STORAGE NAME: h0627.jo.doc
DATE: March 5, 2001

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS

BILL #: HJR 627

RELATING TO: Judiciary

SPONSOR(S): Representative Brummer

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT
(2) SMARTER GOVERNMENT
(3)
(4)
(5)

I. SUMMARY:

This joint resolution proposes an amendment to the state constitution regarding the Judiciary, that:

1. Limits the jurisdiction of the courts, including the jurisdiction to issue most writs, to actual cases in law, equity, admiralty, and maritime jurisdiction and to actual controversies arising under the Constitution and the laws of the State of Florida and the United States.

2. Prohibits rules of the Supreme Court from being inconsistent with statutes in place at the time of the adoption of the rules, and provides that the rules must be revised to conform to subsequently adopted statutes that regulate substantive rights and that rules may be repealed by general law adopted by a majority, rather than 2/3, of each house of the Legislature.

3. Provides that rules adopted by the court shall neither abridge, enlarge, nor modify the substantive rights of any litigant, but additional rulemaking power may be delegated to courts by general law.

4. Limits the District Courts of Appeal jurisdiction to appeals and the Supreme Court jurisdiction to appeals, advisory opinions authorized by the constitution, writs of habeas corpus, and prohibitions and adoption of rules, discipline, and review of questions certified by the Supreme Court of the United States or a United States Court of Appeal.

5. Provides that writs issued by the Supreme Court are subject to statutes of limitation and that in a criminal case the statute of limitation shall be no shorter than 2 years from the final judgment or mandate on direct appeal in a criminal case.

6. Provides for the retention of Supreme Court justices and district courts of appeal judges by a two-thirds vote rather than a majority vote.

7. Provides that the Governor shall nominate and appoint applicants for a court vacancy with the advice and consent of the Senate with a provision for confirmation when the Senate is not in session. Eliminates judicial nominating commissions.

8. Provides that any nonprevailing party in any civil proceeding or any defendant convicted in any criminal proceeding may be assessed, as provided by general law, the full cost of all services utilized and expenses incurred in such proceeding as determined by the clerk of the circuit or county court, to

the extent that such services or expenses are provided by certain appropriations, fees, or service charges.

9. Provides for the state funding of "courts established by the Constitution" rather than state funding of the "state court system."

10. Provides that the judiciary shall have no power to set or modify legislative appropriations.

11. Grants the Supreme Court exclusive jurisdiction to discipline and regulate the admission of persons to practice law before the courts and provides for regulation, by general law, of the professional practice of law other than before the courts.

12. Provides that no attorney shall be required to pay dues to any organization as a condition to admission to practice law before the courts of the state and prohibits the court from assessing any fee as a condition to admission to practice law before the courts of the state. Conforms provisions relating to judges, state attorneys, public defenders, and members of the Judicial Qualifications Commission.

13. Removes The Florida Bar from appointing members of the Judicial Qualifications Commission and allows the Legislature to appoint attorney members to the commission.

14. Reduces judicial certification to optional advice rather than constitutional determination of need.

15. Restores the election of county and circuit judges by eliminating the 1998 amendment allowing local option for appointment and retention of such judges.

16. Removes ability to limit by rule the political rights of candidates for judicial office, but allows such limits by general law if consistent with other provisions of the constitution.

Provides that a District Court of Appeal may be given exclusive jurisdiction over a subject matter.

Removes the requirement that, of the seven Supreme Court justices, each appellate district must have at least one justice elected or appointed from the district to the Supreme Court who is a resident of the district at the time of the original appointment or election.

Clarifies lower court jurisdiction in cases where a case is certified as requiring immediate resolution by the Supreme Court.

Removes the ability to utilize a judge or justice who has attained the age of seventy years to serve “upon temporary assignment”.

Removes a now unnecessary phase-in schedule.

This joint resolution would represent an indeterminate fiscal impact on state government; see Section III.D. Fiscal Comments. This joint resolution does not appear to have a present fiscal impact on local governments, although there may be a future impact; see Section III. Fiscal Analysis and Economic Impact Statement.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Brief History of the Florida Constitution and Article V.

The state of Florida has enacted five constitutions, namely, the Constitution of 1838, commonly known as the St. Joseph's Constitution, which went into effect in 1845 upon admission of the state to the Union; the Confederate Constitution of 1861; the Constitution of 1865, which was not recognized by the Congress of the United States; the Constitution of 1885, which went into effect in 1887; and the Constitution of 1968, which became effective January 7, 1969.[1]

Article V of the Florida Constitution provides for the judicial system. The citizens at the November 6, 1956 election, effective July 1, 1957, adopted former Article V. The proposed constitution of 1968 did not include a revised Article V, because the Legislature could not agree on a text for revision. In 1970, the citizens rejected a proposed revision of Article V. The current Article V passed at the third special session of the Legislature in 1971, and was adopted by the citizens at a special election held March 14, 1972, effective January 1, 1973.[2]

Note to readers: The paragraph numbers of this analysis correspond to the paragraph numbers found in the ballot summary.

1. Case and Controversy

Art. III, s. 2, U.S.Const., provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands

[1] Constitutional Law § 1, 10 Fla.Jur.2d 366.
[2] Historical notes to Article V of the Florida Constitution, Florida Statutes Annotated; and Talbot "Sandy" D'Alemberte, *Judicial Reform – Now or Never*, 46 Fla.BarJ. 68 (1972).

> under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. V, s. 1, Fla.Const., simply provides that the "judicial power shall be vested in a Supreme Court, district courts of appeal, circuit courts and county courts." The Florida Constitution does not have a specific case and controversy limitation, as the United States Constitution does.

The issue in *United States v. Muskrat*, 219 U.S. 346 (1911), was whether the Court of Claims could enter a declaratory judgment regarding the conditions upon which lands were ceded to Native American tribes and their members. The United States Supreme Court stated:

> The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.[3]
>
> . . .
>
> In [*Marbury v. Madison*], Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury v. Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination.[4]

The Florida Supreme Court has determined that Florida courts are not similarly bound by the cases and controversies rule because the Florida Constitution does not contain a cases and controversies clause like the United States Constitution. *Sheldon v. Powell*, 128 So. 258, 261 (Fla. 1930). Florida courts hear matters that do not meet the case or controversy restriction found in federal law. For example, in *In re Connors*, 332 So.2d 336 (Fla. 1976), the Florida Supreme Court declared a state statute unconstitutional because the statute was in conflict with a criminal rule of procedure in existence at the time the statute was passed. By the time the case reached the Florida Supreme Court, the criminal defendant had been released, and was not appealing the decision. Because the

---

[3] *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911) (citations omitted).
[4] *Id.*. at 357-58.

trial court had ruled the statute unconstitutional, it was the affected state agency that had filed the appeal. Under federal jurisprudence, the appeal would have been dismissed because there was no longer a case or controversy; but the Florida Supreme Court heard and decided the issue. In dissent, Justice Hatchett[5] argued for a case and controversy requirement under Florida law, stating:

> The 'judicial power' in Florida, as in the Nation, 'is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of property jurisdiction,' *Muskrat v. United States*, 219 U.S. 346 (1911), with the lone exception of gubernatorial requests for advisory opinions. When the Court overreaches its jurisdiction in order to decide questions which do not 'determine actual controversies,' it invades the province of the other branches of government.[6]
>
> . . .
>
> It is on the ground of separation of powers that the Court today strikes down a statute which was reenacted, as amended, by unanimous vote of both houses of the legislature in the 1974 session. According to the majority, the statute conflicts with a previously adopted court rule, and must therefore fall. Whenever possible, however, striking down 'a solemn act of the Legislature,' should be scrupulously avoided. The majority asserts that such extreme action must be taken in the present case in order to preserve the separation of powers intact. Ironically, in the name of preserving the separation of powers, the Court has blurred the distinctions between the separate branches of government by passing on a statute as a general proposition, in much the same way the governor might, when exercising the power of the veto.[7]

2 and 3. Court Rules

Art. V. s. 2(a), Fla.Const., provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts". A court rule may be repealed by general law enacted by a two-thirds vote of each house of the Legislature.

