The Florida Senate

Interim Project Report 2006-141 *January 2006*

Committee on Judiciary Senator Daniel Webster, Chair

OPTIONS FOR STREAMLINING THE STATE CONSTITUTION

SUMMARY

The State Constitution addresses a number of provisions that are legislative matter rather than fundamental constitutional provisions. Legislative matter is a provision that could have been addressed by statutes rather than in constitutional provisions. Fundamental constitutional provisions are those that define the structure of government, allocate its powers, and protect the fundamental rights of citizens. Examples of legislative matter in the State Constitution include the smoking ban, net ban, and pregnant pigs amendment. Some jurists, legislators, and constitutional scholars are concerned that legislative matter clutters the Constitution with non-constitutional content, creates inflexibility, and degrades the purposes of the State Constitution. If the Legislature wishes, it may propose a constitutional amendment to make legislative matter into statutory law. Additionally, the Legislature could propose the repeal of obsolete and unconstitutional provisions and language as part of the same proposal.

BACKGROUND

During the 2005 Regular Session, many legislators were concerned about the recent proliferation of amendments to the State Constitution proposed by citizen initiative. Some citizen initiative amendments adopted during the last general election include: limits on attorneys' fees in medical malpractice actions;[1] authorization of the use of slot machines;[2] an increase in the minimum wage;[3] creation of a right to information related to adverse medical incidents;[4] and a prohibition on the practice of medicine by doctors who have engaged in repeated medical malpractice.[5] Other recent citizen initiative amendments include a requirement that pens for pregnant pigs be large enough to allow a pig to turn around freely[6] and a requirement that the state build a high-speed railway.[7] One approach approved by the Legislature last session to limit initiatives was to propose a constitutional amendment requiring that all future amendments, regardless of method of proposal, pass by a 60-percent margin.[8] An approach that failed to pass the Legislature was a limit on the subject matter of citizen initiatives.[9] This interim project is another response to the proliferation of state constitutional amendments.

What is a Constitution?

A constitution may be defined as:

> The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.[10]

Florida Constitution

The current Florida Constitution is known as the Constitution of 1968. The Constitution of 1968 is the sixth Florida constitution since 1838.[11] The

[1] Section 26, Art. I, State Const.
[2] Section 23, Art. X, State Const.
[3] Section 24, Art. X, State Const.
[4] Section 25, Art. X, State Const.
[5] Section 26, Art. X, State Const.
[6] Section 21, Art. X, State Const., adopted 2002.
[7] Section 19, Art. X, State Const., adopted 2000; repealed 2004, effective 2005.
[8] House Joint Resolution 1723, 2005 Leg. Sess.
[9] Senate Joint Resolution 4, 2005 Leg. Sess.
[10] BLACK'S LAW DICTIONARY (8th ed. 2004).
[11] The Constitution of 1838 was Florida's Territorial Constitution. *Lanier v. Tyson*, 147 So. 2d 365, 378 (Fla. 2d DCA 1962) (White, J., dissenting). When Florida became a state in 1845, the Territorial Constitution became Florida's first state constitution. As such, Florida's first constitution is also known as the Constitution of 1845. The first Florida Constitution is also known as the Constitution of 1839, based on the year of its adoption.

Constitution of 1968 was based on the recommendations of a commission created by the Legislature in 1965.[12] Three amendments comprising the Constitution of 1968 were approved by the voters at the 1968 general election. These amendments revised all sections of the Constitution of 1885, except for provisions addressing the judiciary in Article V. In the 1972 general election, the voters approved a revised Article V.

Prior to 1968, only the Legislature or a constitutional convention could propose amendments to the State Constitution. The Constitution of 1968 is the first Florida Constitution that has authorized constitutional amendments to be proposed by citizen initiative. In addition to citizen initiatives, constitutional amendments may be proposed by a joint resolution of the Legislature, the Constitution Revision Commission, Constitutional Convention, and the Taxation and Budget Reform Commission. Since 1968, 135 proposed constitutional amendments have been submitted to Florida voters. The voters approved 102 of these. Of these 102 amendments, 71 were proposed by joint resolution of the Legislature; 21 were proposed by citizen initiative; eight were proposed by the Constitution Revision Commission; and two were proposed by the Taxation and Budget Reform Commission. Similarly, the previous constitution, the Constitution of 1885, was amended numerous times. By 1968, the voters had approved 151 of the 214 amendments that were submitted for their approval.[13]

