



**WHAT FLORIDA’S CONSTITUTION REVISION COMMISSION
CAN TEACH AND LEARN FROM THOSE OF OTHER STATES**

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I. INTRODUCTION: WHAT IS A CONSTITUTION REVISION COMMISSION?

At the November 2018 election, Floridians successfully availed themselves of three different ways to amend their state constitution: changes proposed by the Legislature, by citizens’ initiatives, and by a vicennial Constitution Revision Commission.¹ Two methods are shared by other states; the last method is unique to Florida. Voters approved amendments originating from all three methods with the required sixty-percent supermajorities.² Beneath this robust showing, however, is a retreat from Florida citizens’ control over their state constitution. While the Florida initiative process has been under almost continual attack since its first use in 1976, the 2017 Constitution Revision Commission (“CRC”) suffered the first serious attempts to attack its work when several suits were filed to strike its amendments from the ballot in 2018.³ The Florida Supreme Court intervened to review all of the CRC’s proposed amendments and removed one amendment from the voters.⁴

Constitutional conventions have existed in North America since before the colonies prevailed in their bid for independence from Britain.⁵

1. See *Initiatives/Amendments/Revisions*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited May 23, 2019).

2. FLA. CONST. art. XI, § 5(e).

3. See discussion *infra* Section III.D.

4. See *infra* text accompanying notes 311–17.

5. See, e.g., George Justice, *Constitutional Convention*, NEW GA. ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/government-politics/constitutional-conventions> (last updated June 6, 2017); *Massachusetts Constitution of 1780*, ENCYCLOPEDIA, <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/massachusetts-constitution-1780> (last updated Oct. 25, 2019); *Schaffer Law Library’s Guide on the New York State Constitution*, ALB. L. SCH., <https://www.albanylaw.edu/media/user/librarypdfs/guides/nyconsti.pdf> (last visited Nov. 5, 2019).

Nearly every state has experienced at least one convention, and most state constitutions provide for a constitutional convention to be called under defined circumstances.⁶ One example, found in several states, is a timed question at the ballot: if a legislature has not proposed a constitutional convention for a defined number of years, commonly ten, then the Secretary of State must place on the ballot at a general election the question of whether to hold a constitutional convention.⁷ If the people vote yes, the state must, on paper at least, hold a convention.⁸ And when one hears the term *constitutional convention*, one has an idea of what is meant: a gathering of many people, perhaps hundreds, who have been chosen by the citizens through some formal process and are charged with writing—or extensively rewriting—a constitution.

Similarly, citizens' initiatives are familiar to citizens of the eighteen states that provide them as a method of amending that state's constitution.⁹ Regardless of whether a citizen lives in a state that provides for constitutional amendment by initiative, she probably has read or heard about initiatives in the news. For example, California's Proposition 13, a 1978 citizen-propelled measure to limit property taxation, was perhaps the first nationally known initiative.¹⁰ Citizens' initiatives are typically single-subject proposals to amend a state constitution (or, more rarely, create a new statute).¹¹ In most states, an initiative must be supported by petition signatures equal to a stated percentage of the state's population or of the number of votes at the last

6. COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 10 tbl.1.5 (2018), <http://knowledgecenter.csg.org/kc/system/files/1.5.2018.pdf>.

7. *Id.* States with ten-year triggers for conventions are Alaska, Hawai'i, Iowa, New Hampshire, and Rhode Island. *Id.* States with twenty-year triggers for conventions are Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma. *Id.*

8. *Id.* At least one state refused to follow the mandate in recent years: Oklahoma's Legislature has refused to allow the question of a constitutional convention to be placed on the ballot since 1970. John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 33 (2016). Its constitution calls for the question to be placed on the ballot every twenty years. *Id.*

9. COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 9 tbl.1.4 (2018), <http://knowledgecenter.csg.org/kc/system/files/1.4.2018.pdf>.

10. See *What Is Proposition 13?*, CAL. TAX DATA, <https://www.californiataxdata.com/pdf/Prop13.pdf> (last visited Sept. 22, 2019); see also, e.g., Tugend Alina, *The Least Affordable Place to Live? Try Salinas*, N.Y. TIMES (May 7, 2006), <https://www.nytimes.com/2006/05/07/realestate/07california.html?ex=1182830400&en=3831f57bb981c487&ei=5070m&mtrref=undefined&gwh=CE9ECB096C745122B22BFE88F5D3DBA1&gwt=pay&assetType=REGIWALL>.

11. See, e.g., *Initiative*, FREE DICTIONARY BY FARLAX, <https://legal-dictionary.thefreedictionary.com/Citizen+initiative> (last visited Sept. 22, 2019).

general election. Although the effort required to meet the signature requirement means an initiative must be well-funded, the fact that initiatives reach the ballot only by garnering a large number of signatures of voters makes them an example of direct democracy.

The rise of citizens' initiatives in the twentieth century to amend both state constitutions and statute books has been ably documented elsewhere.¹² It is debatable whether the creators of citizens' initiatives foresaw what rapidly became the norm: to get an initiative on the ballot, a sponsor had to get signatures equal to a percentage of the state's population—in effect, many thousands of signatures—on a petition.¹³ And to get signatures in those numbers, the sponsor had to be able to pay people to solicit signatures. Add to this cost the fees of an attorney knowledgeable enough to word the proposed initiative in a way that would satisfy the state's single-subject and ballot-summary requirements.¹⁴ The result: "citizens'" initiatives have become increasingly, instead, millionaire citizens' initiatives. While this ability to shape a state's fundamental organizing document has been popular with citizens, it has not resulted in comprehensive constitutional reform: any single initiative cannot, by definition, revise an entire portion of a constitution.

But between the necessarily piecemeal approach of citizens' initiatives and the comprehensive nature of a convention lies a less-familiar third alternative: the constitution revision commission. Most commissions are created by statute or executive order; few may be provided for in state constitutions themselves.¹⁵ In most cases, constitution revision commissions are convened for a particular purpose, such as to prepare for a scheduled call for a state constitutional convention, to consider changes after a question to form a constitutional convention has been rejected, or to consider changes after voters have rejected proposals referred by a constitutional convention.¹⁶ In all states but one that have them, constitution revision commissions must refer

12. See, e.g., Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1299–1300 (1995); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 304 (2008); Robert F. Williams, *Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 ARK. L. REV. 553, 574 (2016).

13. See COUNCIL OF STATE GOV'TS, *supra* note 9, at 9 tbl.1.4.

14. See, e.g., *infra* note 250.

15. See Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 6 (1996).

16. See *id.* at 3–4.

their proposals to the state legislature;¹⁷ the exception is Florida, where the constitution revision commission is empowered to put its proposals directly to the people.¹⁸ In fact, Florida has not one, but two regularly recurring constitution revision commissions with this power: the Florida Constitution Revision Commission (CRC), original to the 1968 constitution, meets every twenty years beginning in 1977 and most recently meeting in 2017–18; and the other, the Tax and Budget Reform Commission (TBRC), itself created by a constitutional amendment, meets every twenty years in the decades in which the CRC does not meet.¹⁹ The TBRC may propose revisions only to parts of the constitution “dealing with taxation or the state budgetary process.”²⁰

Thus, constitution revision commissions occupy a middle ground between what might be termed passing popular passions—individual changes that can be dealt with as a citizens’ initiative—and total constitutional redrafting, when a constitutional convention is called for.

In his 1996 Hofstra Law & Policy Symposium article, Professor Robert Williams argues that constitution revision commissions have begun to overtake constitutional conventions as methods of effecting comprehensive constitutional change at the state level.²¹ At the end of his article Williams raises several questions, some of which I attempt to answer in this article. His final two questions, in particular, bear analysis now, more than two decades later. They are: “How do we measure the success of state constitutional commissions. . . ?” and “Are commissions utilized . . . more for amendments rather than for wholesale revisions?”²² In attempting to answer Williams’s questions, this Article will address how Florida’s experiences with its plenary-empowered CRC can shed light for residents and leaders in other states on the opportunities and the pitfalls of a state constitution revision commission.

17. See Williams, *supra* note 12, at 571.

18. FLA. CONST. art. XI, § 2.

19. FLA. CONST. art. XI, § 6.

20. *Id.*

21. Williams, *supra* note 15, at 4.

22. *Id.* at 25.

II. THE FLORIDA CONSTITUTION REVISION COMMISSION

A. *Hybrid Design*

The composition of Florida's Constitution Revision Commission, with members appointed by the heads of the branches of government, implies that it was designed to be a representative, deliberative body. However, it has an element of direct democracy in that its proposals go straight to the voters without legislative or executive approval. Even so, its constitutional framework is scant. It consists of the Florida Attorney General as an automatic member and thirty-six appointed members.²³ The Governor appoints fifteen members, one of which he designates as chair; the President of the Senate and the Speaker of the House each appoint nine members; and the Chief Justice of the Supreme Court appoints just three members, and must do so "with the advice of the justices."²⁴ No restrictions are placed on who may be appointed.²⁵ For example, the legislative leaders are neither forced to appoint, nor prohibited from appointing, legislators, and appointing authorities may appoint themselves. In fact, the constitution requires no qualifications at all for appointees to the CRC.

The CRC is designed to be deliberative because its members are collectively required to fulfill the CRC's constitutional obligations. The CRC is required to do only a few things: convene at the call of the chair; make its own rules; hold public hearings; review the constitution; decide what, if any, changes to propose; and send those proposed changes to the "custodian of state records" at least 180 days before the next general election.²⁶ The constitution contains no provision for judicial oversight of the CRC's work.²⁷

But in addition to being representative and deliberative, the CRC adds a fillip of direct democracy: its proposals "shall be submitted to the electors."²⁸ No stopping by the Legislature or the Governor's Office for approval. And, until 2018, there had been no stopping by the courthouse either.²⁹ The CRC instead has relied on the trust of the voters to approve necessary changes and block unfavorable amendments. Thus, Florida's CRC partakes in both the "filter" view of constitutional change and the

23. FLA. CONST. art. XI, § 2.

24. *Id.*

25. *See id.*

26. *Id.*

27. *See id.*

28. FLA. CONST. art. XI, § 5.

29. *See infra* text accompanying notes 232–34.