Florida law is substantially different from federal law on the issue of court rules. "It has long been settled that Congress has the authority to regulate matters of practice and procedure in the federal courts." *Allen v. Butterworth*, 756 So.2d 52, 63 (Fla. 2000). Under federal law, 28 U.S.C. § 2072, provides the that United States Supreme Court has "the power to prescribe general rules of practice and procedure", which "rules shall not abridge, enlarge or modify any substantive right." No rule is in effect until Congress has had seven months within which to review the rule.

The Florida Supreme Court has affirmed the general proposition that a court rule may not abridge, enlarge or modify any substantive right, stating:

> Unlike the Act of Congress in providing that the Supreme Court of the United States may promulgate rules for the district courts, Section 3 of Article V, supra, failed to specify that such rules as might be promulgated by this court 'shall neither abridge, enlarge, nor modify the substantive rights of any litigant'; however, such limitation is implicit by reason of Article II of our Constitution providing for a separation of the powers of government of this state. The rule [at issue in this case] exceeds the

---

[5] Justice Joseph W. Hatchett was a justice of the Florida Supreme Court from 1975 to 1979. In 1979, President Carter appointed him as an appellate judge for the Fifth Circuit Court of Appeals (from which the Eleventh Circuit Court of Appeals was created in 1981).
[6] *In re Connors*, 332 So.2d 336, 347 (Fla. 1976) (Hatchett, dissenting).
[7] *Id*.

> scope of 'practice and procedure,' is legislative in character and must yield to the provisions of the statute.

State v. Furen, 118 So.2d 6, 12 (Fla. 1960).

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity. *In re Connors*, 332 So.2d 336 (Fla. 1976). In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any counterclaims in the action to be unconstitutional because it conflicted with an existing rule of civil procedure. *Haven Federal Saving & Loan Association v. Kirian*, 579 So.2d 730 (Fla. 1991).

In short, the rule is that substance is legislative, and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, former Justice Adkins described the difference between substance and procedure as:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

In re Florida Rules Of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1973). This “twilight zone” remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

In addition to the difficulty of determining procedure versus substance in the many gray areas, problematic too is an inconsistent treatment of the issue by the courts. While there have been numerous instances where the Supreme Court has struck down a statute because it was procedural, there are numerous examples where the Supreme Court has accepted procedure found in the statutes. For example, the current Probate Code, passed in 1974, is rife with procedural matters. In 1984, the Court adopted the procedural aspects of the Probate Code as “temporary rules of procedure.” *The Florida Bar Re Emergency Amendments To Florida Rules Of Probate And Guardianship Procedure*, 460 So.2d 906 (Fla. 1984). In 1988, the Probate Rules Committee, organized by the Supreme Court, announced its intention to review the Probate Code and seek removal from it of procedural matters, *The Florida Bar, In re Rules Of Probate And Guardianship Procedure*, 531 So.2d 1261, 1263 (Fla. 1988), a task that has yet to be completed to this day.[8] Other statutes that include substantial amounts of unchallenged procedure include ch. 51, F.S. (Summary Procedure); ch. 61, F.S. (Dissolution of Marriage; Support; Custody); ch. 63, F.S.

[8] HB 137, filed this session, would complete this mandate.

(Adoption); ch. 73, F.S. (Eminent Domain); ch. 744, F.S. (Guardianship); and chapters 900-985 (Criminal Procedure and Corrections).

Two recent rulings on the distinction between substantive law and rulemaking power have involved whether a statute of limitations is substantive law or a rule of procedure. In *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998), the Court upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

> As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. *See, e.g.*, *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.

Kalway at 269. Two years later, the Legislature passed a statute of limitations applicable to post-conviction death penalty cases as part of the Death Penalty Reform Act (DPRA). In ruling that statute of limitations unconstitutional, the Supreme Court declared: "we find that the DPRA is an unconstitutional encroachment on this Court's exclusive power to 'adopt rules for the practice and procedure in all courts.'" *Allen v. Butterworth*, 756 So.2d 52, 54 (Fla. 2000). The Court ruled that it has "exclusive authority to set deadlines for postconviction motions" under the rulemaking authority of Art. V, s. 2(a), Fla.Const. *Allen* at 62 (rejecting a comparison to the holding in Kalaway).

4. Jurisdiction

Art. V, s. 3(b), Fla.Const., provides that the Supreme Court has jurisdiction to:

- Hear appeals from final judgments of trial courts imposing the death penalty.
- Hear appeals from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
- When provided by general law, hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness
- When provided by general law, review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
- Review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.
- Review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

- Review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the Supreme Court.
- Review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals that is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida.
- Issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.
- Issue writs of mandamus and quo warranto to state officers and state agencies.
- As a court, or any justice may, issue writs of habeas corpus returnable before the Supreme Court or any justice, a district court of appeal or any judge thereof, or any circuit judge.
- The Supreme Court must, when requested by the Attorney General pursuant to the provisions of Art. IV, s. 10, Fla.Const., render an advisory opinion of the justices, addressing issues as provided by general law.

Art. V, s. 4(b), Fla.Const., provides that the District Courts of Appeal have jurisdiction to:

- Hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the Supreme Court or a circuit court.
- Review interlocutory orders in such cases to the extent provided by rules adopted by the Supreme Court.
- Direct review of administrative action, as prescribed by general law.
- Issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court.
- Issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction.
- And, to the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

Art. V, s. 5(b), Fla.Const., provides that the Circuit Courts have jurisdiction to:

- Hear all trial court matters not vested in the county courts.
- Appeals when provided by general law.
- Issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.
- Direct review of administrative action prescribed by general law.

Art. V, s. 6(b), Fla.Const., provides that the jurisdiction of the County Courts is prescribed by general law.

Quo Warranto
Quo warranto is defined as:

> A common law writ designed to test whether a person exercising power is legally entitled to do so. An extraordinary proceeding, prerogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted. It is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers.[9]

Quo warranto is an archaic writ used to challenge the right of an individual to hold an office. It may be a form of indirectly challenging an action by challenging the right of the person holding the office to claim the office, but it is not intended to challenge the action itself. The most common use for quo warranto is its traditional use by a losing candidate to challenge an election result.

Despite the limitation in the definition of quo warranto that it "is not ordinarily available to regulate the manner of exercising such powers," in Florida the writ has ordinarily been available to regulate the manner in which public officials exercise their powers. For instance, in 1936, the Florida Supreme Court stated:

> It is not out of place to state, however, that under our practice, quo warranto is a remedial as well as a prerogative writ, and that this court will not refuse to extend its use on proper showing made. In *State ex rel. Watkins v. Fernandez*, 106 Fla. 779, 143 So. 638, and *State ex rel. Bauder v. Markle*, 107 Fla. 742, 142 So. 822, we reviewed many instances in which the common-law writ of quo warranto had been extended and employed for purposes other than for which it was originally conceived.