As of January 1, 2004, the Florida Constitution had 51,456 words.[14] This figure includes more than 9,000 words from specific provisions of the Constitution of 1885 that are expressly incorporated into the Constitution of 1968 by reference.[15] As such, the Florida Constitution is the tenth longest in the nation.[16] New Hampshire has the shortest constitution at 9,200 words. Alabama, has the longest constitution at 340,136 words. Constitutions in 31 states have fewer than 30,000 words. The U.S. Constitution contains about 7,500 words.

U.S. Constitution and State Constitution Functions

The federal Constitution and state constitutions have different functions. The U.S. Constitution functions as a delegation of authority to the federal government. This delegation of authority is evidenced by the Tenth Amendment to the U.S. Constitution, which states:

> The powers not *delegated* to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In contrast to the delegated authority of the federal government, state legislatures are said to have plenary power.[17] As such, the legislative power of a state exists in the absence of limitations imposed by its constitution or federal law.[18] State constitutions function as a limit on the authority of a state. For example:

> The 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.[19]

The differences between the length of state constitutions and the federal Constitution result in part from their different functions to grant authority or limit power.[20] Some legislators and commentators have expressed concerns that state constitutions are also becoming lengthy due to the inclusion of legislative matter.[21] The distinction between fundamental provisions and legislative matter will be addressed in the **Findings** section of this interim project report.

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[12] Chapter 65-561, L.O.F.

[13] FLORIDA'S CONSTITUTION REVISION COMMISSION: 1997-1998 MANUAL 55.

[14] THE COUNCIL OF STATE GOVERNMENTS, STATE CONSTITUTIONS, THE BOOK OF THE STATES 10 (2004).

[15] The provisions of the Constitution of 1885 that have been expressly incorporated by reference into the Constitution of 1968 can be found in the notes following s. 6, Art. VIII, and s. 9, Art. XII, State Const.

[16] THE COUNCIL OF STATE GOVERNMENTS, *supra* note 14, at 10.

[17] Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57, 62 (1995).

[18] Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 966 (1968); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 10 (1998).

[19] *Smathers v. Smith*, 338 So. 2d 825, 827 (Fla. 1976).

[20] Albert L. Sturm, *The Procedure of State Constitutional Change-With Special Emphasis on the South and Florida*, 5 FLA. ST. U. L. REV. 569, 570 (1977).

[21] *See* John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 252 (1998).

METHODOLOGY

To complete this interim project, committee staff reviewed academic literature on the principles of state constitutions; examined constitutions from other states; obtained input from constitutional scholars on the appropriate content of the State Constitution; and researched options for phasing out or preserving constitutional provisions as statutes.

FINDINGS

Content of State Constitutions

What Should a State Constitution Contain?

There are no laws or rules that specify the provisions a state constitution should or should not contain. The general consensus among most commentators and jurists, however, is that the primary purposes of a state constitution are to "limit, define, and allocate government functions among the various branches, and to protect the fundamental rights of the people with respect to government."[22] Accordingly, provisions that accomplish these purposes are appropriate for inclusion in a state constitution. Some commentators also believe that issues such as local government, suffrage and elections, methods for amendment, and fiscal management should also be addressed in state constitutions.[23] Additionally, most commentators agree that a state constitution should be brief and limited to "'fundamentals,' avoiding all 'legislative' matter."[24]

> Yet most state constitutions also contain a myriad of policy-specific substantive provisions, setting forth edicts for such issues as (in roughly the order of how often they are found in state constitutions) tax policy, education, corporations, the environment and natural resources, employment, and public utilities.[25]

Fundamental-Legislative Matter Distinction

The distinction between what is a fundamental constitutional provision and what is legislative matter is not clear.[26] Different opinions can exist on what is a fundamental provision.[27] On this point, one constitutional scholar has stated that "your fundamentals might be my legislative detail and vice versa."[28] However, constitutional scholars and jurists have suggested the following principles to distinguish the two types of provisions:

- The federal Constitution contains examples of fundamental provisions.[29]
- The federal Constitution focuses on "shaping the general process of government" and leaves policy determinations to elected officials.[30]
- Provisions that protect citizen rights by limiting government power are constitutional in nature.[31]
- "A constitution states or ought to state not rules for the passing hour, but principles for an expanding future."[32] In other words, constitutional provisions should be timeless.
- Legislative matter "accomplish[es] a purpose that is within the power of [a legislature] to accomplish by law."[33]
- Legislative matter is no different in type or quality from ordinary laws.[34]
- Legislative matter is often statute-like in detail or may contain unnecessary procedural detail.[35]
- Legislative matter includes social, political, and economic policy determinations.[36]
- "[T]he purpose of a statute is to govern the conduct of the citizen, but the purpose of a constitution is to govern the conduct and authority of [a] state."[37]

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[22] Ryan Maloney, *Smoking Laws, High-Speed Trains, and Fishing Nets A State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative*, 14 U. FLA. J.L. & PUB POL'Y 93, 99 (2002); *see, e.g.*, Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 409 (1995); Grad, *supra* note 18, at 947-949.

[23] Grad, *supra* note 18, at 947-949; W. BROOKE GRAVES, STATE CONSTITUTIONAL REVISION vii (1960).

[24] Grad, *supra* note 18, at 942; and *see, e.g.*, PAUL G. KAUPER, CITIZENS RESEARCH COUNCIL OF MICHIGAN, THE STATE CONSTITUTION: ITS NATURE AND PURPOSE 14 (1961).

[25] Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 864 (1996).

[26] Grad, *supra* note 18, at 942; KAUPER, *supra* note 24, at 14.

[27] KAUPER, *supra* note 24.

[28] Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 228 (1998).

[29] Grad, *supra* note 18, at 942-943.

[30] Thompson, *supra* note 25, at 863.

[31] *See Smathers v. Smith*, 338 So. 2d 825, 827 (Fla. 1976); Little, *supra* note 22, at 409-410.

[32] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture II (1921).

[33] Little, *supra* note 22, at 410.

[34] Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 810 (1997).

[35] *See McCulloch v. Maryland*, 17 U.S. 316, 407 (1819); *see* Grad, *supra* note 18, at 942-943.

[36] *See* Major Harding, *Florida's Constitutional Amendment Process* (on file with the Senate Committee on Judiciary).

[37] Jery Payne, National Conference of State Legislators, *Editor's Corner: The Uses of a Constitution*, THE

Nevertheless, some constitutional scholars suggest that legislative matter may be fundamental because it has broad public support.[38] However, election results may not necessarily indicate the level of popular support for a proposed constitutional amendment.[39] Complexities of the constitutional amendment process could account for the passage or rejection of amendments. For example, the existence of unpopular proposals on the ballot may have lead to the defeat of all of the proposals.[40] In 1978, all of the amendments proposed by the 1978 Constitution Revision Commission were defeated. These amendments were placed on the ballot with an unpopular proposal to permit casino gambling.[41] In 1980, however, the voters approved a proposal creating the right to privacy which was similar to a provision contained in one of the 1978 proposals.[42]

Examples of Legislative Matters

Jurists and commentators have specifically identified several provisions of the State Constitution as legislative matter. In *Advisory Opinion to the Attorney General—Limited Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993), Justice McDonald stated in a concurring opinion:

> I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution.
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> 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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> Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments.

Justice Pariente repeated Justice McDonald's concerns when she stated that the pregnant pig amendment "is a subject more properly reserved for legislative enactment."[43] Other commentators and jurists have criticized the smoking ban, high-speed rail amendment, net ban, and the pregnant pig amendment as lacking constitutional content.[44]

Why Constitutions Contain Legislative Matter

State constitutions contain legislative matter for a number of reasons. The most repeated reason is that an issue was not addressed by legislation.[45] Other reasons amendments containing legislative matter are proposed or adopted include the following:

- An amendment is needed to circumvent or prevent adverse judicial determinations.[46]
- "[P]olitical candidates will often sponsor initiative measures, hoping that voter support for an initiative measure will spill over into their campaign for office."[47]
- Political parties may support proposed constitutional amendments to bring their base of voters to the polls to vote for the parties' candidates.
- The Florida Legislature "tends to use its 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," according to one commentator.[48]

LEGISLATIVE LAWYER, Dec. 2004 at 9.