“mirror” view, as James S. Fishkin describes them.³⁰ James Madison supported the filter view of legal change, in which representatives “refine and enlarge the public views by passing them through the medium of a chosen body of citizens.”³¹ The result, Madison argued, could be that “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, if convened for the purpose.”³² The mirror view, on the other hand, as advocated by John Adams, held that a body of representatives should be “in miniature an exact portrait of the people at large.”³³ Florida’s CRC, with its elements of both filtration, through appointed representatives, and mirroring, through allowing ordinary citizens to be members and presenting proposals directly to the people, attempts to blend—or straddle—both.

In addition to its broad mandate to consider and potentially revise the entire constitution, Florida’s CRC does share, loosely, one more trait with the constitutional conventions of its sibling states: its periodic appearance on the ballot.³⁴ As do fourteen other states, Florida mandates the periodic appearance on the ballot of the question of constitution revision.³⁵ The difference is that the fourteen other states mandate a vote on the question of *whether* to have the revision, and in every other state the form of revision is a constitutional convention.³⁶ As Professor John Dinan notes, mandatory convention calls are the most useful tool for achieving comprehensive amendments.³⁷ The Florida CRC is unique in that it must occur and is not contingent upon a legislature deciding whether to call it into being, as in states such as Wisconsin and

30. James S. Fishkin, *Beyond Referendum Democracy: Competing Conceptions of Public Opinion*, in *DEMOCRACY: HOW DIRECT?: VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA*, 53, 55–58 (Elliott Abrams ed., 2002); see also *In re Advisory Op. to Att’y Gen. re: Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d 235, 242 (Fla. 2015) (noting the CRC has a filtering process).

31. Fishkin, *supra* note 30, at 55.

32. *Id.*

33. *Id.* at 56.

34. See Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 252–53 (2000).

35. See COUNCIL OF STATE GOV’TS, *supra* note 6.

36. *Id.* These states are Alaska, Connecticut, Hawai’i, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, New Hampshire, New York, Ohio, Oklahoma, and Rhode Island. *Id.*

37. John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 395 (2010); see also Dinan, *supra* note 8.

California, or a vote by the electorate on whether to call it, as in states such as Michigan and Ohio.³⁸ Professor Dinan observed that a group of states held conventions between 1971 and 1992, including four automatic convention ballot referrals, which enacted “notable reforms.”³⁹ Since 1992, however, no voters in a state with automatic convention referrals have approved calling a convention.⁴⁰ New York is the most recent state, having had a convention question placed on the ballot in 2017.⁴¹ New York voters remained highly allergic to a convention, with eighty-three percent voting against the ballot proposal, embodying what could be called a national “fear of filing.”⁴²

At its inception in 1968, the Florida Constitution provided that the CRC meet ten years after the constitution was adopted and every twenty years thereafter;⁴³ therefore, it met in 1977–78, 1997–98, and 2017–18. This constitutionally provided schedule demonstrates that the Florida CRC is not the subject of a popular vote as to *whether* it should meet every twenty years; instead, it *does* meet, and Florida’s citizens accept or reject, more or less piecemeal, its proposals.

The structure of the Florida CRC reflects a composite of trends for amending state constitutions. Although created before citizens’ assemblies became vogueish, it shares similar features: like a citizens’ assembly, the Florida CRC is a small subset of the larger population which deliberates on an issue and makes recommended changes directly to the voters.⁴⁴ Unlike recent citizens’ assemblies, its members are selected by certain public officials instead of randomly, and the remit of

38. See COUNCIL OF STATE GOV'TS, *supra* note 6.

39. Dinan, *supra* note 37, at 396–97.

40. See Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881, 892 (2010).

41. John Dinan, *State Constitutional Developments in 2017*, CSG KNOWLEDGE CTR. (Aug. 9, 2018, 12:45 PM), <http://knowledgecenter.csg.org/kc/content/state-constitutional-developments-2017>.

42. *Id.* See generally ERICA JONG, FEAR OF FLYING (1973) (detailing the protagonist’s fear of living outside the shackles of traditional male companionship).

43. FLA. CONST. art. XI, § 2.

44. See Michael Pal, *The Promise and Limits of Citizens’ Assemblies: Deliberation, Institutions and the Law of Democracy*, 38 QUEEN’S L.J. 259, 259 (2012); see also Kevin O’Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1497–98 (2007) (contrasting citizens’ assemblies with representative government); Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959, 962–63 (2010) (describing the British Columbia citizens’ assembly charged with developing ballot initiatives).

the Florida CRC is the entire state constitution as opposed to a single problem.⁴⁵

The CRC is also like a convention as it has plenary authority to recommend revisions for the whole constitution “or any part of it.”⁴⁶ Its operation is similar in some respects to conventional CRCs and constitutional conventions in that its work is designed to be deliberative, to a point. After all, the fact that decisions within the CRC have always been made by voting means that deliberations cease when voting begins.⁴⁷ As Michael Pal has written, “Voting is, of course, an aggregative rather than deliberative decision-making procedure.”⁴⁸ That aggregative process continues when, also as in a convention, the Florida CRC’s recommendations are put directly to the public for a vote.⁴⁹

There are differences, however. A plenary convention, in Florida as in most other states, can be called at any time, while the CRC is programmed on a twenty-year repetition.⁵⁰ Delegates to the plenary convention are elected, while CRC commissioners are appointed.⁵¹ There is a prolonged cooling-off period before and after a plenary convention as provided in Florida’s constitution; the period between the ballot question of whether to hold a convention and the submission by the convention members of their proposals is four years (three separate general elections).⁵² The CRC, in contrast, operates on a faster timeline to complete its work and have it voted upon: its members must be named, thus “establish[ing]” it, within thirty days before the Legislature convenes for its regular session in early spring, in an odd-numbered, non-election year.⁵³ The CRC must also have its proposals ready for the ballot

45. See generally Pal, *supra* note 44, at 260 (examining the role of citizens’ assemblies in enacting electoral reform in British Columbia and Ontario).

46. FLA. CONST. art. XI, § 2.

47. Cf. FLA. CONSTITUTION REVISION COMM’N 2017–18 RULES § 1.17, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf> (describing CRC voting obligations); FLA. CONSTITUTION REVISION COMM’N 1997–98 RULES § 1.17 (same); see also Transcript of Proceedings at 188, Const. Revision Comm’n (Sept. 27, 1977).

48. Pal, *supra* note 44, at 267.

49. FLA. CONST. art. XI, § 2(c).

50. Compare FLA. CONST. art. XI, § 4, with FLA. CONST. art. XI, § 2.

51. Compare FLA. CONST. art. XI, § 4(b), with FLA. CONST. art. XI, § 2(a)–(b).

52. FLA. CONST. art. XI, § 4.

53. FLA. CONST. art. XI, § 2(a). Before 1998, the CRC was to be called within thirty days after the Legislature convened. See *Miscellaneous Matters and Technical Revisions*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=9> (last visited July 1, 2019). The 1998 CRC amended this timeline to allow the CRC to have additional time to complete its work before its deadline. *Id.*

180 days before the next general election.⁵⁴ This makes for an approximately fourteen-month timeline.

B. History

The Florida CRC originated as a reaction against legislative intransigence.⁵⁵ The state legislatures of all fifty states were malapportioned prior to 1962.⁵⁶ Florida had no semblance of “one-person-one-vote.”⁵⁷ Its apportionment scheme was ossified into its constitution so that any meaningful legislative reapportionment would have to come as a result of constitutional change.⁵⁸ That change faced formidable resistance from the legislators already occupying the malapportioned seats, a group popularly called the Pork Chop Gang.⁵⁹ The malapportionment had started as accurate apportionment under the population patterns in Florida at the time of the adoption of its most recent constitution: 1885. At that time, most Floridians lived within fifty miles of Georgia or Alabama, and the peninsula was thinly inhabited.⁶⁰ By the time *Baker v. Carr* and *Reynolds v. Sims* were decided, however, the population center had long ago shifted to central and south Florida, without the apportionment scheme having changed significantly.⁶¹ The Florida Constitution contained rigid rules for how many legislators a county could have,⁶² and the many rural counties of the north and the fewer, but urbanized counties of the south ensured that most legislators lived in North Florida and had constituencies of just several thousand. In 1955, for example, it took only about one-seventh of the voters to elect a majority in both houses of the Florida Legislature.⁶³ The legislators

54. FLA. CONST. art. XI, § 2(c).

55. See Williams, *supra* note 34, at 255–56.

56. See STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 26–27 (2008).

57. Williams, *supra* note 34, at 255–56.

58. See FLA CONST. art. VII §§ 2–4 (repealed 1968).

59. See DAVID R. COLBURN & LANCE DEHAVEN-SMITH, GOVERNMENT IN THE SUNSHINE STATE: FLORIDA SINCE STATEHOOD 38 (1999).

60. Cf. *1880 Census – Florida*, CENSUS ONLINE, <http://census-online.com/links/FL/1880.html> (last visited Sept. 25, 2019).

61. 377 U.S. 533 (1964); 369 U.S. 186 (1962); see also *Florida Census; 1960*, FLA. CTR. FOR INSTRUCTIONAL TECH., <http://fcit.usf.edu/florida/docs/c/census/1960.htm> (last visited Sept. 25, 2019).

62. FLA. CONST. art. VII, §§ 3–4.

63. MARY E. ADKINS, MAKING MODERN FLORIDA: HOW THE SPIRIT OF REFORM SHAPED A NEW STATE CONSTITUTION 33 (2016); see also William C. Havard & Loren P. Beth, *Representative Government and Reapportionment: A Case Study of Florida*, in

representing Tampa, Miami, and Fort Lauderdale represented as many as 300,000 constituents.⁶⁴ Thus, metropolitan areas such as Tampa, Miami, and Fort Lauderdale had only one vote apiece in, for example, the 1963 Senate.⁶⁵

Then came the apportionment decisions from the Supreme Court of the United States. First, *Baker v. Carr* allowed federal courts to involve themselves in state legislative districting;⁶⁶ and second, *Reynolds v. Sims* set the standard for state legislatures to apportion themselves in equal districts to achieve the goal of “one person, one vote.”⁶⁷ One person, one vote meant trouble for the Pork Chop Gang.