State ex rel. Pooser v. Wester, 170 So. 736, 737 (Fla. 1936). In 1989, the Florida Supreme Court stated that:

> Quo warranto is the proper method to test the "exercise of some right or privilege, the peculiar powers of which are derived from the State." *Winter v. Mack*, 142 Fla. 1, 8, 194 So. 225, 228 (1940). *Compare, e.g., State ex rel. Smith v. Brummer*,[10] 426 So.2d 532 (Fla.1982) (quo warranto issued because public defender did not have authority to file class action on behalf of juveniles in federal court), *cert. denied*, 464 U.S. 823, 104 S.Ct. 90, 78 L.Ed.2d 97 (1983); *Orange County v. City of Orlando*, 327 So.2d 7 (Fla.1976) (legality of city's actions regarding annexation ordinances can be inquired into through quo warranto); *Austin v. State ex rel. Christian*, 310 So.2d 289 (Fla.1975) (power and authority of state attorney should be tested by quo warranto). Testing the governor's power to call special sessions through quo warranto proceedings is therefore appropriate.

Martinez v. Martinez, 545 So.2d 1338, 1339 (Fla. 1989) (footnote added).

Of late, quo warranto was used again outside of its traditional manner in *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998). In that case, the individual petitioners sought a writ of quo warranto determining that the Legislature and its officers exceeded their authority in overriding the Governor's veto of a bill. The Florida Supreme Court accepted original jurisdiction. In response to the Legislature's brief seeking dismissal of the claims of the individuals, the Court replied:

---

[9] Black's Law Dictionary, Sixth Edition, at 1256 (citations omitted).
[10] The respondent in this case was the Honorable Bennett H. Brummer, Public Defender for the Eleventh Judicial Circuit (Dade County). Representative Fred Brummer, sponsor of this joint resolution, was not involved in the case.

> Additionally, petitioners A Choice for Women and Dr. Watson filed their petition as members of the general public. We have held that members of the general public seeking enforcement of a public right may obtain relief through quo warranto. *See Martinez v. Martinez*, 545 So.2d at 1339 ("In quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit 'need not show that he has any real or personal interest in it.' ") (footnote omitted) (quoting *State ex rel. Pooser v. Wester*, 126 Fla. 49, 53, 170 So. 736, 737 (1936)). The "public right" at issue in *Martinez* was the right to have the Governor perform his duties and exercise his powers in a constitutional manner. 545 So.2d at 1339 n. 3. A similar public right is at issue here, i.e., the right to have the legislature and its leaders exercise their powers in a constitutional manner. Therefore, quo warranto is an appropriate method to bring the instant challenge.

Chiles v. Phelps, 714 So.2d 453, 456-57 (Fla. 1998).

"All Writs" Jurisdiction

Jurisdiction in the Supreme Court, District Courts of Appeal, and the Circuit Courts, includes jurisdiction to issue "all writs necessary to the complete exercise of its jurisdiction." In 1980, Former Justice Arthur J. England, Jr., described the all writs power as follows:

> The "all writs" powers of the Supreme Court has been defined to exclude writs which initiate jurisdiction in the court, as opposed to those which are necessary after jurisdiction is otherwise properly invoked. Besoner v. Crawford, 357 So.2d 414 (Fla. 1978); Shevin *ex rel.* State v. Public Serv. Comm'n, 333 So.2d 9 (Fla. 1976). *Contra*, Couse v. Canal Auth., 209 So.2d 865 (Fla. 1968).

England, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U.Fla.L.Rev. 147, 197 n.294 (1980). The statement that the all writs power cannot confer jurisdiction by itself is no longer accurate.

The history of the all writs power is a history of change and uncertainty on the question of whether the all writs power confers jurisdiction, or merely follows it. In *State ex rel. Watson v. Lee*, 8 So.2d 19 (Fla. 1942), the Supreme Court ruled that the all writs power "has reference only to ancillary writs to aid in the complete exercise of the original or the appellate jurisdiction of the Supreme Court, and does not confer added original or appellate jurisdiction in any case." *Id*. at 21. In *Couse v. Canal Authority*, 209 So.2d 865 (Fla. 1968), the Supreme Court ruled that the all writs power gave the court jurisdiction to hear an issue that ultimately could end up in the Supreme Court on appeal. Realizing the conflict in decisions, the Supreme Court expressly overruled *Watson v. Lee*. Id. at 867. In 1976, the Supreme Court again stated that the all writs power "contemplates a situation where the Court has already acquired jurisdiction of a cause on some independent basis, and the complete exercise of that jurisdiction might be defeated if the Court did not issue an appropriate writ or other process," citing to the previously overruled *Watson v. Lee*. *Shevin ex rel. State v. Public Service Commission*, 333 So.2d 9, 12 (Fla. 1976). In 1982, the Supreme Court accepted jurisdiction of an original action whereby the Senate sued the Governor, where there clearly was no ancillary action upon which a writ could be issued, thus again finding that the all writs power alone conferred jurisdiction. *The Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982).

In the recent past, the use of the all writs power to create jurisdiction in the Supreme Court has increased. Apparently, greater numbers of petitioners without an underlying ground for jurisdiction

are filing petitions that ask for relief based on the all writs power.[11] In 1999, the Supreme Court lamented how the practice of filing original actions in the Supreme Court seeking extraordinary relief has grown:

> In the last year alone, this Court has received well over 500 petitions for extraordinary relief. The overwhelming majority of these petitions were filed by prisoners seeking to invoke this Court's original writ jurisdiction pursuant to article V, section 3(b)(7), (8) and (9) of the Florida Constitution. This case is but one example.

Harvard v. Singletary, 733 So.2d 1020 (Fla. 1999). The practice is most visible in the death penalty area, where numerous "all writs petitions" are filed with the Supreme Court. *See, for example*, *Arbelaez v. Butterworth*, 738 So.2d 326 (Fla. 1999) (Capital Collateral Representative seeking stay of all death penalty cases until the CCR office is "adequately funded"). In 1999, the Supreme Court disposed of 17 cases without opinion where the disposition was either "All writs denied" or "Invoke all writs dismissed."

5. Statute of Limitations for Writs

The Florida Supreme Court has the authority to issue writs of prohibition, mandamus, quo warranto, habeas corpus, and all writs necessary to the complete exercise of its jurisdiction. Art. V, ss. 3(b)(7)-(9), Fla.Const. The District Courts of Appeal, under Art. V, s. 4(b)(3), Fla. Const., and circuit courts, under Art. V, s. 5(b), Fla.Const., have the authority to issue writs of habeas corpus, mandamus, certiorari, prohibition, quo warranto, and all other writs necessary to the complete exercise of jurisdiction.

Statutes of Limitations

A statute of limitations is a "statute prescribing limitations to the right of action on certain described causes of action or criminal prosecution; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued."[12] "A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (U.S. 1988).

Federal law now imposes a one-year statute of limitations for habeas corpus petitions filed in federal court. 28 U.S.C. §2244(d). The Florida Supreme Court has stated, however, that a law creating a statute of limitations on habeas corpus relief in state court is unconstitutional. *Allen v. Butterworth*, 756 So.2d 52, 62 (Fla. 2000) ("the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions").

---

[11] A common title to the petitions is "'Petition for Writs of Mandamus and Prohibition and Other Extraordinary Relief and Petition Invoking This Court's All-Writs Jurisdiction". *See, for example*, *Hauser v. Moore*, 25 Fla.L.Weekly S628 (Fla. 2000); *In re Rules Governing Capital Postconviction Actions*, 763 So.2d 273, note 2, (Fla. 2000) (footnote listing 2 cases with similar title in the petition). Some are even briefer, simply titled "Petition to Invoke All Writs Jurisdiction". *Richardson v. State*, 760 So.2d 983, 984 (Fla. 3rd DCA 2000). Among others, convicted murderers Thomas Provenzano and Terry Sims filed last minute petitions "all writs" petitions. *Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999); *Sims v. State*, 750 So.2d 622 (Fla. 1999).