[38] KAUPER, *supra* note 24, at 14; Grad, *supra* note 18, at 950.

[39] *See* TARR, *supra* note 18, at 32-34.

[40] *See* TARR, *supra* note 18, at 32.

[41] Steven J. Uhlfelder & Billy Buzzett, *Constitution Revision Commission: A Retrospective and Prospective Sketch*, 71 FLA. B.J. 22, 24 (1997).

[42] The right to privacy is codified in s. 23, Art. I, State Const.

[43] *Advisory Opinion to the Attorney General Re: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 600 (Fla. 2002) (Pariente, J., concurring).

[44] *See* Maloney, *supra* note 22, at 98; Harding, *supra* note 36.

[45] *See* Maloney, *supra* note 22, at 103 (stating that the Legislature and Governor were unwilling to bring high-speed rail to Florida); Cooper, *supra* note 21, at 255-256.

[46] *See* Cooper, *supra* note 21, at 255-256. (stating that lengthy constitutions result from judicial opposition to social policy); P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 421 (1995) (stating that lengthy and detailed state constitutions result from "public dissatisfaction with strict judicial interpretations of constitutional provisions").

[47] Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203, 1216 (1996).

[48] Little, *supra* note 22, at 398; *see also* Joseph W. Little & Julius Medenblick, *Restricting Legislative Amendments to*

- Special interest groups may use the citizen initiative process to insert legislative matter into a state constitution to protect their interests.[49]
- Legislative matter may be inserted into a state constitution because of its perceived importance.[50]

The State Constitution contains a number of provisions that were designed to circumvent adverse court rulings. For example, the Florida Supreme Court invalidated the Parental Notice of Abortion Act[51] in 2003 for violating the right to privacy under s. 23, Art. I, State Const.[52] In response, the Legislature proposed and the voters approved s. 22, Art. X, State Const., to circumvent the Court's ruling. Section 22, Art. X, State Const., permits the Legislature to require that parents be notified in advance of the termination of a minor's pregnancy.[53] Similarly, s. 17, Art. I, State Const., prevents the Florida Supreme Court from finding that the death penalty violates the State Constitution.[54]

Constitutional provisions such as the right to privacy might also be considered to be a broad limitation on legislative power. The parental notice constitutional provision is an exception to the limitation on legislative power imposed by the right to privacy.

Consequences of Legislative Matters

Adding legislative matter to a state constitution places a provision "beyond change by normal lawmaking processes" and "at the highest legal authority of the state."[55] However, negative consequences can result from the insertion of legislative matter in a constitution. These negative consequences include:

- Legislative matter may create inflexibility and prevent the Legislature from addressing more pressing needs.[56]
- If the policy embodied in legislative matter is a failure, it is difficult to change the policy.[57]
- A state constitution loses its "significance as the basic and enduring instrument of government when the process of constitutional amendment or revision is used as a substitute for legislation."[58]
- Legislative matter clutters a state constitution with non-constitutional matter.[59]
- The inclusion of legislative matter in a state constitution limits legislative responsibility and discretion.[60]

The Constitution Revision Commission and the Taxation and Budget Reform Commission must review the State Constitution on a regular schedule. Neither commission, however, is required to determine whether legislative matter in the State Constitution results in negative consequences.[61] Further, neither commission is required to propose the correction of errors or the repeal of obsolete provisions.

What a Constitution Should Not Contain

A constitution should not contain errors or obsolete provisions. These items have been cited as evidence of the need to revise state constitutions. For example, a review of a New York Constitution found that it contained "hollow phrases, defective provisions, and creakingly antiquated policies."[62] Problems in a Louisiana Constitution included inconsistencies, errors, references to other legal documents, and contradictions and omissions.[63] Similar problems with the Florida Constitution of 1885 may have been part of the impetus for its revision in 1968.[64] Further, the current Florida Constitution contains obsolete language, at least one

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the Constitution, 60 FLA. B.J. 43 (1986).

[49] *See* GRAVES, *supra* note 23, at 144.

[50] *See id.*

[51] Section 390.01115, F.S. (1999).

[52] *North Florida Women's Health and Counseling Services, Inc., v. State*, 866 So. 2d 612 (Fla. 2003).

[53] In 2005, the Legislature enacted s. 390.01114, F.S., to require parental notification in advance of the termination of a minor's pregnancy.