Every state reapportioned within new constitutional limits between 1962 and 1967 following the *Baker* and *Reynolds* decisions.⁶⁸ As we shall see, Florida was among the last. Three years after *Baker*, Florida’s own federal reapportionment case, *Swann v. Adams*, had forced just enough “creeping reapportionment,” as one Speaker of the House put it, to get enough votes to pass a bill creating a Constitution Revision Commission.⁶⁹ The bill passed in 1965.⁷⁰ This Commission would consist of thirty-seven members appointed by the heads of each of the three branches of the government—the Governor, the Senate President, the House Speaker, and the Chief Justice—plus appointees by the President of the state bar.⁷¹ The Attorney General would be a member automatically.⁷² This Commission, like most around the nation, would have power only to suggest constitutional changes to the Legislature.⁷³

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fig.2.6–2.7 (MacManus ed., 1992).

64. *Sobel v. Adams*, 208 F. Supp. 316, 320 (S.D. Fla. 1962).

65. *Id.* at 323.

66. 369 U.S. 186, 197–98 (1962).

67. 377 U.S. 533, 558 (1964).

68. ANSOLABEHERE & SNYDER, *supra* note 56, at 187.

69. 378 U.S. 553, 553 (1964) (per curiam); Telephone Interview with Ralph Turlington, Former Speaker of the Florida House of Representatives (June 13, 2014).

70. *See* 1965 Fla. Laws 1776.

71. *Id.* at 1776–77.

72. FLA. CONST. art. XI, § 2(a)(1).

73. 1965 Fla. Laws 1776; *see also* Williams, *supra* note 12, at 570. A similar commission had been appointed ten years earlier, in 1955. ADKINS, *supra* note 63, at 22. The Florida Constitution Advisory Committee (“FCAC”) also had thirty-seven members and was asked to consider a new constitution. *Id.* The FCAC was created by the Legislature at the request of reformist Governor LeRoy Collins. *Id.* at 20–22. Having created it, the Legislature felt free to ignore its recommendations. *Id.* 22–24. *Baker v. Carr* had not yet put the “fear of God” into the Legislature.

The 1965–67 CRC proposed a complete overhaul of Florida’s constitution, which the newly apportioned, much younger, and much more urban Legislature proposed to the voters in 1968, changing everything but the judicial article.⁷⁴ The near-complete amendment of Florida’s constitution in 1968 was, strictly speaking, not the result of a convention but of the legislatively created CRC.

The 1965 CRC proposed a constitutionally based, recurring CRC and a citizens’ initiative process as new methods of amendment. That CRC, still in place today, was intended to be independent of political pressures by consisting of appointees who, because the CRC would not recur for twenty years, had no need to worry about losing their seat as a result of voting their conscience in CRC work. CRC Chair Chesterfield Smith unambiguously urged the group, during its 1966 debates, to create a CRC entrenched in the constitution and separate from the Legislature: “the purpose of it is to eliminate the Legislature from the process, because the Legislature over the past 20 years has had the right to do something about the constitutional conventions, but because it was malapportioned, it refused to do so, and this [CRC] would permit people to act without legislative action.”⁷⁵

In January 1967, when the CRC’s draft constitution was about to be taken up for consideration at a legislative special session, Chairman Smith addressed a joint session of the Legislature on adopting the CRC proposals, stating:

As an individual, and as your agent, who was directed by you to make this study, I have concluded that the single most important thing that this historic Legislature can do—is to give to the people forevermore the power to amend and revise their constitution in the future without the interference of the Legislature, or without the interference or the veto of the Chief Executive. The people themselves, should have the right to initiate changes in their constitution in the future if they want to

74. See H. JOURNAL, Special Sess., at 89–99, 101–02 (Fla. 1968).

75. Transcript of Proceedings at 180–81, Const. Revision Comm’n (Dec. 15, 1966) (on file with State Archives of Florida). Smith was pithier twenty years later while testifying at the Robert Bork confirmation hearings before the national Senate Judiciary Committee: “[T]hat’s the exact crap that I used to hear from those people up in North Florida that had their hands on the throat of the people.” *Nomination of Robert H. Bork to be Assoc. Justice of the Supreme Court of the U.S.: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 2302 (1987).

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do so. If no other thing is achieved here, that, in and of itself, justifies a complete constitutional revision.⁷⁶

Twenty-one months later, when campaigning for the adoption of the Legislature's final proposed constitution, Smith said during a televised speech:

It is my own personal judgment that above all other matters, the new provisions in the 1968 Constitution authorizing means for further constitutional changes are the most important things in the new constitution. It gives to the people forevermore the power to amend and revise their constitution without the interference of the Legislature, or without the interference or the veto of the Chief Executive. The people themselves will have the right to initiate changes in their constitution if they want to do so, and the Legislature cannot stop them. If no other thing is achieved by the new constitution, that in and of itself justifies its adoption.⁷⁷

Again:

I reiterate then that the most important things in this modern constitution are the provisions which insure that neither the Legislature nor the Executive will ever in the future be allowed to block constitutional amendment or constitutional revision. The people must be the great repository of power to change the constitution. This is achieved in the new constitution, and that fact alone justifies the work which has been done over the past few years.⁷⁸

That CRC was eventually successful in getting its proposed constitution through the Legislature,⁷⁹ but perhaps only because the very day the Legislature was supposed to take up its recommendations, in fact while Smith was addressing the Legislature, the U.S. Supreme Court struck down Florida's latest legislative apportionment scheme.⁸⁰

76. H. JOURNAL, Extraordinary Sess., at 21 (Fla. 1967).

77. Chesterfield Smith, Chairman, Constitution Revision Comm'n, Speech televised by University of Florida Television, Gainesville, Florida, 18 (Oct. 24, 1968) (transcript on file with University of Florida George A. Smathers Libraries).

78. *Id.* at 18–19.

79. H. JOURNAL, Special Sess., at 89 (Fla. 1968).

80. *Swann v. Adams*, 385 US. 440, 443–44 (1967).

Although that scheme had already created the most geographically and politically diverse Legislature Florida had seen since Reconstruction, it was not good enough for the Supreme Court. The Legislature that had planned to work on the proposed constitution had to disband.⁸¹

When the Legislature next met, it was composed of persons elected under a scheme created by a University of Florida political science professor whose plan, which he had submitted to the court as an *amicus curia*, the court adopted as satisfying its one-person, one-vote standard.⁸² Thus Florida's new constitution, drafted by reformers, was submitted to a reformed Legislature. That reformed Legislature tweaked it and placed it on the ballot.⁸³ Florida's swiftly growing, swiftly urbanizing population—a population that was working to put astronauts on the moon and build Disney's eastern theme park near Orlando—adopted the new constitution.⁸⁴

The Florida Legislature that received the CRC proposals did not alter the CRC and initiative proposals other than to slant future CRC appointees to the House and Senate.⁸⁵ The citizens' initiative provision passed through the Legislature largely unchanged.⁸⁶ The voters approved both processes along with the rest of the proposed new Florida Constitution;⁸⁷ Florida adopted its new constitution in the general election of 1968, one of several states that did so in the decade after *Baker v. Carr*.

The 1965 CRC and 1967–68 Legislature unquestionably reflected the views of a new generation who had chafed under Florida's antiquated political system. Florida's population had exploded following World War II, and rapid urbanization in southeast Florida required greater local control of local issues.⁸⁸ The constitutionally based, automatically recurring CRC was intended to permit, therefore, a generational

81. See ADKINS, *supra* note 63, at 156–57.

82. See Petition of Manning J. Dauer as Amici Curiae Supporting Himself, Swann v. Adams, 258 F. Supp. 819 (S.D. Fla. 1965) (Civ. No. 186-62) (on file with University of Florida George A. Smathers Libraries).

83. H. JOURNAL, Special Sess., at 89–99 (Fla. 1968).

84. See ADKINS, *supra* note 63, at 178–80.

85. See H. JOURNAL, Extraordinary Sess., at 15 (Fla. 1967).

86. H. JOURNAL, Extraordinary Sess., at 21 (Fla. 1967); FLA. CONST. art. XI, § 3.

87. *Florida Constitutional Basic Document, Amendment 1 (1968)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Constitutional_Basic_Document,_Amendment_1_\(1968\)](https://ballotpedia.org/Florida_Constitutional_Basic_Document,_Amendment_1_(1968)) (last visited Oct. 3, 2019).

88. See *Population of Counties by Decennial Census: 1900 to 1990*, U.S. BUREAU CENSUS (Mar. 27, 1995), <https://www.census.gov/population/cencounts/fl190090.txt> (stating the population of Florida went from 1,897,414 in 1940 to 4,951,560 in 1960).

adjustment for the rapidly changing state. Florida's constitution was intended to not be static.

The modern birth of the idea of a fixed, recurring constitutional review occurred within feverish discussions in Paris in the winter of 1788–89. A French “Society of Thirty” began work on a written constitution including a declaration of rights.⁸⁹ One member of the Society, Marquis de Lafayette, began secretly drafting a declaration of rights beginning in January of 1789 which he shared with his American friend Thomas Jefferson, then the United States Minister to France, for the purpose of getting Jefferson's advice.⁹⁰ Jefferson sent this draft and other materials to his friend James Madison, in an electrified letter dated September 6, 1789, as information on the United States' effort to draft a bill of rights.⁹¹ Jefferson had been absent from the United States during its 1787 constitutional convention and was struck that neither the United States Constitution nor those under discussion by the Society of Thirty contained provisions restricting the extent to which one generation could bind another, especially in allowing generational review of its constitution or limiting public debt to be paid by future generations.⁹² The editor of Jefferson's papers states that this letter “stands apart” from all others in the extensive correspondence between Jefferson and Madison in that Jefferson is speaking more theoretically than practically—especially as the United States Constitution was already written and ratified and, of course, contained no provision for regular review.⁹³

The September 1789 letter challenges the authority by which one generation binds the fundamental right of a later generation to change its government or immerse it in debt.⁹⁴ Jefferson analogized it to the legal ban on perpetual entailments of property.⁹⁵ Significantly, Jefferson concluded that a guarantee of periodic constitutional review was

89. Daniel Wick, *The Court Nobility and the French Revolution: The Example of the Society of Thirty*, 13 EIGHTEENTH-CENTURY STUD. 263, 263–64, 264 n.4 (1980).