[12] Black's Law Dictionary, 6th Ed., at 926.

Writ of Habeas Corpus
Habeas corpus is described as follows:[13]

> Although the term "habeas corpus" is applicable to each of several different writs, as generally used, it refers to habeas corpus ad subjiciendum, a writ issued pursuant to a petition or application, directed to an officer or person detaining another, and requiring that person to make a return thereon. The writ requires the body of the person alleged to be unlawfully held in custody or restrained of liberty to be brought before the court so that appropriate judgment may be rendered, upon judicial inquiry into the alleged unlawful restraint.
>
> The writ known commonly by the name of habeas corpus was a high prerogative writ known to the common law, the object of which was the liberation of those who were imprisoned without sufficient cause. It is a writ of inquiry upon matters of which the State itself is concerned in aid of right and liberty. In other words, the writ is designed for the purpose of effecting a speedy release of persons who are illegally deprived of their liberty or illegally detained from the control of those who are entitled to their custody. Essentially, it is a writ of inquiry granted to test the right under which a person is detained. It's function is to make precise and definitive inquiry as to whether one's liberty is legally restrained, not to conduct general inquiry in the nature of an appellate review. As a general rule, a habeas corpus proceeding is an independent action, legal and civil in nature, designed to secure prompt determination as to the legality of restraint in some form.
>
> The writ of habeas corpus ad subjiciendum is not an action or suit but is a summary remedy open to the person detained. It is civil rather than criminal in nature and is a legal and not equitable remedy. It is not the purpose of the writ to determine whether a person has committed a crime, or the justice or injustice of a person's detention on the merits, but to determine whether the person is legally imprisoned or restrained of liberty, and to secure speedy release when the illegality of detention is shown.

But see, *Allen v. Butterworth*, 756 So.2d 52, 60 (Fla. 2000) ("Although habeas corpus petitions are technically civil action, they are unlike other traditional civil actions.")

Art. V, s. 3(b)(9), Fla.Const., provides that the Supreme Court as a whole, or any justice, has jurisdiction to issue a writ of habeas corpus returnable before the Supreme Court or any justice, a district court of appeal or any judge thereof, or any circuit judge. Art. I, s. 13, Fla.Const., provides that the writ of habeas corpus is grantable of right, freely and without cost. A writ of habeas corpus is returnable without delay, and the right to seek a writ of habeas corpus may not be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

6. Retention Elections for Appellate Judges
Justices of the Supreme Court, and judges of the District Courts of Appeal, face a retention vote at the first regular election after appointment, and every six years thereafter.[14] Art. V, s. 10(a), Fla.Const., provides for the ballot language, and provides that a majority of the qualified electors voting within the territorial jurisdiction of the court must vote to retain in order for the justice or judge to retain his or her position. Since passage of the retention vote system in 1972, no judge or justice has been removed from office in a retention election.

---

[13] From Fla.Jur.2d *Habeas Corpus and Postconviction Remedies* §3 (footnotes omitted).
[14] This system is commonly referred as "merit selection and retention".

7. Selection of Appellate Judges

Under the first Florida Constitution, the only appellate court was the Supreme Court, which consisted of a panel of all of the trial court judges (the circuit judge that heard the trial would not serve on the panel for that case).[15] In 1851, an independent Supreme Court was first established by the Legislature. The three justices were appointed to eight year terms by the Legislature.[16] The 1865 Florida Constitution provided that the three justices of the Florida Supreme Court were appointed by the Governor with the advice and consent of the Senate.[17]

The Florida Constitution was amended in 1868 to provide that the three justices of the Florida Supreme Court, while still appointed by the Governor and confirmed by the Senate, were to serve a life term;[18] thereby making Florida's system the same as that in the United States Constitution. The 1868 amendment was the first to require that a Supreme Court justice be a "practicing attorney".[19] In 1875, the terms of Supreme Court justices were reduced from life to 4 years.[20] The Florida Constitution of 1885 changed the selection of Supreme Court Justices to popular election, with six year terms.[21]

Article V was substantially revised in 1956. Among those changes was the creation of the intermediate district courts of appeal whose judges were elected.[22] Supreme Court justices continued to be elected under the revision. The current version of Article V was adopted in 1972. In that latest revision, popular election of Supreme Court justices and District Court of Appeal judges was replaced with a system of nominations and retention votes. When a vacancy occurs, a judicial nominating commission reviews the applications of persons seeking the nomination, and provides the Governor a list of between three and six candidates, from which the Governor must appoint a person for the vacancy. Justices and judges face a retention vote after nomination,[23] and then serve six year terms subject to a retention election at the conclusion of each term.

Art. V, s. 11(d), Fla.Const., provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court and for each district court of appeal, and each judicial circuit for all trial courts within the circuit. The judicial nominating commissions at each level of the court system must establish uniform rules of procedure. General law enacted by a majority vote of the membership of each house of the Legislature, or by the Supreme Court, five justices concurring, thereof, may repeal such rules, or any part. Except for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records are open to the public.

Art. V, s. 3(a), Fla.Const., requires that one of the Supreme Court justices must have been an elector in each of the District Courts of Appeal when nominated. These districts, however, are not balanced by population, nor are they regularly reapportioned; thus, this provision may perhaps give rise to a question of whether this requirement creates unequal representation.

---

[15] Florida Constitution of 1838, §18.
[16] Act of 1850, § 1, 1850 Fla. Laws 371.
[17] Florida Constitution of 1865, Article V, s. 10.
[18] Florida Constitution of 1868, Article VI, s. 3.
[19] Florida Constitution of 1868, Article XVI, s. 30.
[20] Florida Constitution of 1868, Article VI, s. 15, as amended in 1875.
[21] Florida Constitution of 1885, Article V, s. 2.
[22] Florida Constitution of 1885, Article V. s. 5, as amended in 1956.
[23] The vote is at the first general election conducted at least one year after the nomination.

7 and 15. Selection of Circuit and County Court Judges

Under the first Florida Constitution, trial court judges were appointed by the Legislature. By constitutional amendment of 1852, circuit court judges were selected by popular vote for a six year term.[24] The Florida Constitution of 1865 was amended in 1868 to provide that circuit court judges were to be appointed by the Governor and confirmed by the Senate for an eight year term.[25] That constitution also provided the first county court judges, who were appointed by the Governor and confirmed by the Senate for a four year term.[26] The 1868 amendment was the first to require that a circuit court judge be a "practicing attorney".[27] The Florida Constitution of 1885 changed the selection of county court judges to one by popular election, for a four year term,[28] and modified the term of appointed circuit court judges from 8 years to 6.[29] A 1942 amendment restored election of circuit court judges, for six year terms.[30]

In the 1998 general election, the citizens amended Art. V, s. 10(b), Fla.Const., to provide a local option for judicial circuits and counties to move from elected judges to a nomination and retention system like that of Supreme Court justices and District Court of Appeal judges. In the 2000 general election, all 67 counties and 20 judicial circuits were asked if they would like to change to the nomination and retention system. The measure was defeated in every county and every judicial circuit.

