative article to permit the people to initiate statutory enactments upon obtaining a prescribed number of petitions signed by qualified electors (the number required should be substantially less than that required for initiating a constitutional amendment);[103] (2) a requirement that initiated statutes conform to the same ballot title and single-subject restrictions that apply to enactments by the legislature; (3) a provision that initiatives may repeal general laws enacted by the legislature, except for general appropriations statutes; and (4) a limitation against subsequent repeal by the legislature, such as is proposed above.

The specter of popular lawmaking will alarm some people. After all, the artful packaging of initiatives and clever advertising can fool the people into voting for bad laws. But this is nothing new. Well-financed special interests already exert extraordinary power in deciding what laws are made in Tallahassee. Taking certain statutes directly to the people may dilute the power of the "big" interests. If popular initiation of statutes should prove not to work, as determined by the people themselves, the people continue to possess the

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102. FLA. CONST. art. III, § 1 (emphasis added).

103. For example, to obtain a ballot position a statutory initiative might only require petitions signed by two percent of the number of voters who participated in the preceding presidential election, as opposed to eight percent for constitutional initiatives. *See supra* note 12.

power to expunge the provision from the constitution.

CONCLUSION

"It is hard to amend the Constitution and it ought to be hard."[104] This maxim, attributed by Justice Roberts to the "late and revered Justice Terrell,"[105] was most recently endorsed by Justice Shaw.[106] Justice Roberts also espoused the view that the people intended amendment by initiative to be the hardest path for an amendment to take.[107] In 1993, Justice McDonald "heartily" concurred that the initiative was intended to be the "most difficult method of amending the constitution."[108]

With all of this, in principle, I strongly agree. But as to any implication that the initiative process has been overused, I strongly disagree. It ought to be hard to amend the constitution by initiative and it *is*. Since the initiative was introduced in Florida in 1968, only five amendments have been added by that method, including one added in 1994.[109] This production over twenty-six years hardly establishes that the initiative process is too easy or overused.

By contrast, historic practices since 1968 show patterns of abuse in the legislature's proclivity to proffer amendments by joint resolution, which is restrained by no prudential limitation. In fact, when Justice Roberts warned about amendment by initiative in 1976, he mistakenly referred to evidence of the abusive practice of the *legislature* to make his point:

> Significantly, the Constitution of the United States in 200 years has been amended only 26 times, whereas, the Constitution of

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104. Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976) (Roberts, J., dissenting), *overruled in part by* Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978).

105. *Id*. at 824.

106. Fine v. Firestone, 448 So. 2d 984, 996 (Fla. 1984) (Shaw, J., concurring).

107. "There is little doubt that it was the clear intent of the authors of the initiative provision and its amendment [i.e., the 1972 amendment substituting the one-*subject* standard to supplant the one-*section* standard] that it be more restrictive and more difficult to amend the Constitution by the initiative method rather than Legislative Resolution or a Constitutional Convention . . . ." *Weber*, 338 So. 2d at 824 (Roberts, J., dissenting).

108. *Fine*, 448 So. 2d at 994 (McDonald, J., concurring).

109. *See* FLA. CONST. art. XI, § 3; *id*. art. VII, § 4(c); *id*. art. II, § 9; *id*. art. X, § 15; *id*. art. II, § 8.

> Florida, carefully prepared following a two-year study and which became effective as recent as 1969, has already been amended 14 times with nine proposed amendments on the ballot in November, 1976. If all of these should be adopted, the recent 1968 Constitution of Florida would have been amended 23 times in seven years . . . .[110]

Of the fourteen amendments referred to by Justice Roberts, all had been proposed by the legislature, and none by initiative.[111] Only one of the nine proposals on the 1976 ballot was proposed by initiative, whereas eight were proposed by the Constitution Revision Commission.[112] Furthermore, the evil of misuse has continued to be primarily a shortcoming of the legislature.

Justice Roberts was correct to criticize the subject matter of the particular amendment then under his scrutiny — "Ethics in Government" — as being of non-constitutional content. Non-constitutional content has proved to be a recurring characteristic of proposed amendments whether initiated by the people, the legislature, or one of the commissions.[113] Justice McDonald recently focused upon this form of abuse to warn that "the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments."[114] Justice McDonald homed in on the problem and hinted at possible solutions:

> The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.
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> . . . .
>
> Undoubtedly, some of Florida's most crucial legal principles

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110. *Weber*, 338 So. 2d at 824 (Roberts, J., dissenting).

111. A compilation of constitutional amendments is maintained in the office of the secretary of state (listing of amendments on file with Author).

112. A compilation of constitutional amendments is maintained in the office of the secretary of state (listing of amendments on file with Author).

113. *See, e.g.*, Advisory Op. to Att'y Gen. re: Limited Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

114. *Id*.

> have evolved as a result of the initiative process. However, the legislative power of the state is vested in the Legislature, . . . and on matters that are statutory in nature, a concerted effort should be made to have the Legislature address the subject. The technical requirements, such as the single-subject rule . . . appear insufficient to prevent abuse of the amendment process. At this juncture, rather than espouse any particular solution as to how to prevent such abuse, I merely express my thought that some issues are better suited as legislatively enacted statutes than as constitutional amendments.[115]

I offer concrete proposals to implement Justice McDonald's goals. The proposal to provide for the initiation of statutes is important. More important still is the adoption of a rule of constitutional content, stated previously,[116] to be applied to every proposed amendment, whatever the method. Apart from the content restriction and possible limits on the number of measures permitted on a single ballot, no further restrictions need be placed upon the people's power to propose amendments to the constitution.

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115. *Id.*
116. *See supra* p. 410.