90. WILLIAM HOWARD ADAMS, *THE PARIS YEARS OF THOMAS JEFFERSON* 269–71 (1997); see also ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 62–91 (1964) (noting possible contribution by Thomas Paine, who met with Jefferson in Paris).

91. See Thomas Jefferson, *September 6, 1789 Letter to James Madison*, in 15 THE PAPERS OF THOMAS JEFFERSON 392–97 (Julian P. Boyd ed., 1958).

92. *Id.* at 392.

93. Julian P. Boyd, *Editorial Note to The Earth Belongs in Usufruct to the Living*, in 15 THE PAPERS OF THOMAS JEFFERSON 384, 387 (Julian P. Boyd ed., 1958).

94. Jefferson, *supra* note 91, at 392–93.

95. *Id.* at 396–97.

necessary to protect the natural right of self-government, which a prior generation could not bind:

[I]t may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.⁹⁶

Jefferson concluded that a voluntary call for a convention to repeal prior constitutional provisions would be insufficient; a fixed mechanism was required.⁹⁷ His reason:

The people cannot assemble themselves. Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.⁹⁸

Jefferson would remain committed to this idea through his life.⁹⁹ Lafayette was not as enthusiastic about the automatic revision proposal as Jefferson but left a general provision in an intermediate draft.¹⁰⁰ The provision was later removed when Lafayette's draft Declaration of Rights met immediate resistance by conservative delegates in the French National Assembly.¹⁰¹ Events immediately overtook this draft and it was never seriously considered: street violence started in Paris, assembly

96. *Id.* at 396 (using mortality tables to hypothesize the political lifespan of one generation to be nineteen years).

97. *Id.* at 395.

98. *Id.*

99. Boyd, *supra* note 93, at 384; *see also* Williams, *supra* note 15, at 3 (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON: WRITINGS 1395, 1402 (Merrill D. Peterson ed., 1984)).

100. 2 DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 224 (1951).

101. ADAMS, *supra* note 90, at 293.

delegates were sidetracked, and when discussion of the constitution resumed weeks later, political opinions had hardened.¹⁰²

In Florida, no overt indication has been found that the 1966 CRC relied on Jefferson in proposing the mandatory twenty-year review by the CRC. A constitution review committee that convened at the call of Governor LeRoy Collins in 1958 considered a twenty-year review as well, but its recommendations died in the next legislative session.¹⁰³ However, Chairman Smith addressed the 1967 joint Legislature on this point as it took up his group's proposed constitution.¹⁰⁴ Smith did stress the Jeffersonian theme that the future is unknowable as reason to not bind a constitution:

As you face this historic task of drafting a new constitution, I suggest that the most difficult thing that you will have to do is to face up to the reality that someone else besides you has intelligence. Legislators of twenty and thirty years from now should be granted the flexibility to meet problems as they then exist without a present restriction imposed by you. If you determine something is needed now, it is not necessary that you also determine that it will be needed forevermore.¹⁰⁵

C. The Promise of Comprehensive Reform

Florida's CRC was conceived to allow for comprehensive reform; it is not restricted by single-subject requirements, as citizens' initiatives are.¹⁰⁶ And logically, its place in Florida's unusually broad array of tools

102. LAURA AURICCHIO, *THE MARQUIS: LAFAYETTE RECONSIDERED 182–83* (2014); JONATHAN ISRAEL, *REVOLUTIONARY IDEAS: AN INTELLECTUAL HISTORY OF THE FRENCH REVOLUTION FROM THE RIGHTS OF MAN TO ROBESPIERRE 77–85* (2014) (discussing Assembly Committee debates); see also ADAMS, *supra* note 90, at 286 (“On the morning of July 11 Lafayette laid the draft of his declaration on the assembly desk. His timing could not have been worse.”).

103. Letter from Maxine Baker, Member, Special Constitutional Advisory Comm., to Van Gill and Frances Kilroe, Members, League of Women Voters (Nov. 21, 1958) (on file with the University of Florida George A. Smathers Libraries).

104. H.R. JOURNAL, 41st Leg., at 21 (Fla. 1967) (statement of Rep. Smith).

105. *Id.*

106. In the 2019 Florida legislative session, proposed constitutional amendments were considered that would have imposed a single-subject restriction on CRC proposals. See H.R.J. Res. 53, 2019 Leg. (Fla. 2019); S.J. Res. 74, 2019 Leg. (Fla. 2019); S.J. Res. 86, 2019 Leg. (Fla. 2019). Another amendment proposed by the Legislature would have abolished the CRC altogether. H.R.J. Res. 249, 2019 Leg. (Fla. 2019). Both failed. However, another

for constitutional change lies between the prospect of complete revision in a constitutional convention and piecemeal amendment in a citizens' initiative. Chairman Smith's statements about the CRC's purpose confirm its purpose. In theory then, Florida's CRC is in a position to make comprehensive reforms that the people want and that the Legislature may not want. For example, the CRC might be able to place a set of strong environmental protections into the constitution, free of the powers of special interests. Or the CRC, with voters' support, might be able to respond to popular issues such as gun safety by amending the constitution, free of the force of the National Rifle Association lobby.

But has it worked out that way? Has the CRC fulfilled its ability to offer comprehensive reform, rather than piecemeal amendments? And has its power to bypass the Legislature resulted in a strong example of direct democracy?

For the most part, the answer is no. Even though supposedly free of political pressure, CRCs have accomplished little comprehensive reform and the most recent CRC was no exception. A former CRC Chair, Talbot "Sandy" D'Alemberte, wrote an open letter recommending comprehensive cleanup of noncontroversial provisions prior to the 2017 CRC.¹⁰⁷ For example, the Florida Constitution still purports to impose term limits on federal senators and members of Congress and to recognize marriages occurring only between a man and a woman.¹⁰⁸ Both of these provisions had been ruled unconstitutional under the Federal Constitution.¹⁰⁹ The 2017 CRC ignored public recommendations to remove these two provisions,¹¹⁰ leaving these clauses perhaps as marks of defiance, much as Florida had refused to remove its constitutional ban on integrated schools until 1968, well after the 1954 *Brown v. Board of*

passed that restricts the signature-collection requirements on citizens' initiatives. H.B. 5, 2019 Leg., 2019 Fla. Laws c. 64.

107. Talbot "Sandy" D'Alemberte, *Time for Spring Cleaning for the Florida Constitution*, TALLAHASSEE DEMOCRAT (Oct. 11, 2016, 2:56 PM), <https://www.tallahassee.com/story/opinion/2016/10/11/time-spring-cleaning-florida-constitution/91905728/>.

108. FLA. CONST. art. VI, § 4(b)(5)–(6); *id.* art. I, § 27.

109. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

110. See *Public Proposals - Website Submissions*, FLA. ST. U.: CONST. REVISION COMMISSION, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCPublicProposals.pdf> (last visited Sept. 29, 2019) (listing for CRC's consideration public proposal 700046, regarding election of U.S. Senators and Representatives, and public proposal 700118, regarding elimination of definition of marriage).

Education ruling.¹¹¹ The 2017–18 CRC disregarded most clean-up recommendations.

But it must be said that the 2017–18 was actively discouraged from the efforts it did make at comprehensive changes. Section III discusses some of the challenges Florida’s CRCs have faced, which a CRC or convention from any state could face, if not alert to the pitfalls. Subsection A explains why the structure of the CRC steps on its own feet by discouraging the comprehensive change it appears to enable. Subsection B describes in detail how that structure has affected the work of the CRCs, with detailed examples from the most recent CRC. Finally, Subsection C suggests changes for greater effectiveness of CRCs in Florida and other states.

III. CHALLENGES FACED BY CRCs

A. *CRC Structure: Divided Priorities*

1. Selection of Members

Although the CRC sends its proposals directly to the voters, most of its members do not come directly from the voters. The exception is the Attorney General, a position that, in Florida, is elected on a partisan basis.¹¹² The selection of the other members, however, is once, twice, or three times removed from the public vote. The Governor’s appointees are selected by a popularly elected governor, thus being just once removed from popular election.¹¹³ The eighteen combined appointments by legislative leadership are twice removed: the public elect legislators, then those legislators choose their leaders—the Speaker of the House and the President of the Senate—and those leaders appoint nine CRC members each.¹¹⁴ The Chief Justice is appointed as a Justice by the Governor, after first being nominated by a Judicial Nominating Commission.¹¹⁵ The

111. See *Florida’s Constitutions: The Documentary History*, FLA. ST. U.: FLA. CONST. REVISION COMMISSION, <https://fall.fsulawrc.com/crc/conhist/contents.html> (last visited Sept. 29, 2019) (indicating all amendments to the Florida Constitution of 1885, with no proposed amendment to Article XII, Section 12, which required racial segregation of public schools).

112. See generally FLA. CONST. art. IV, § 5. In practice all Florida cabinet positions, of which the Attorney General is one under this article, are elected on a partisan basis.

113. FLA. CONST. art. XI, § 2(a)(2).

114. FLA. CONST. art. XI, § 2(a)(3).

115. FLA. CONST. art. V, § 11(a).

seven justices elect their Chief on a two-year rotating basis.¹¹⁶ Thus, the three CRC members appointed by the Chief Justice are thrice removed from the elective process: voters elect the Governor, who selects the Justice, who is elected Chief.¹¹⁷ Thus, this process contrasts with the representative democratic notion that CRC members are accountable to the people.¹¹⁸

CRC members are not, in their CRC role, employees of their appointer. CRC members are not paid; there is no promotion for which CRC members can become eligible based on their performance in the CRC. Similarly, CRC members cannot be fired by their appointer for any decision made in their CRC role. Appointees have no constituency, in contrast to a local legislator representing a district, so they are free to act on behalf of the whole state. CRC members do not face election or reelection to the CRC, so they have no fundraising duties and are therefore immune from lobbyists with the power to fund or defund election campaigns.