A mid-term vacancy in the office of a circuit or county court judgeship is filled by appointment by the Governor from a list of between three and six candidates selected by a judicial nominating commission. Art. V, s. 11(d), Fla.Const., provides for a separate judicial nominating commission, as provided by general law, for each judicial circuit for all trial courts within a circuit. The judicial nominating commissions at each level of the court system must establish uniform rules of procedure. General law enacted by a majority vote of the membership of each house of the legislature, or by the Supreme Court, five justices concurring, may repeal such rules, or any part. Except for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records are open to the public. Art V, s. 11(a), Fla.Const., provides that an appointed circuit or county court judge must sit for election at the next regular election more than one year after the appointment.

8, 9 and 10. Court System Funding

Art. V, s. 14, Fla.Const., currently provides that justices and judges are compensated by the state, and the judiciary is prohibited from setting appropriations.

Art. V, s. 14, Fla.Const., was substantially changed by an amendment passed at the 1998 general election. Art. XII, s. 25(a), Fla.Const., provides that "[c]ommencing with fiscal year 2000-2001, the legislature shall appropriate funds to pay for the salaries, costs, and expenses set forth in the amendment to Section 14 of Article V pursuant to a phase-in schedule established by general law." Art. XII, s. 25(b), Fla.Const., provides for the amendment to, Art. V, s. 14, Fla.Const., to "be fully effectuated by July 1, 2004." The Legislature has not yet determined the cost or scope of this change, and thus the phase-in amount that was selected for the 2000-2001 fiscal year was zero.

---

[24] Amendment I, § 1, to the Florida Constitution of 1838.
[25] Florida Constitution of 1868, Article VI, s. 7.
[26] Florida Constitution of 1868, Article VI, s. 9.
[27] Florida Constitution of 1868, Article XVI, s. 30.
[28] Florida Constitution of 1885, Article V, s. 16.
[29] Florida Constitution of 1885, Article V, s. 8.
[30] Florida Constitution of 1885, Article V, s. 46 (as amended 1942) (SJR 334, 1941 Fla. Laws 2812).

New Art. V, s. 14, Fla.Const., is renamed "Funding" by the amendment. The revised section, readopts at 14(a) the provision that justices and judges are compensated by the state. New s. 14(b) provides that funding for offices of the clerk of courts to provide court services must be provided for in court filing fees; and where those filing fees are insufficient to pay the cost of operating the clerk's office, the state must provide supplemental funding. New s. 14(c) provides that no county or municipality can be required to fund the state courts system, state attorneys' offices, public defenders' office, court-appointed counsel, or the offices of the clerks of court to the extent the clerks are providing court related services. Counties are required to fund communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for the trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall also pay reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law. New s. 14(d) restates the prohibition in current s. 14 that "[t]he judiciary shall have no power to fix appropriations."

11 and 12. Regulation of the Practice of Law

Art. V, s. 15, Fla.Const, provides that the Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted. This provision first appeared in the Florida Constitution in the 1957 revision of Article V.

The organized bar in Florida began in 1889 with a small group of lawyers. The Florida State Bar Association was formed in 1907 and continued until the summer of 1949 when the Supreme Court of Florida approved the formation of a "unified" or "integrated" bar requiring mandatory membership. *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949).[31] In April 1950, the name was changed to The Florida Bar and some 3,758 lawyers automatically became members.[32]

From its humble beginnings, The Florida Bar has grown. In the integration order of 1949, the Supreme Court looked with admiration at the $250,000 annual budget of the California Bar. The Florida Bar's 2000-2001 budget is $25.1 million, of which $13 million (51.8%) is from mandatory dues.[33] Additionally, the Florida Bar Foundation has a budget of approximately $10 million, the primary source of which is interest on client funds held in lawyer trust accounts. As to expenses, the category of "Regulation of Law" represents 40.4% of the budget. Currently, there are 68,178 members of The Florida Bar.[34] The Board of Bar Governors has recommended an increase in annual membership fees from $190 to $265 for active members, and from $140 to $175 for inactive members.[35] The Florida Bar owns real property of approximately 6.515 acres in Tallahassee, with an appraised market value of $10,016,650,[36] which includes approximately 107,000 square feet of buildings[37] and tangible personal property assets in Tallahassee of $317,590.00.[38] The Florida Bar also operates branch offices in Miami, Tampa, Orlando, and Ft. Lauderdale.

---

[31] On a historical note, one of the petitioners supporting the integrated bar was Charles S. Ausley, esquire, grandfather of Representative Loranne Ausley.
[32] Florida Bar Journal, September 2000, at 18.
[33] Florida Bar Journal, September 2000, at 38.
[34] From http://www.flabar.org/, as of February 24, 2001.
[35] Minutes of meeting of the Florida Bar, Board of Governors, December 15, 2000.
[36] Includes property transferred from The Florida Bar to the Florida Bar Building Corporation, a wholly owned subsidiary. Figures from records of the Leon County Property Appraiser.
[37] Florida Bar Journal, September 2000, at 36.
[38] From Leon County Tax Collector records, account number 6883010.

Among its many programs, The Florida Bar operates a legislative program. Should the Board of Governors elect to take a position on an issue, it will become an official position of The Florida Bar, which will then lobby on behalf of that position. The legislative budget of $516,104 for the year 2000-2001 represents a cost per member of approximately $7.67, and represents 1.9% of the expense budget.[39] In 1980, the Florida House of Representatives, Committee on Regulatory Reform, Representative George Sheldon,[40] chairman, convened a Select Subcommittee on the Legal Profession (sometimes referred to as the "Sheldon Commission").[41] The use of mandatory dues money to fund political activities was questioned by the subcommittee, which found:

> The use of mandatory dues collections to achieve political aims that any portion of the membership disagrees with does not seem consistent with the high ideals of individual freedom that lawyers as a body are dedicated to upholding. The fact that a lawyer must belong to a quasi-governmental/trade organization in order to practice his profession already is a heavy burden on his freedom – if it can be justified. To cause lawyers also to contribute to political action that they may oppose, no matter how small the share of that contribution, raises before the subcommittee a question of inherent unfairness. The fact that a lawyer might have a chance of influencing the outcome of a political policy debate through direct participation in the Bar process or by changing his elected Bar representative does not relieve the problem. The right to engage or not to engage in political activity has been sacred throughout the history of the United States.[42]
>
> . . .
>
> Charged by the constitution with regulating admissions and discipline of lawyers, the Supreme Court requires lawyers to fund programs not directly related to those functions. The court should not exact compulsory dues for programs other than those for discipline. Payment to support those not related to discipline should be voluntary.[43]

13. Judicial Qualifications Commission

Art. V, s. 12, Fla.Const., provides for the creation of a Judicial Qualifications Commission (JQC). The JQC investigates and recommends to the Supreme Court of Florida the removal from office of any justice or judge whose conduct demonstrates a present unfitness to hold office, or for whom discipline is warranted. The commission also investigates allegations of incapacity during service as a justice or judge.

The JQC is composed of two judges of district courts of appeal selected by the judges of those courts, two circuit judges selected by the judges of the circuit courts, two judges of county courts selected by the judges of those courts, four members of The Florida Bar who are Florida residents and are selected by The Florida Bar, and five Florida residents who have never held judicial office or been members of The Florida Bar who are appointed by the Governor. The members of the JQC serve staggered terms, not to exceed six years.

---

[39] Florida Bar Journal, September 2000, at 38-40.
[40] Former Representative George Sheldon served in the House for 8 years, from 1974-1982. In 2000, he ran for Education Commissioner.
[41] Chair of the subcommittee was Dick Batchelor. Voting members of the committee were Tom Bush, Arnett Girardeau, Ron Johnson, and James Harold Thompson. Ex officio members were Larry Kirkwood and Tom Woodruff.
[42] Report of the Select Subcommittee on the Legal Profession, June 5, 1980, at 111.
[43] *Id*. at 177.