[54] The voters actually approved the same amendment in 1998 and in 2002. However, the Florida Supreme Court declared the first amendment invalid because it found the ballot statement inaccurate. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

[55] Grad, *supra* note 18, at 946.

[56] *See, e.g.*, Maloney, *supra* note 22, at 103. The high-speed rail amendment has been identified as an inflexible provision because it could not be changed or delayed in response to current budgetary concerns.

[57] Thompson, *supra* note 25, at 915.

[58] KAUPER, *supra* note 24, at 14.

[59] Thompson, *supra* note 25, at 915.

[60] KAUPER, *supra* note 24, at 14.

[61] Sections 2 and 6, Art. XI, Stat. Const.

[62] GRAVES, *supra* note 23, at 140 (quoting Inter-Law School Committee, *Report on the Problem of Simplification of the Constitution* to the New York Special Legislative Committee on the Revision and Simplification of the Constitution, Staff Report No. 1. (Apr. 1958), p. 330).

[63] *Id.* at 140-141 (quoting Kimbrough Owen, *The Need for Constitutional Revision in Louisiana*, 8 LA. L. REV. 1 (1947)).

[64] *See* Manning J. Dauer & William C. Havard, *The Florida Constitution of 1885 – A Critique*, 8 U. FLA. L. REV. 1, 12 (1955) (finding numerous spelling and grammatical errors, excessive detail, obsolete matter, inconsistencies and contradictions, incorporation by reference to other materials, and errors).

error, cross-references to the Constitution of 1885, and inconsistent use of style and wording.

One of the most repeated types of obsolete language is the inclusion of long-since-past effective dates and implementation dates.[65] For example, s. 16(h), Art. X, State Const., states that the net ban amendment "shall take effect on the July 1" after the amendment is adopted. The net ban amendment was adopted in 1994 and did not require implementing legislation. If subsection (h) had been codified as a section of Art. XII, State Const., it could be deleted pursuant to s. 11, Art. XII, State Const., "by joint resolution . . . when all events to which the section to be deleted is or could become applicable have occurred." Once the net ban amendment took effect, the effective date in subsection (h) was obsolete. Additionally, if the Legislature chooses to repeal an effective date or implementation date of a constitutional provision, the provision will not be negated. The Legislature has a duty to implement the State Constitution regardless of the existence of effective dates or implementation dates.[66]

Provisions such as s. 20(g), Art. V, State Const., are obsolete due to Legislative action. Section 20(g), Art. V, State Const., states:

> All provisions of Article V of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

Under ch. 73-303, L.O.F., the Legislature repealed all of the provisions of the Constitution of 1885 to which s. 20(g), Art. V, State Const., could have applied.[67]

At least one provision of the State Constitution appears to be obsolete because it is unconstitutional under the U.S. Constitution. Section 4(b)(5) and (6), Art. VI, State Const., imposes term limits on federal officeholders. In 1995, the U.S. Supreme Court determined that term limits on federal officeholders are unconstitutional under the Qualifications Clause of the U.S. Constitution.[68] In 1999, the Florida Supreme Court stated that:

> there is no question but that . . . section 4(b)(5) and 6 of article VI[, State Const.], placing limits on the terms of the U.S. Representatives and U.S. Senators, are unenforceable as violative of the United States [Constitution].[69]

As such, the provisions relating to term limits on federal officeholders could be repealed without making a substantive change to the State Constitution.

Section 5, Art. X., State Const., may be obsolete because it is no longer relevant. It states:

> There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

The provision may no longer be relevant because it is hard to imagine a court ruling that women lack property rights. Further, the Legislature abolished dower[70] and curtesy[71] in s. 732.111, F.S.

The apparent substantive error in the State Constitution is related to the Taxation and Budget Reform Commission (TBRC). The TBRC, as originally described in s. 6, Art. XI, State Const., was to be established in 1990 and every 10 years thereafter.[72] Under s. 6(e), Art. XI, State Const., the TBRC is

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[65] *See, e.g.*, s. 8(c), Art. I, State Const. (stating that the Legislature shall enact implementing legislation relating to a handgun waiting period by December 31, 1991); s. 25, Art. I, State Const. (stating that the section on taxpayers' rights shall take effect on July 1, 1993); s. 19, Art. III, State Const. (requiring the Legislature to prescribe a state budgetary and planning process by July 1, 1994).