Another way in which the structure of the CRC is not designed to form a true representative body is that no requirements exist to qualify for CRC membership, and no provision exists to coordinate choices among the appointing authorities. For the 1977–78 CRC, the Governor’s staff coordinated informally with the staff of the legislative leadership to ensure the appointers would not overlap appointees, but that was voluntary as it is not mentioned in the constitution.¹¹⁹ For the 1997–98 and 2017–18 CRCs, appointers used applications for people interested in a CRC appointment.¹²⁰

One result of having no particular requirements for members has been a lack of geographic diversity. Six of the thirty-seven 2017–18 members lived in the state capital of Tallahassee, a city with a population of less than 200,000.¹²¹ Miami-Dade County, which has a population of

116. FLA. SUPREME COURT, THE SUPREME COURT OF FLORIDA MANUAL OF INTERNAL OPERATING PROCEDURES §1(B) (2016).

117. See FLA. CONST. art. XI, § 2(a)(4).

118. Pal, *supra* note 44, at 266.

119. Interview with James Apthorp, Staff, Gov. Reubin O’D. Askew, Member, Constitution Revision Comm’n 1977–78, in Tallahassee, Fla. (July 23, 2015).

120. See Mary Ellen Klas, *Want a Chance to Shape Florida’s Future? Applications Accepted*, MIAMI HERALD (Jan. 29, 2017), <https://www.miamiherald.com/news/politics-government/state-politics/article127506539.html>.

121. *Commissioners*, CONST. REVISION COMMISSION 2017–18, <http://crc.law.fsu.edu/Commissioners.html> (last visited Aug. 28, 2019); see also *QuickFacts: Tallahassee City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/tallahassee-cityflorida/POP010210> (last visited Sept. 29, 2019).

nearly 2.5 million, also had six members.¹²² The Senate President, who was from Martin County, with a population of less than 150,000, chose three of his nine appointees from among Martin County citizens.¹²³ Jacksonville, which is the most populous city in the state at more than 820,000, had only one member.¹²⁴

On the other hand, CRCs have had a refreshing diversity of professions and ages. Over the decades, CRC members have been not only the lawyers and elected officials one might expect, but also an architect, a department store executive, a home builder, physicians, automobile dealers, educators—including a home-school mother and teacher—and a Disney World executive.¹²⁵ Some members have been in their seventies; two babies have been born to CRC members during their service.

2. Politics in the Process

The appointive process for the CRC has been criticized as overtly political. Florida's voter registration balance has been nearly evenly divided between Democrats and Republicans (with a rapidly growing no-party-affiliate registration) for twenty years, with a small edge to Democrats.¹²⁶ In 2017, 4,807,950 Democrats were registered to vote; 4,544,708 Republicans were registered; and 3,514,531 minor-party or no-party-affiliates were registered.¹²⁷ Yet, Floridians have elected

122. CONST. REVISION COMMISSION 2017–18, *supra* note 121; *see also QuickFacts: Miami-Dade County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida,FL/POP010210> (last visited Sept. 29, 2019).

123. CONST. REVISION COMMISSION 2017–18, *supra* note 121; *see also QuickFacts: Martin County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/martincountyflorida,FL/POP010210> (last visited Sept. 29, 2019).

124. CONST. REVISION COMMISSION 2017–18, *supra* note 121; *see also QuickFacts: Jacksonville City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/jacksonvillecityflorida,FL/POP010210> (last visited Sept. 29, 2019).

125. *See* ADKINS, *supra* note 63, at 66 (listing 1966 CRC members); *Commissioners & Alternates, 1997–1998*, FLA. ST. U.: FLA. CONST. REVISION COMMISSION, <https://fall.fsulawrc.com/crc/members.html> (last visited Sept. 29, 2019).

126. *By Party Affiliation Archive*, FLA. DEP'T. OF STATE: DIVISION ELECTIONS, <https://www.dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/by-party-affiliation-archive/> (last visited Sept. 29, 2019).

127. *Voter Registration – By Party Affiliation*, FLA. DEP'T. OF STATE: DIVISION ELECTIONS, <https://www.dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/> (last updated July 31, 2019).

Republican governors since 1998 and have elected Republican supermajorities to both houses of the Legislature for nearly that long.¹²⁸ The Attorney General was a Republican; the Governor, appointing fifteen members, was Republican; the Speaker of the House and the President of the Senate, each with nine appointments, were Republican.¹²⁹ Chief Justice Jorge Labarga was officially nonpartisan, though he was appointed by Charlie Crist, who served as Republican Governor of Florida before becoming elected to the United States Congress as a Democrat.¹³⁰ The Chief Justice was often a swing vote on the court.¹³¹ So, even though Florida had more Democrats than Republicans registered to vote, the 2017–18 CRC contained only a few Democrats.¹³² Many of the 2017–18 CRC members were Republican office-holders or former office-holders; many were educators, reflecting the Republican leadership’s interest in strengthening charter schools in the constitution; and some were Republican financial backers.¹³³

128. See generally FLA. DEPT. OF STATE: DIVISION ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=> (last visited Sept. 29, 2019).

129. See *November 4, 2014 General Election*, FLA. DEPT. OF STATE: DIVISION ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/2014&DATAMODE=> (last visited Sept. 29, 2019).

130. See *November 7, 2006 General Election*, FLA. DEPT. OF STATE: DIVISION ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/7/2006&DATAMODE=> (last visited Sept. 29, 2019); *November 8, 2016 General Election*, FLA. DEPT. OF STATE: DIVISION ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2016&DATAMODE=> (last visited Sept. 29, 2019).

131. Sun Sentinel Editorial Board, *The Most Conservative Florida Supreme Court in Decades*, SUN SENTINEL (Jan. 22, 2019), <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html>.

132. On April 16, 2018, when the 2017–18 CRC was considering the final bundled proposals, member Tom Lee compared the present CRC with the 1997–98 CRC, which was nearly evenly divided between Democrats and Republicans. Transcript of Proceedings at 118, Const. Revision Comm’n (Apr. 16, 2018), http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript04-16-2018_Voll.pdf. He said bluntly: “There’s nothing—there’s very little bipartisan about this Commission.” *Id.* When asked about the heavy Republican CRC majority during a panel presentation in August 2017, 2017–18 CRC member and former Republican State Senator Lisa Carlton answered, “Whether it’s the Democrat Party [or] Republican Party, [there] are different people with different persuasions if you will.” Manatee Educational Television METV, *Manatee Tiger Bay – Florida’s Constitutional Commission*, YOUTUBE (Aug. 23, 2017), https://www.youtube.com/watch?time_continue=1242&v=7d6aAx_oIYA. Senator Carlton had a point: the Republicans ranged from very conservative to center-leaning. *Id.*

133. See *Florida Constitution Revision Commission*, BALLOTPEDIA, https://ballotpedia.org/Florida_Constitution_Revision_Commission#2017-2018 (last visited Sept. 29, 2019).

Similarly, in 1977–78, Florida’s CRC appointers were Democrats, and the membership of the CRC had only a few Republicans.¹³⁴ In 1997–98, the Attorney General and Governor were Democrats, the Chief Justice was left-leaning, and both houses of the Legislature were Republican;¹³⁵ if the members of the CRC itself reflected the party affiliation of the appointers, its membership would be nearly evenly split between party affiliation.

The political fact that most of the appointing authorities are officials elected through a partisan election raises the question of whether CRC appointees act as agents or proxies for their appointing person or body—an agent theory—or deliberately independent under a theory of representation similar to John Adams’s, in which the appointee is chosen “becau[s]e they think he knows more, and is better di[s]po[s]ed, than the generality, and even than them[s]elves very often.”¹³⁶ The CRC is nominally free from politicians’ self-interest because the appointing authorities do not know what the commission will propose. Additionally, voters rather than politicians decide whether to adopt the recommendations. The politicians can interfere, however, in the internal deliberation of the commission.¹³⁷

Like the appointment process, the political agenda behind the scenes of the CRC is not new. In 1977–78, gubernatorial appointee Jon Moyle openly admitted his role on the CRC was to act as floor manager to advance the priorities of Governor Askew.¹³⁸ The 2017 Speaker of the House announced ahead of time the type of member he intended to

134. Interview with Martha Barnett, Member, Constitution Revision Comm’n 1997–98, and Talbot “Sandy” D’Alemberte, Chair, Constitution Revision Comm’n 1977–78, in Tallahassee, Florida (April 29, 2014).

135. See *November 8, 1994 General Election*, FLA. DEPT. OF STATE: DIVISION ELECTIONS, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/1994&DATAMODE=> (last visited Sept. 29, 2019); *Gerald Kogan (Retired Chief Justice Florida Supreme Court)*, JAMS, <https://www.jamsadr.com/kogan/> (last visited Sept. 29, 2019) (listing awards from the American Civil Liberties Union); *Florida State Senate*, BALLOTPEDIA, https://ballotpedia.org/Florida_State_Senate (last visited Sept. 29, 2019); *Florida House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Florida_House_of_Representatives (last visited Sept. 29, 2019).

136. 1 JOHN ADAMS, *DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 121 (London 1787).

137. Although appointing authorities have no formal authority over their appointees, they can still urge them to vote a certain way on a proposal, using nothing more than the weight of their high office as pressure.