14. Judicial Certification

Art. V, s. 9, Fla.Const., provides a methodology whereby the Supreme Court annually certifies to the Legislature the need for additional judges at the county, circuit, and district court of appeals levels. Upon receipt of the certification, the Legislature, at the next regular session, must consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the Legislature may create more judicial offices than are recommended by the Supreme Court or may decrease the number of judicial offices by a greater number than recommended by the Supreme Court only upon a finding of two-thirds of the membership of both houses of the Legislature, that such a need exists. A decrease in the number of judges is effective only after the expiration of a term.

16. Political Activities by Judges and Judicial Candidates

The Florida Constitution does not speak to the issue of political activities of judges and judicial candidates other than the prohibition that a justice or judge may not hold office in a political party. Art. V, s. 13, Fla.Const. The Supreme Court has promulgated a Code of Judicial Conduct that governs the activities of justices and judges, and candidates for justice and judge. Canon 7 of the Code of Judicial Conduct severely restricts the political activities of judges and judicial candidates.[44]

Other

1. Art. V, s. 1, Fla.Const., provides that the intermediate appellate courts are to be divided into districts upon geographical lines. This provision may be in conflict with the long-standing practice of directing that appeals of certain issues must be heard at the First District Court of Appeal. *See, e.g.*, s. 440.271, F.S. (workers' compensation appeals).

---

[44] Some of the provisions of Canon 7:

A judge or judicial candidate may not: act as a leader or hold an office in a political organization; publicly endorse or publicly oppose another candidate for public office; make speeches on behalf of a political organization; attend political party functions; or solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions. A judge must resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election.

A judicial candidate must maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary; must encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; must prohibit employees and officials who serve at the pleasure of the candidate; must discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; may not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; may not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; may not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Judges and candidates subject to public election may not personally solicit campaign funds, or solicit attorneys for publicly stated support. A candidate for merit retention in office may conduct only limited campaign activities until such time as the judge certifies that the judge's candidacy has drawn active opposition. A judicial candidate involved in an election or re-election, or a merit retention candidate who has certified that he or she has active opposition, may attend a political party function to speak in behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice, provided function is not a fund raiser and the invitation includes the other candidates for that office. The candidate should refrain from commenting on the candidate's affiliation with any political party or other candidate, and should avoid expressing a position on any political issue. A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party, a political issue, or another candidate.

Incumbent judges may not engage in any political activity except on behalf of measures to improve the law, the legal system or the administration of justice, or as expressly authorized by law.

2. Art. V, s. 3(a), Fla.Const., provides that, of the seven Supreme Court justices, each appellate district shall have at least one justice elected or appointed from the district to the Supreme Court who is a resident of the district at the time of the original appointment or election.

3. Art. V, s. 3(b)(5), Fla.Const., provides that a District Court of Appeal may certify a case as requiring immediate resolution by the Supreme Court. In such cases, the Supreme Court has jurisdiction to hear the appeal notwithstanding that there is not an appellate decision being appealed from. Upon certification, the District Court's jurisdiction is deemed transferred to the Supreme Court, and thus the District Court cannot issue any form of temporary order (such as a temporary injunction) that may be necessary to preserve the issue or protect a party.

4. Art. V, s. 8, Fla.Const., provides eligibility requirements for judges and justices. A judge or justice who has attained the age of seventy years may serve "upon temporary assignment".

5. Art. V, s. 20, Fla.Const., provides a phase-in schedule for transfer of offices and duties from the previous Article V, and was necessary as part of the 1972 enactment. The phase-in has been complete for some time now, and the section is of no more than historical interest today.

C. EFFECT OF PROPOSED CHANGES:

1. Case and Controversy
This joint resolution amends Art. V, s. 1, Fla.Const., to provide that the jurisdiction of any state court extends only to actual cases in law, equity, admiralty and maritime jurisdiction, and to actual controversies arising under the constitution and the laws of the State of Florida and of the Untied States.

2 and 3. Court Rules
This joint resolution amends Art. V, s. 2(a), Fla.Const., to provide that the Supreme Court may adopt rules of practice and procedure. Rules of court may not be inconsistent with statutes in place at the time of adoption and must be revised to conform to subsequently adopted statutes that regulate substantive rights. General law may repeal a court rule. A court rule may not abridge, enlarge, nor modify substantive legal rights, but additional rulemaking power may be expressly delegated to courts by general law.

4. Jurisdiction
This joint resolution creates Art. V, s. 1(b), Fla.Const., to provide in part that the "any writs power" does not in and of itself grant a court jurisdiction over a case or controversy. Some legal or equitable claim otherwise cognizable by such court is required to establish the jurisdictional basis for the issuance of a writ. The power to issue a writ of quo warranto does not establish power to review any right, power, or duty of a public official other than the right to hold the particular office claimed by such official, and the writ of quo warranto shall not be used for any purpose except to test a person's authority to continue holding an office when challenged by competing claimant to such office.

This joint resolution further amends Art. V, s. 3(b), Fla.Const. (as to the Supreme Court); Art. V, s. 4(b)(3), Fla.Const. (as to District Courts of Appeal); and Art. V, s. 5(b), Fla.Const. (as to circuit courts); to conform to the limits on jurisdiction.

This joint resolution also amends Art. V, s. 3(b)(10), Fla.Const., to provide that advisory opinions requested by the attorney general are not subject to the "case and controversy" restriction created

by this joint resolution. Additionally, the court opinion in any case where the attorney general has sought an advisory opinion is binding upon all citizens of this state.

This joint resolution additionally creates Art. V, s. 3(b)(11), Fla.Const., to provide that the Governor may request an advisory opinion of the Supreme Court. Any such request is not subject to the "case and controversy" restriction created by this joint resolution. Unlike advisory opinions to the attorney general, which are binding upon all citizens (under other changes proposed by this proposed amendment), advisory opinions to the Governor are not binding upon any party not voluntarily participating in such proceeding.

This joint resolution creates Art. V, s. 3(b)(12), Fla.Const., to provide that the Supreme Court has jurisdiction to hear an original proceeding only if the case is instituted against or relating to a judicial officer or officer of the court pursuant to Art. V, s. 3(b)(7), Fla.Const. ("all writs" clause); or Art. V, s. 12, Fla.Const. (discipline of judges); Art. V, s. 15 (discipline of attorneys); or is a claim ancillary to one of these types of claim. Original proceedings may also be instituted pursuant to Art. V, s. 3(b)(2), Fla.Const. (certain bond validation and utilities matters); Art. V, s. 3(b)(6), Fla. Const. (advisory opinions to the United States Supreme Court or a United States Court of Appeals); Art. V, s. 3(b)(9), Fla.Const. (writ of habeas corpus); Art. V, s. 3(b)(10), Fla.Const. (advisory opinion on request of the Attorney General); or Art. V, s. 3(b)(11), Fla.Const. (advisory opinion on request of the Governor):

5. Statute of Limitations for Writs

This joint resolution creates Art. V, s. 1(b), Fla.Const., to provide in part that all writs except those directed to judicial officers are subject to statutes of limitation as provided by general law. This joint resolution further provides that a statute of limitations applicable to the writ of habeas corpus may not be less than two years.

This joint resolution amends Art. V, s. 3(b)(9), Fla.Const. (as to the Supreme Court), and Art. V, s. 4(b)(3), Fla.Const. (as to the District Courts of Appeal), to conform.