[66] *See Dade County Classroom Teachers' Ass'n, Inc. v. Legislature*, 269 So. 2d 684 (Fla. 1972). In *Dade County*, the Florida Supreme Court held that the Legislature has a duty to implement collective bargaining rights that are guaranteed by s. 6 Art. I, State Const., for public employees. Section 6, Art. I, State Const., does not contain an effective date or implementation date.

[67] Under s. 20(i), Art. V, State Const., s. 20(g) could be repealed by a joint resolution of the Legislature rather than a constitutional amendment.

[68] *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995).

[69] *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999).

[70] The term "dower" is defined as: "At common law, a wife's right, upon her husband's death, to a life estate in one-third of the land that he owned in fee." BLACK'S LAW DICTIONARY (8th ed. 2004).

[71] The term "curtesy" is defined as: "At common law, a husband's right, upon his wife's death, to a life estate in the land that his wife owned during their marriage, assuming that a child was born alive to the couple." BLACK'S LAW DICTIONARY (8th ed. 2004).

[72] House Joint Resolution 1616, 1988 Leg. Sess. (proposing s. 6, Art. XI, State Const.).

required to file proposed constitutional amendments with the custodian of state records "[n]ot later than one hundred eighty days prior to the general election in the second year following the year in which the commission is established." As such, the 1990 TBRC had to file its proposed constitutional amendments 180 days before the 1992 general election. However, in 1998, s. 6(a), Art. XI, State Const., was amended to provide that the TBRC is to be established in 2007 and every 20 years thereafter. The 1998 amendment did not account for the fact that general elections are scheduled only in even-numbered years.[73] As a result, the constitution appears to require the 2007 TBRC to file its proposed constitutional amendments 180 days prior to a nonexistent 2009 general election.

Constitutional Provisions as Statutes

The Legislature may determine, as a result of this interim project, that certain provisions of the State Constitution should not be constitutional law. In such an event, the Legislature could propose the repeal of provisions or propose to make provisions into statutory law. Previously, constitutional provisions were made into statutes by operation of s. 10, Art. XII, and s. 20(g), Art. V, State Const. For example, s. 10, Art. XII, State Const., states:

> All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

However, s. 10, Art. XII, State Const., did not clearly specify which provisions of the Constitution of 1885 became statutes, resulting in confusion.[74] After s. 10, Art. XII, State Const., was adopted, the Division of Statutory Revision codified some of the provisions of the Constitution of 1885 as statutes.[75] Nevertheless, some provisions that were not codified were still statutory law. For example, in *Flack v. Graham*, 453 So. 2d 819 (Fla. 1984), the Florida Supreme Court determined that s. 3, Art. XVI, Constitution of 1885, was a statute. The provision, however, was not among those codified as statutes by the Division of Statutory Revision. Following *Flack*, s. 3, Art. XVI, Constitution of 1885, appeared in the Florida Statutes as s. 111.045, F.S.[76] In *Dade County v. American Hospital of Miami, Inc.*, 502 So. 2d 1230 (Fla. 1987), the Florida Supreme Court ended the confusion over which provisions of the Constitution of 1885 became statutes. The Court held that provisions of the Constitution of 1885 which were not codified were repealed by revisor bills.[77]

If the Legislature chooses to make existing constitutional provisions statutory law, the Legislature should specifically identify the provisions to be made statutes to avoid repeating the confusion caused by s. 10, Art. XII, State Const. The Legislature should also provide the Division of Statutory Revision clear authority to codify the provisions as statutes and make technical changes. The Legislature may wish to look to the Louisiana Constitution as a model. In s. 16, Art. XIV, Louisiana Const., specific provisions of an earlier constitution are made into statutes. Additionally, the Louisiana State Law Institute, a body similar to the Florida Division of Statutory Revision, was directed to arrange the former constitutional provisions into proper statutory form.

Future Constitutional Amendments

Even if the Legislature succeeds in streamlining the State Constitution, the Constitution may become cluttered with legislative matter again. According to the Division of Elections, there are 49 active citizen initiative petitions.[78] Some of the constitutional amendments proposed by the initiatives:

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[73] *See* s. 5(a), Art. VI, State Const., and s. 97.021(14), F.S.