138. Interview with Jon Moyle, Member, Constitution Revision Comm’n 1977–78, in Cape San Blas, Fla. (June 14, 2014). Askew was also a member of the 1965–67 CRC. See ADKINS, *supra* note 63, at 66.

appoint.¹³⁹ Apparently recognizing a potential for members' lingering loyalty to the appointer, the 2017–18 CRC members created a unique rule that membership on the powerful Rules and Administration Committee be distributed to balance members from each appointer.¹⁴⁰

The composition of the CRC showed some evidence that the governmental leaders doing the appointing held little interest in the CRC as a serious tool for constitutional reform. As will be mentioned, no steering committee existed to plan for the CRC;¹⁴¹ thus, when it was first formed, it had no proposed rules, agenda, or schedule. The Chair, a wealthy home builder, had little experience in government, except an unsuccessful run for the U.S. Senate.¹⁴² The Senate President responsible for choosing nine members had introduced a bill in 2012 to abolish the CRC and declared at the time, “We have a revision commission. It’s called the Florida Legislature.”¹⁴³ The Speaker of the House, also responsible for nine members, announced ahead of time that he would have a litmus test for any member he appointed: he would appoint only conservatives and would prefer to appoint only people who favored imposing term limits on judges.¹⁴⁴

3. Rules of the CRC

The constitution provides that the CRC shall “adopt its rules of procedure” as a mandatory requirement.¹⁴⁵ This ostensibly gives the CRC

139. See *infra* text accompanying note 144.

140. FLA. CONSTITUTION REVISION COMM’N 2017–18 RULES § 2.3(2), <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

141. See *infra* text accompanying notes 145–46.

142. Sara Kennedy, *Developer Carlos Beruff: Modest Beginnings to Multimillion-Dollar Business*, BRADENTON HERALD (Aug. 4, 2013, 12:00 AM), <https://www.bradenton.com/news/local/article34587321.html>; Mary Ellen Klas, *Scott Names Sarasota Businessman Carlos Beruff to be Chairman of the Constitution Revision Commission*, MIAMI HERALD (Mar. 1, 2017, 2:01 PM), <https://miamiherald.typepad.com/nakedpolitics/2017/03/scott-names-sarasota-businessman-carlos-beruff-to-be-chairman-of-the-constitution-revision-commission.html>.

143. Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What It Has Become*, 18 FLA. COASTAL L. REV. 5, 26–27 (2016); Mary Ellen Klas, *Negron Gets Support for Bill to Repeal Ballot Access of Budget and Tax Commissions*, MIAMI HERALD (Feb. 9, 2012, 2:41 PM), <https://miamiherald.typepad.com/nakedpolitics/2012/02/negron-gets-support-for-bill-to-repeals-ballot-access-of-budget-and-tax-commissions.html>.

144. Brandon Larrabee, *Corcoran Makes Business Pitch for Judiciary Changes Zeroing in on Responding to Rulings on Workers’ Compensation Insurance*, NEWS SERV. FLA. (Dec. 5, 2016, 7:26 PM), <https://www.news4jax.com/news/corcoran-makes-business-pitch-for-judiciary-changes>.

145. FLA. CONST. art. XI, § 2(c).

considerable autonomy. Like the 1977–78 CRC, which pioneered the CRC process under the new constitution, and unlike the 1997–98 CRC, which had a steering committee, the 2017–18 CRC began its life with no rules or proposed rules. Its first challenge, then, under its mandate was to “adopt its rules of procedure.”¹⁴⁶ This proved more difficult than originally expected. The 1997–98 CRC had been more successful than the previous one, having most of its proposals adopted in comparison to the 1977–78 CRC’s experience of having every proposal rejected by voters.¹⁴⁷ A common understanding was that the 1998 success was due, in part, to the group’s rule that proposals could go to the ballot only on a supermajority vote of twenty-two of the thirty-seven members.¹⁴⁸ Therefore, it would have been logical for the 2017–18 group to adopt some version of the 1997–98 rules. But accusations of secrecy and railroading marred the rulemaking process and gave the CRC unfavorable publicity.¹⁴⁹ Finally, the Chair of the Style and Drafting Committee proposed a set of rules that received a majority vote.¹⁵⁰

Those rules did largely echo those of the 1997–98 CRC, which had seemed to work so well for that body. Like the 1997–98 CRC, the 2017–18 rules required a supermajority of twenty-two votes to send a proposal to the ballot.¹⁵¹ The idea in 1997 had been to require broad consensus of

146. *Id.*

147. *See Initiatives / Amendments / Revisions Database*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited Sept. 30, 2019).

148. *E.g.*, FLA. CONSTITUTION REVISION COMM’N 1997–98 MANUAL § 5.4; Interview with Martha Barnett and Talbot “Sandy” D’Alemberte, *supra* note 134.

149. *See, e.g.*, Mary Ellen Klas, *Constitution Commission Feuds Over Rules and Adhering to Sunshine Law*, MIAMI HERALD (May 31, 2017, 7:03 PM), <http://www.miamiherald.com/news/politics-government/state-politics/article153679384.html>. The progress of rule creation may be tracked through the corresponding transcripts and video recordings. *See* Transcript of Proceedings at 18–125, Const. Revision Comm’n (June 6, 2017), <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript6-6-2017.pdf>; Transcript of Proceedings at 37–52, Const. Revision Comm’n (Mar. 20, 2017), <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript03-20-2017.pdf>; *5/17/17 Constitution Revision Commission Rules Working Group Part 1*, FLA. CHANNEL (May 17, 2017), <https://thefloridachannel.org/videos/51717-constitution-revision-commission-rules-working-group-part-2/>; *5/17/17 Constitution Revision Commission Rules Working Group Part 2*, FLA. CHANNEL (May 17, 2017), <https://thefloridachannel.org/videos/51717-constitution-revision-commission-rules-working-group-part-2/>.

150. Transcript of Proceedings at 101, 125, Const. Revision Comm’n (June 6, 2017), <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript6-6-2017.pdf>.

151. FLA. CONSTITUTION REVISION COMM’N 2017–18 RULES § 5.4, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

the CRC, which was nearly evenly divided between the two political parties.¹⁵² In 2017, almost all of the members were members of the Republican Party, so whether the supermajority vote requirement would make an effective difference would remain to be seen.

The 2017 rules differed in one important way from those of either previous CRC: they allowed proposals to die in committee.¹⁵³ Each proposal had to survive every committee to which it was assigned before it could be discussed by the full CRC.¹⁵⁴

While this rule may have sounded as though it would lend efficiency to the process, it had the effect of sharply reducing the full group's debate on issues. If a member was interested in a bill that was not assigned to her committee, the most she could do was attend the committee meetings to which the proposal had been assigned and watch the action. Linking the success of proposals to committee votes created a path dependence for each proposal. If the particular combination of people on a committee opposed a proposal, it would not proceed. Additionally, in all three CRCs, the chair decided who would serve on each committee; the chair also chose committee chairs and co-chairs, thus exerting control over the path dependence.¹⁵⁵

A proposal that had died in committee could be revived at a full CRC meeting only if a majority of the CRC voted in favor of reviving it for discussion purposes.¹⁵⁶ But, because almost all of the work was done in committees, the full CRC met infrequently.¹⁵⁷ By the midpoint of the CRC's work, one member remarked that there were still CRC members she had met only at the opening luncheon meeting.¹⁵⁸

152. Interview with Martha Barnett and Talbot "Sandy" D'Alemberte, *supra* note 134.

153. FLA. CONSTITUTION REVISION COMM'N 2017–18 RULES § 2.13, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

154. *Id.* § 2.12 to 2.13; *see also* Transcript of Proceedings at 46–48, Const. Revision Comm'n (Mar. 20, 2017), <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript03-20-2017.pdf> (discussing adoption of legislative committee model).

155. FLA. CONSTITUTION REVISION COMM'N 2017–18 RULES § 1.3, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>; FLA. CONSTITUTION REVISION COMM'N 1997–98 RULES § 1.3; Transcript of Proceedings at 182, Const. Revision Comm'n (Sept. 27, 1977).

156. FLA. CONSTITUTION REVISION COMM'N 2017–18 RULES § 4.5, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

157. *See Transcripts*, FLA. ST. U.: CONST. REVISION COMMISSION, <https://crc.law.fsu.edu/Meetings/Transcripts.html> (last visited Oct. 3, 2019) (indicating that the dates of full commission meetings were March, June, and October 2017 and March and April 2018).

158. Interview with Jacqui Thurlow-Lippisch, Member, Constitution Revision Comm'n 2017–18, in Tallahassee, Fla. (Jan. 12, 2018).

The rules also, as rules for deliberative bodies tend to do, allowed those who understood their details, such as legislators and former legislators, to wield control over the process. For example, a member might have believed he was voting procedurally to advance a proposal for further consideration when it was actually being voted for final placement on the ballot.¹⁵⁹ This put members new to political processes at an understandable disadvantage. As 1997–98 CRC member Martha Barnett put it, CRC members should not be politically naïve or “they’ll be eaten alive.”¹⁶⁰ Another 1997–98 member, Miami lawyer Bobby Brochin, who was not familiar with legislative-type rules, admitted that he failed to get through a proposal he supported, in part because others’ use of the rules against him “flummoxed” him.¹⁶¹

The rules also led to unintended consequences. The 2017 CRC rules provided that the Style and Drafting Committee could bundle together items for the full CRC to pass.¹⁶² The CRC sent twenty-five separate proposals to the committee for a proposed ballot workup as a result of the March 2018 plenary sessions.¹⁶³ The committee chose to bundle eighteen of the proposals while leaving six others independent.¹⁶⁴ At the final April 16, 2018 session, some CRC members complained they were denied an up or down vote on each proposal as a result of the bundling.¹⁶⁵ They objected to the log-rolling effect of forcing them to choose or reject the entire bundle.¹⁶⁶ The strong response by another member was that the bundling was permitted by the rules adopted over a year earlier and the items should not be re-unbundled simply because some members failed

159. See Transcript of Proceedings at 117–18, Const. Revision Comm’n (Apr. 16, 2018), <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript04-16-2018Vol1.pdf>.

160. Interview with Martha Barnett and Talbot “Sandy” D’Alemberte, *supra* note 134.

161. Interview with Robert Brochin, Member, Constitution Revision Comm’n 1997–98, in Miami, Fla. (July 13, 2015).

162. Alvan Balent Jr., *Florida’s Constitution Revision Commission (CRC): Behind-the-Scenes Insights from Bob Butterworth, Florida’s Former Attorney General and Member of the 1998 CRC*, 72 U. MIAMI L. REV. 1073, 1085 (2018).

163. *Id.*

164. *The Constitution Revision Commission Committee Meeting Extended Agenda*, CONST. REVISION COMM’N 2017–18 (Apr. 5, 2018), http://crc.law.fsu.edu/PublishedContent/Committees/2017-2018/SD/MeetingRecords/MeetingPacket_195.pdf.