6. Retention Elections of Appellate Judges

This joint resolution amends Art. V, s. 10(a), Fla.Const., to provide that two-thirds of the qualified electors voting within the territorial jurisdiction of a court must vote to retain the justice or judge facing a retention election at the end of his or her term.

7. Selection of Appellate Judges

This joint resolution amends Art. V, s. 11(a), Fla.Const., to provide that the Governor, by and with the advice and consent of the Senate, fills a vacancy in the office of a justice of the Supreme Court or a judge of a District Court of Appeal. Judicial Nominating Commissions are eliminated.

The Governor must make the nomination within 90 days after the occurrence of a vacancy, unless the Governor certifies to the Supreme Court a need to extend the period to a time certain, not to exceed one hundred eighty days after the occurrence of the vacancy. The nomination must be transmitted to the Senate with the Governor's signature. If the Senate is not in session at the time the Governor transmits the nomination, the Senate may call itself into session, by proclamation of the president of the Senate, or as otherwise provided by its rules, to consider the nomination. If the Senate is not in session during the thirty-day period following the Governor's transmission of a judicial nomination, and the Senate does not convene within such thirty-day period, the nomination shall be deemed confirmed. If the Senate is in session at any time during such thirty-day period and does not confirm such nomination by majority vote of senators voting on the question within

such thirty-day period, the nomination shall be rejected, unless the rules of the Senate in effect immediately prior to the nomination provide for confirmation in such circumstances. A person nominated to judicial office and rejected by the Senate shall not be eligible for nomination to any judicial office until the next following general election.

7 and 15. Selection of Circuit and County Court Judges

This joint resolution amends Art. V, s. 10(b), Fla.Const., to eliminate the local option for judicial circuits and counties to change from elected judges to nomination with retention votes. As the option has not been exercised by any of the 67 counties or 20 judicial circuits, this change will not affect any sitting judge.

This joint resolution amends Art. V, s. 11(b), Fla.Const., to provide that the Governor, by and with the advice and consent of the Senate, fills a vacancy in the office of a circuit or county court judge. Judicial Nominating Commissions are eliminated.

The Governor must make the nomination within 90 days after the occurrence of a vacancy, unless the Governor certifies to the Supreme Court a need to extend the period to a time certain, not to exceed one hundred eighty days after the occurrence of the vacancy. The nomination must be transmitted to the Senate with the Governor's signature. If the Senate is not in session at the time the Governor transmits the nomination, the Senate may call itself into session, by proclamation of the president of the Senate, or as otherwise provided by its rules, to consider the nomination. If the Senate is not in session during the thirty-day period following the Governor's transmission of a judicial nomination, and the Senate does not convene within such thirty-day period, the nomination shall be deemed confirmed. If the Senate is in session at any time during such thirty-day period and does not confirm such nomination by majority vote of senators voting on the question within such thirty-day period, the nomination shall be rejected, unless the rules of the Senate in effect immediately prior to the nomination provide for confirmation in such circumstances. A person nominated to judicial office and rejected by the Senate shall not be eligible for nomination to any judicial office until the next following general election.

8, 9 and 10. Court System Funding

This joint resolution amends Art. V, s. 14, Fla.Const., to replace the undefined term “state courts system” with the phrase “courts established by this constitution.”

This joint resolution further provides that the state may provide supplemental funding to clerks of court should filing fees authorized by law be insufficient to fund operation of the clerks’ offices.

This joint resolution further amends Art. V, s. 14(b), Fla.Const., to provide that a nonprevailing party in any civil proceeding or a defendant convicted in any criminal proceeding may be assessed, as provided by general law, the full cost of all services utilized and expenses incurred in such proceeding as determined by the clerk of the circuit or county court, to the extent that such services or expenses are provided by appropriations, fees, or service charges pursuant to this Art V, s. 14(a) or 14(b), Fla.Const. Such assessments may be enforced as any money judgment or tax obligation.

Additionally, this joint resolution amends Art. V, s. 14(d), Fla.Const., to provide that “[t]he judiciary shall have no power to fix or order any modification of appropriations.”

11 and 12. Regulation of the Practice of Law

This joint resolution amends Art. V, s. 15, Fla.Const., to provide that the cost of the Supreme Court’s exclusive jurisdiction to regulate the admission of persons to the practice of law before the

courts of this state and the discipline of persons admitted is to be funded by appropriations, disciplinary penalties, and fees paid to the Supreme Court as authorized by general law.

This joint resolution further adopts the recommendation of the Select Subcommittee on the Legal Profession that no attorney may be required to pay dues to any organization and no fees may be otherwise assessed by the court as a condition to admission to practice law before the courts of this state. General law may regulate the professional practice of law other than before the courts of this state.

This joint resolution amends Art. V, s. 8, Fla.Const. (eligibility of persons to hold the office of justice or judge); Art. V, s.12(a)(1)b., Fla.Const. (composition of the Judicial Qualifications Commission); Art. V, s. 17, Fla.Const. (qualifications of state attorneys); and Art. V, s. 18, Fla.Const. (qualifications of public defenders); to conform to the change eliminating the integrated bar.

13. Judicial Qualifications Commission

This joint resolution amends Art. V, s. 12(a)(1)b., Fla.Const., to transfer appointment power over four of the members of the Judicial Qualifications Commission from The Florida Bar to the Legislature.

This joint resolution further amends Art V, s. 12, Fla.Const., to provide that all other matters of procedure and organization of the Judicial Qualifications Commission, and any panels thereof, the selection of judges to serve on the commission, and the power to recover costs of an investigation, that are not otherwise set forth in the Constitution, are to be governed by rules adopted by the Supreme Court.

This joint resolution further amends Art. V, s. 12, Fla.Const., to remove a now unnecessary phase-in schedule for the Judicial Qualifications Commission.

14. Judicial Certification

This joint resolution amends Art. V, s. 9, Fla.Const., to provide that the number of judges for all courts other than the Supreme Court are established by general law. The Supreme Court may make recommendations to the Legislature regarding any need for an increase or decrease in the number of judges or a change in judicial districts or judicial circuits.

16. Political Activities by Judges and Judicial Candidates

This joint resolution amends Art. V, s. 11(d), Fla.Const., to provide that no judicial rule of conduct or other court rule may limit the political rights of candidates for election or appointment to judicial office, including, but not limited to, serving a political organization, endorsing or opposing other candidates for public office, making speeches, attending political functions, or making statements with respect to issues; however, such limits consistent with other provisions of this constitution may be imposed by general law. This joint resolution would thus remove Canon 7 from the Code of Judicial Conduct.

Other

1. This joint resolution amends Art. V., s. 1, Fla.Const., and Art. V, s. 4(b)(1), Fla.Const., to provide that the Legislature has the flexibility to grant a District Court of Appeal exclusive jurisdiction over a subject matter. This could allow expertise to be focused in particular courts. It could also permit creation of a specialized DCA having jurisdiction over certain subject matters. For example, the First District Court of Appeal, which currently hears approximately 90% of the appeals to

administrative rulings, might reasonably become the only court of appeal with jurisdiction over Administrative Procedure Act (Ch. 120, F.S.) cases.

2. This joint resolution deletes the requirement in Art. V, s. 3(a), Fla.Const., that, of the seven Supreme Court justices, each appellate district shall have at least one justice elected or appointed from the district to the Supreme Court who is a resident of the district at the time of the original appointment or election.