[74] See William R. Woods, *Article XII, Section 10: Formerly of the Florida Constitution*, 17 FLA. ST. U. L. REV. 353 (1990), for a lengthy discussion of the litigation involving s. 10, Art. XII, State Const.

[75] The statutes that were codified as a result of s. 10, Art. XII, State Const., are listed in a tracing table in Volume 6, page D-196 of the Florida Statutes (2005). Why some provisions of the Constitution of 1885 were codified while others were not is unknown.

[76] The history note for s. 111.045, F.S. states: "Former s. 3, Art. XVI of the Constitution of 1885, as amended, converted to statutory law by s. 10, Art. XII of the Constitution as revised in 1968; *see Flack v. Graham*, 453 So. 2d 819 (Fla. 1984)." History notes for a statute normally include a reference to the Law of Florida in which the statute was created. The history note for s. 111.045, F.S., contains no such reference.

[77] *Dade County v. American Hospital of Miami, Inc.*, 502 So. 2d 1230, 1232 (Fla. 1987). As a result of the opinion, the only provisions of the Constitution of 1885 that are statutes in accordance with s. 10, Art. XII, State Const., are codified as statutes. As such, s. 10, Art. XII, State Const., is obsolete and could be repealed without making a substantive change to the State Constitution.

[78] Initiatives/Amendments/Revisions, Division of Elections, Florida Department of State, http://election.dos.state.fl.us/initiatives/initiativelistNL.asp.

- Eliminate alimony obligations;
- Strengthen local government authority to remove bill boards;
- Prohibit same sex marriages;
- Require the Legislature to spend 15 percent of the Tobacco Settlement funds on a tobacco education and prevention program;
- Create a non-partisan commission to apportion legislative districts;
- Automatically repeal certain sales tax exemptions;
- Appropriate funds for embryonic stem cell research; and
- Prohibit state spending on research that destroys human embryos.

Most of the issues in the proposed amendments could be addressed through statutes. As such, the subject matter of many of the proposals is not constitutional in nature.

To prevent the State Constitution from containing additional legislative matter, commentators have suggested that the State Constitution should be harder to amend. Some have also suggested that the availability of a statutory initiative process would reduce the interest in citizen initiative amendments.[79] A statutory initiative process allows citizens to propose statutes. Under another approach, the Legislature may defuse the need for a constitutional amendment by passing legislation that addresses the concerns in a proposed amendment, thus making the amendment unnecessary Similarly, the Legislature may anticipate that a proposed citizen initiative may limit the state's ability to respond to changing needs. In this case, the Legislature could decide to propose a competing amendment that advances an alternative policy or minimizes the negative effects of a citizen initiative.

RECOMMENDATIONS

If the Legislature chooses to streamline the State Constitution, it may wish to propose the repeal of obsolete provisions and provisions that are unconstitutional under the U.S. Constitution. As an additional part of a streamlining effort, the Legislature may wish to distinguish fundamental provisions of the State Constitution from legislative matter and convert legislative matter into statutory law.

To determine whether a constitutional provision is a fundamental provision, the Legislature should consider the following:

- Does the provision relate to the structure of government or allocate government powers among its functions?
- Does the provision limit government power in a manner that protects the fundamental rights of citizens?
- Is the provision similar to provisions in the federal constitution?
- Do criteria other than the criteria above suggest that a provision is a fundamental provision?

If the answer to any of the questions above is yes, then the provision may be a fundamental provision. To determine whether a provision contains legislative matter, the Legislature should consider the following:

- Does the provision accomplish a purpose that is within the power of the Legislature to accomplish by law?
- Is the provision statute like in detail, or are similar matters addressed in statutes?
- Does the provision regulate the conduct of individuals as opposed to government conduct?
- Instead of being timeless, could the provision become obsolete?

If the answer to any of the questions above is yes, then the provision may be legislative matter. If the Legislature wishes, it may propose a constitutional amendment though a joint resolution to repeal obsolete and unconstitutional provisions and make legislative matter statutory law. Legislative matter should be specifically identified in the joint resolution to be made statutory law. Additionally, the Division of Statutory Revision should be given authority to make technical changes.

[79] *See, e.g.*, John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations for Change*, 71 FLA. B.J. 71 (1997).