165. Transcript of Proceedings at 117–18, Const. Revision Comm’n (Apr. 16, 2018), <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript04-16-2018Vol1.pdf>.

166. *Id.* at 71–73, 118.

to understand their rules.¹⁶⁷

The Florida Constitution contains public records and conflict-of-interest provisions that apply to the CRC.¹⁶⁸ The Florida Legislature, too, has passed laws to govern some aspects of the CRC notwithstanding the CRC's rule autonomy.¹⁶⁹ Florida had amended a public-servant conflict-of-interest statute to apply to CRC members.¹⁷⁰ This action had actually been taken in 1997, when the 1997–98 CRC was traveling the state holding its obligatory public hearings.¹⁷¹ At a hearing in Pensacola, a prominent lawyer threw a party to honor the CRC members.¹⁷² A member of the press who attended the party and partook in the bounty then published a newspaper article criticizing the CRC for accepting favors from members of the public.¹⁷³ The CRC amended its rules to forbid such conflicts, and the CRC depended on parties thrown by its own members for the remainder of the public hearing tour.¹⁷⁴

Perhaps as a result of the rules keeping the bulk of work at the committee level, the few meetings the full CRC did have were brief. The 2017–18 CRC held eight plenary sessions. The final session to determine which items would proceed to the ballot lasted nine hours on a single day,¹⁷⁵ and altogether the plenary sessions totaled less than forty hours.¹⁷⁶ This contrasts with the 1997 deliberative sessions, which occupied twenty-nine days and lasted a total of more than 173 hours.¹⁷⁷

167. *Id.* at 109–12.

168. FLA. CONST. art. I, § 24(a) (pertaining to the people's right to access public records); FLA. CONST. art. II, § 8 (discussing conflict of interest restrictions on public officials); *see also* Transcript of Proceedings at 55–67, Const. Revision Comm'n (Mar. 20, 2017), <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript03-20-2017.pdf> (discussing public records and conflict restriction).

169. *See* FLA. STAT. § 112.3215(6) to (9) (2014).

170. 1997 Fla. Sess. Law Serv. 54 (West) (codified as amended at FLA. STAT. § 112.3215 (West 2019)).

171. JOURNAL OF THE 1997–98 CONSTITUTION REVISION COMMISSION 39 (1997); *see also* FLA. CONST. art. XI, § 2(c).

172. Interview with Martha Barnett and Talbot “Sandy” D’Alemberte, *supra* note 134.

173. *Id.*

174. *Id.*

175. *4/16/18 Constitution Revision Commission*, FLA. CHANNEL, <https://thefloridachannel.org/videos/4-16-18-constitution-revision-commission/> (last visited Oct. 1, 2019).

176. *See generally Constitution Revision Commission: Video Library*, FLA. CHANNEL, <https://thefloridachannel.org/programs/constitution-revision-commission/> (last visited Oct. 1, 2019).

177. *See Constitution Revision Commission: Transcripts of CRC Meetings*, FLA. ST. U., <https://fall.fsulawrc.com/crc/minutes.html> (last visited July 1, 2019).

B. History: Long-Term Effects of Political Structure of CRCs

The Florida CRCs, over their fifty-year history, have effected change, but often greater and more comprehensive change has been defeated by political pressures that the structure of the CRC could not prevent. This subsection discusses some specific examples from each of the three CRCs and points out the legal authority that permitted or even encouraged the politicized results.

1. Lack of Subject-Matter Standards

While the CRC's mandate to review the whole constitution is commendable, the power it places in the hands of its members makes it vulnerable to being treated as a chance to exercise pet projects of the CRC members. Indeed, the need to pass policy points that have been rejected by the Legislature was an explicit reason 1965–67 CRC Chair Chesterfield Smith gave for providing the broadest possible power to the CRC.¹⁷⁸ Yet the constitution provides no standards or guidelines to the CRC as to what types of amendments are “constitutional” and what types are “legislative” in nature, a common point of discussion in conversations about constitution revision. In 2017–18, several committee debates centered around whether the constitution was intended to be a receptacle for projects that had failed in the Legislature.¹⁷⁹ And many of the amendments proposed by the 2017–18 CRC could be characterized as legislative in nature. For example, the 1997–98 CRC proposed, and the public adopted, a waiting period for handgun purchases, into which counties could opt-in.¹⁸⁰ The 2017–18 CRC provided that wagering on dog racing should end, along with vaping in the workplace.¹⁸¹

2. Authority to Make Own Rules for Each CRC

Each CRC's ability to make its own rules further illustrates the plenary authority the 1968 constitution gave to the CRC. Yet the ability to make new rules in each iteration means that each CRC operates differently and may have different, inconsistent results. To what extent

178. See *supra* text accompanying notes 76–79.

179. See e.g., *1/26/18 Constitution Revision Commission Ethics and Elections Committee*, FLA. CHANNEL, at 3:34–38, <https://thefloridachannel.org/videos/1-26-18-constitution-revision-commission-ethics-elections-committee/> (last visited Oct. 2, 2019).

180. FLA. CONST. art. I, § 8, cl. (b).

181. FLA. CONST. art. X, §§ 20, 32.

does this wide flexibility matter? In 1978, the CRC enacted a rule to allow proposals to go to the ballot with only a majority vote of CRC members.¹⁸² That low bar, combined with the left-leaning bent of most of the commissioners, may have meant that the proposals did not reflect the wishes of the public.¹⁸³ And, in 2017–18, the rule allowing committees to table proposals,¹⁸⁴ effectively killing them without discussion by the full CRC, may have squashed debate on many proposals that might have met a different fate had they been subject to plenary discussion. If a body meets only every twenty years, should it be subject to the same rules that governed earlier iterations, or should it remain able to fix its own rules?

3. Training

Members from the 1997–98 CRC report having been provided thick binders of material to study before beginning their CRC work.¹⁸⁵ Not so for the 2017–18 members. Senate President Joe Negron provided his nine appointees two soft-bound volumes, but even those were not guides specifically written for 2017: they were the manual that had been prepared for the 1998 CRC, and the journal that memorialized its work.¹⁸⁶ The members of the 2017–18 CRC were provided no training as a group and no advance materials to help prepare them for their work on the state's fundamental organizing document.¹⁸⁷

The opening plenary meeting, brief though it was, did feature a PowerPoint outlining the ethical duties of the CRC members, reminding them that they could not accept some gifts and had certain financial disclosure obligations.¹⁸⁸ Some early committee meetings brought in experts of different kinds to advise the members of the background of the

182. See Transcript of Proceedings at 368, Const. Revision Comm'n (Sept. 27, 1977).

183. Interview with Martha Barnett and Talbot "Sandy" D'Alemberte, *supra* note 134.

184. See FLA. CONSTITUTION REVISION COMM'N 2017–18 RULES §§ 2.12, 2.13, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

185. Interview with Martha Barnett and Talbot "Sandy" D'Alemberte, *supra* note 134; Interview with Jon L. Mills, Member, Constitution Revision Comm'n 1997–98, in Gainesville, Fla. (July 20, 2015).

186. Interview with Sherry Plymale, Member, Constitution Revision Comm'n 2017–18, Port St. Lucie, Fla. (Apr. 26, 2019).

187. *Id.*

188. CONSTITUTION REVISION COMM'N, 2017–18 MEETING NOTICE 1, 23, 28 (2017), http://crc.law.fsu.edu/PublishedContent/Meetings/Calendars/Links/CRC_Meeting_NoticeandPacket_3-20-2017.pdf.

CRC and of the kinds of issues the CRC and committees were likely to encounter.¹⁸⁹

4. Conflicts Regarding Comprehensive Versus Piecemeal Reform

The Florida Constitution does not prohibit CRCs from combining separate amendments into a proposal.¹⁹⁰ But public criticism of CRCs for doing so reached a pitch in 2018.¹⁹¹

This controversy highlights a possible misunderstanding, or conflict in viewpoint, in the purpose of a CRC. Is it intended to bring comprehensive reform? If so, should it not present its plans for reform as proposals composed of related groups of individual amendments? Vladimir Kogan argued that a main purpose of a constitution revision commission, like that of a constitutional convention, is to do what a citizens' initiative cannot—plan for comprehensive constitutional reform.¹⁹² Yet gaining the trust and support of voters for broader reform remains elusive. Florida's electorate, perhaps accustomed to the constitutionally required single-subject requirement of citizens' initiatives, has criticized the "logrolling" or "bundling" that the CRCs have done in an effort to pack their proposals into fewer lines on the ballot.¹⁹³ When the 2018 CRC ballot proposals were finalized, several leading Florida newspapers carried editorials recommending a "no" vote on all of the bundled amendments simply on the principle that the CRC should be subject to the same single-subject restriction as the other methods of constitutional amendment.¹⁹⁴ Lawsuits were brought to strike the proposals from the ballot; this phenomenon had not occurred

189. See, e.g., Mary E. Adkins, Master Legal Skills Professor, Univ. of Fla. Levin Coll. of Law, Remarks to the Declaration of Rights Committee Regarding a Historical Overview of the CRC (Oct. 1, 2017).

190. See FLA. CONST. art. XI, § 2(c).

191. See, e.g., Elizabeth Koh, *Here Are the 12 Constitutional Amendments on Florida's 2018 Ballot and What They Do*, MIAMI HERALD (June 14, 2018 1:56 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article213043344.html>;

Jim Rosica, *Pam Bondi Says Certain Constitutional Amendments Can Be "Bundled"*, FLA. POL. (Aug. 21, 2018), <https://floridapolitics.com/archives/272353-pam-bondi-amendments-bundled>.