3. This joint resolution amends Art. V, s. 3(b)(5), Fla.Const., to provide that, when a case is certified as requiring immediate resolution by the Supreme Court, the district court's jurisdiction shall be retained unless and until the Supreme Court issues an order accepting jurisdiction.

4. This joint resolution amends Art. V, s. 8, Fla.Const., to provide that a judge or justice who has attained the age of seventy years may not serve “upon temporary assignment”.

5. This joint resolution deletes Art. V, s. 20, Fla.Const., which section provided a phase-in schedule that was necessary when Article V was substantially re-written in 1972, but which is now unnecessary.

D. SECTION-BY-SECTION ANALYSIS:

See “Present Situation” and “Effect of Proposed Changes”.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This joint resolution amends Art. V, s. 14(b), Fla.Const., to provide that the non-prevailing party in any court proceeding may be assessed the full cost of operating the court system for that case. Theoretically, if implemented by general law, this measure would fully fund the court system; but it is likely that, in practice, collection from many non-prevailing parties may be difficult.

2. Expenditures:

This joint resolution does not appear to have a current affect on state expenditures. This joint resolution will, however, forego a part of the implementation of the revised provisions Article V related to funding of the clerks of court, which implementation must begin in the 2004-2005 budget year. If not passed, the revised Article V may require state supplemental funding of court clerks and court budgets in areas that are currently being paid for by the counties. This joint resolution, if passed, may provide for retaining of the status quo before any change is placed in effect, thus representing no fiscal impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This joint resolution does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

This joint resolution does not appear to have a current affect on local government expenditures. This joint resolution will, however, forego the implementation of the revised provision in Art. V, s. 14, Fla.Const., related to mandatory supplemental funding of the clerks of court, scheduled to begin in the 2004-2005 budget year. If this joint resolution is not passed, the revised Art. V, s. 14, Fla.Const., may perhaps require state supplemental funding of court clerks and court budgets in areas that are currently being paid for by the counties.

The Florida Association of Court Clerks has not specifically quantified the potential fiscal impact of the proposed change regarding supplemental state funding of clerks of court.[45]

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The 2000-2001 Budget Summary published by The Florida Bar[46] shows that the category of "Annual Fees" represents 51.5% of income, and that "Cost Recoveries Lawyer Regulation" represents an additional 2.2% income. The Summary further shows the category "Regulation of Law" representing 40.4% of expenses. Thus, it appears likely that restricting mandatory licensing fees for persons engaged in the practice of law to the actual cost of regulation, will likely result in a significant lowering of the annual licensing fee paid by individuals in the private sector.

D. FISCAL COMMENTS:

The State Courts Administrator provided the following fiscal comments:[47]

> General Comment - Any change in the constitution (or even general law) could have an unsettling effect upon the state of the law, resulting in the institution of lawsuits seeking to clarify the exact meaning of any particular provision. Such would almost certainly be the case if the proposed constitutional amendment is adopted by the people. The exact fiscal impact of such an increase in litigation could be substantial, but can obviously not be quantified.
>
> Section 1(a) - Restrictions on the jurisdiction of the state courts to issue extraordinary writs, and establishment of statutes of limitation applicable to writs, may result in a slight, indeterminate positive fiscal impact, due to a reduction in court caseloads.
>
> Section 8 - The amendment to section 8 apparently would preclude the use of senior (retired) judges 70 years old or above. This would remove approximately two-thirds (115 of 175) of those judges presently being used as senior judges. This could create the type of shortage which could require the court to certify additional full-time judges. In the 2000-01 budget year, a total of $2,283,293 has been allocated for 8184 senior judge days. Based on a full-time equivalent position serving 260 days, this calculates as 31.5 judgeships. It is unlikely that the existing pool of under 70 senior judges could perform the entire 8184 days, so additional judgeships will likely be needed to handle the caseload.

---

[45] Letter dated February 28, 2001, from the Florida Association of Court Clerks & Comptroller. Specifically, they said: "we would suggest that the change of the responsibility for the state to satisfy any resulting shortfall in the clerks' office from a mandatory 'shall' to a permissive 'may' could result in tens of millions of dollars of unfunded liabilities which the clerks would have no ability to pay."
[46] The Florida Bar Journal, Volume LXXIV, No. 8, September 2000, at page 40.
[47] Fiscal analysis prepared by the State Courts Administrator, February 28, 2001.

Section 10(a) - The increase in the vote necessary for an appellate judge to be retained from a majority to a two-thirds majority could, based on previous elections, result in the removal of a number of judges. This would not necessarily result, however, in a fiscal impact, but rather in a lessening of the experience levels of appellate judges. Subjecting judges to such a heightened percentage requirement would permanently affect the recruiting and retention of appellate judges.

Section 11 - The abolition of the judicial nominating commissions could save the state the $13,690 appropriation to fund various expenses of the 26 commissions. Whether transferring this function to the executive and legislative branches results in cost increases for those entities is beyond the scope of this fiscal note.

Section 14(b) - The amendment to section 14(b) imposing costs on non-prevailing civil litigants and convicted criminal defendants could, in relation to the former, have a chilling effect on the filing of lawsuits, thereby decreasing somewhat the civil caseload at the trial, and eventually, appellate levels. How much this possible savings would be supplemented by the imposition of costs against non-prevailing civil litigants and convicted criminal defendant is difficult to quantify since each clerk would have constitutionally-derived authority to establish a system for the imposition of such costs.

Section 15 - The transfer of the regulation of attorneys from the Florida Bar would apparently result in the substantial abolition of the Bar, an arm of the Supreme Court funded by membership dues. The state, presumably through the Supreme Court, would then appropriate funds for the regulation and discipline of attorneys and authorize the assessment of fees against attorneys by the court. The language of the amendment does not provide any basis upon which to quantify either the appropriation which would be necessary or the fees which would be imposed. Although the extent of any appropriation cannot be ascertained accurately (as opposed to what would be covered by fees), it should be noted that the Bar, for the year 2000-01, required 187 FTE's and expended approximately $13,400,000 to perform its regulatory function. This amount does not include the extensive use of lawyer and non-lawyer volunteers. In addition, under the proposed constitutional language, there is no authority for the legislature to regulate attorneys not practicing before the courts. The method of funding this regulatory function is not apparent, but presumably would be outside the courts budget.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

A mandates analysis is unnecessary to an analysis of a proposed constitutional amendment.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

A mandates analysis is unnecessary to an analysis of a proposed constitutional amendment.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

A mandates analysis is unnecessary to an analysis of a proposed constitutional amendment.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Art. XI, s. 1, Fla.Const., provides that a constitutional amendment may be proposed by joint resolution of the Legislature. Final passage in the House and Senate requires a three-fifths vote in each house, passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, Art. XI, s. 5, Fla.Const., provides that that the proposed amendment would be placed before the electorate at the 2002 general election.[48] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published. If the proposed amendment or revision is approved by vote of the electors, it will be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election.[49]

There are issues addressed by this joint resolution that are not listed in the ballot summary. In *Armstrong v. Harris*, 25 Fla. L. Weekly S656 (Fla. 2000), the Supreme Court found that there is an implicit requirement that the ballot summary of a proposed constitutional amendment initiated by the Legislature must accurately and completely describe all matters in the proposal.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This joint resolution does not specify the date when Art. V, s. 14, Fla.Const. ("Funding"), is to change, and perhaps should be clarified on that point.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
Nathan L. Bond, J.D.	Lynne Overton, J.D.

[48] The 2002 general election is on November 5, 2002.
[49] The first Tuesday after the first Monday in January after the election is Tuesday, January 7, 2003.