192. Kogan, *supra* note 40, at 884.

193. See, e.g., Koh, *supra* note 191; Rosica, *supra* note 191.

194. See, e.g., *Editorial: Just Vote No (Except for Amendment 4)*, TAMPA BAY TIMES (Oct. 30, 2018), <http://www.tampabay.com/opinion/editorials/editorial-just-vote-no-except-for-amendment-4-20181030/>.

in previous CRCs. The lawsuits against the CRC proposals will be discussed in more detail later in this Article.¹⁹⁵

Florida's resistance to comprehensive reform fits the pattern Kogan described but, in so resisting, Florida ensures that it will have no body short of a constitutional convention from which it will accept comprehensive reform. Kogan, in recognizing this trend, referred to it as "[t]he great irony" of state constitutional reform: "that, in an effort to win voter approval for broader constitutional revisions that went beyond standalone constitutional amendments, successful comprehensive reforms came to look a lot like the piecemeal amendments that these reforms were designed to avoid."¹⁹⁶

5. Vulnerability to Lobbying

The structure of the CRC does not protect CRC members from outside influences. Not only are potential employers free to apply political pressure on CRC members, but special interest groups can as well, and they have. Two examples from 1998 illustrate the power of political pressure.

The CRC was considering a proposal to reduce the size of Florida's cabinet, which, in addition to the term-limited Governor, then consisted of six officials elected statewide.¹⁹⁷ Their elected status meant that they had their own political constituencies, apart from the Governor—yet part of their job was to decide issues of statewide importance by meeting with the Governor as a cabinet.¹⁹⁸ The CRC's proposal would eliminate the elected positions of Secretary of State, Commissioner of Agriculture, and Commissioner of Education, combine the positions of Commissioner of Insurance and Comptroller into a new position called Chief Financial Officer, and retain the Attorney General.¹⁹⁹ Thus, the Cabinet would be reduced to only two positions: a Chief Financial Officer and Attorney General. The other positions would be appointed by the Governor,²⁰⁰ strengthening the historically weak Florida Governor.

195. See *infra* Section III.D.

196. Kogan, *supra* note 40, at 891; see also Gais & Benjamin, *supra* note 12, at 1300–03.

197. See FLA. CONST. art. IV, §§ 4, 5.

198. See FLA. CONST. art. IV, §§ 4, 6.

199. See FLA. CONST. REVISION COMM'N, 1997–98 JOURNAL, at 152, 220; *History of Proposals*, FLA. CONST. REVISION COMM'N. (May 5, 1998), <https://fall.fsulawrc.com/crc/proposals/history200.html>.

200. See FLA. CONST. art. IV, § 6; FLA. CONST. REVISION COMM'N, 1997–98 JOURNAL, at 227.

The Chair of the Executive Branch Committee tells a story that he was working in his office one day in the basement of the Historic Capitol when nineteen men walked in.²⁰¹ They represented Florida's largest agricultural interests: cattle, sugar, and citrus.²⁰² The Committee Chair reported the spokesman for the men threatened his livelihood unless he left the Agricultural Commissioner as an elected position.²⁰³ The chair resisted the political brute force of being threatened and reasoned with the men.²⁰⁴ But, more than twenty years later, Florida still elects a Commissioner of Agriculture.

The second example illustrates overtly political, rather than special-interest, pressure. In 1996, both houses of the Legislature had Republican majorities for the first time since the Reconstruction Era.²⁰⁵ Yet many of the CRC members realized that, no matter which party was in charge, gerrymandering was an ongoing problem. Therefore, a Republican former legislator proposed an amendment that would replace the legislative reapportionment process with an independent redistricting commission.²⁰⁶ This commission would take reapportionment out of the hands of the Legislature and leave it with a bipartisan board of non-elected people.²⁰⁷ The proposal had received the supermajority of twenty-two votes it needed to go on the ballot for adoption by the voters.²⁰⁸

Then the Legislature came back into the capital to begin its annual session. As Henderson and others told it, the Republican legislators could not abide the idea that finally, after wresting power from the Democrats

201. Telephone Interview with Carlos Alfonso, Member, Constitution Revision Comm'n 1997–98 (Dec. 15, 2015).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Florida House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Florida_House_of_Representatives (last visited Nov. 5, 2019); *Florida State Senate*, BALLOTPEDIA, https://ballotpedia.org/Florida_State_Senate#Historical_party_control (last visited Nov. 5, 2019).

206. *See* FLA. CONST. REVISION COMM'N, 1997–98 JOURNAL, at 240; *History of Proposals*, *supra* note 199.

207. *See id.*

208. *See* FLA. CONST. REVISION COMM'N, 1997–98 JOURNAL, at 215–16; Interview with Deborah Kearney, Assistant General Counsel, Constitution Revision Comm'n 1997–98, in Tallahassee, Fla. (July 22, 2015); Telephone Interview with Ellen Freidin, Member, Constitution Revision Comm'n 1997–98 (Aug. 26, 2015); Interview with Clay Henderson, Member, Constitution Revision Comm'n 1997–98, in Gainesville, Fla. (Feb. 11, 2017).

after 120 years, they would have to give it up for a neutral system.²⁰⁹ They lobbied the CRC members hard, applying both promises and threats. It was whispered that some of those who held elected office were threatened with campaign-fund blackballing; one CRC member whose priority was preserving Florida's environment was promised restoration of a dammed river in exchange for a vote change.²¹⁰

Apparently, as a result of the legislators' pressure, a majority of CRC members voted to hold a re-vote on the independent redistricting commission six days after the original vote to go on the ballot.²¹¹ On the re-vote, the independent redistricting commission failed to make the ballot by two votes.²¹²

In 2017–18, a lobbying group actually succeeded in providing the text for one of the amendments and in working with CRC members to garner the amendment enough votes to go on the ballot. That group was "Marsy's Law For Florida," a branch of a California-based organization, funded by billionaire Henry Nicholas.²¹³ The organization drafted "Marsy's Law" and provides lobbyists, presumably paid, to push for implementation of the law in several states. Representing Marsy's Law in Florida in 2017–18 was 1997–98 Florida CRC Member Paul Hawkes, who is employed with a Tallahassee lobbying firm.²¹⁴ It passed in Florida in 2018, and has also been passed as a constitutional amendment in Georgia, Illinois, Kentucky, Nevada, North Carolina, Oklahoma, and Ohio.²¹⁵ Efforts to have it pass in other states are underway.²¹⁶

Whether one believes lobbying is an evil to be avoided or an expression of free speech, the attempts to structure Florida's CRC to be free of the need to bow to political pressure have been futile.

209. See Interview with Deborah Kearney, *supra* note 208; Interview with Ellen Freidin, *supra* note 208; Interview with Clay Henderson, *supra* note 208.

210. See Interview with Clay Henderson, *supra* note 208.

211. See FLA. CONST. REVISION COMM'N 1997–98 JOURNAL, at 230.

212. See *id.* at 241.

213. See *About Marsy's Law*, MARSY'S LAW, https://www.marsyslaw.us/about_marsys_law (last visited Oct. 22, 2019).

214. See Jim Rosica, *Paul Hawkes Joins Buchanan Ingersoll Rooney's Lobbying Team*, FLA. POL. (May 26, 2016), <https://floridapolitics.com/archives/211477-paul-hawkes-buchanan-ingersoll>; Gary Blankenship, *Implementing Bill for Marsy's Law Goes Nowhere in Legislature*, FLA. BAR NEWS (May 21, 2019), <https://www.floridabar.org/the-florida-bar-news/marsys-law-update/>.

215. See *About Marsy's Law*, *supra* note 213.

216. See *id.* ("Currently, efforts are underway in Idaho, Iowa, Maine, Mississippi, New Hampshire, Pennsylvania, and Wisconsin.").

6. No Obligation to Reflect Citizens' Wishes

Although the CRC has few obligations under the Florida Constitution, holding public hearings is one of them.²¹⁷ Yet the CRC has no constitutional obligation to consider the public's input—or to do anything with it at all. All three of the CRCs held under Florida's 1968 Constitution have held public hearings before beginning their constitution-revision work. The 1977–78 CRC was on the tightest schedule of the three, because a court opinion deciding its actual starting date gave it little time to plan or hold hearings.²¹⁸ The 1977 hearings were held in a rush in a five-week period, and the CRC held its first working session the very next day.²¹⁹ The 1997–98 CRC held two rounds of public hearings, with the first a tour of Florida in which the CRC took submissions from the public as to which constitutional amendments members of the public would like to see.²²⁰ That CRC's rules then called for each of the several hundred proposals to be considered in an early plenary session; any proposal receiving at least ten votes would move forward, assigned to a CRC member as its sponsor.²²¹ That process was the basis for the 1997–98 CRC's amendments, although members could propose amendments other than those submitted by the public as well.²²²

In the spring and early summer of 2017, the 2017–18 CRC held fifteen public hearings in a grand round of Florida.²²³ Members of the public submitted 782 proposals on the CRC's website.²²⁴ But the 2017–18 CRC, in practice, advised that a member should sponsor a public proposal only if that member wished to use the exact language the member of the public had used.²²⁵ This restriction meant that the great majority of the

217. See FLA. CONST. art. XI, § 2(c).

218. See *In re Advisory Op. of the Governor Request of November 19, 1976* (Constitution Revision Commission), 343 So. 2d 17, 18 (Fla. 1977).

219. See CTR. FOR GOVERNMENTAL RESP., PUBLIC TESTIMONY BEFORE THE FLA. CONST. REVISION COMMITTEE 1 (1977).

220. See FLA. CONST. REVISION COMM'N 1997–98 MANUAL, back cover.

221. *Id.* at § 3.3.

222. *Id.* at § 3.35.

223. *Public Hearings*, CONST. REVISION COMM'N, <http://crc.law.fsu.edu/Meetings/PublicHearings.html> (last visited Oct. 22, 2019).

224. *Id.*

225. See Transcript of Public Meeting at 4–5, St. of Fla. Const. Revision Comm'n (Oct. 2, 2019), <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETINGS/TRANSCRIPTS/Transcript10-17-2017.pdf>.

publicly submitted proposals were not officially taken up by the CRC.²²⁶ Although many more concepts proposed by the public were considered, proposed, and argued by the CRC, the public perception was that the CRC ignored almost all of its suggestions.²²⁷ The optics were horrible.

7. Effective and Ineffective Use of Technology

Unlike any of the previous CRCs, the 2017–18 one had access to not only the World Wide Web, but also social media. While the 1997–98 CRC was cutting-edge for its time, posting committee and meeting information, member biographies, and transcripts of its plenary meetings online, the 2017–18 CRC used the easy and ubiquitous access to the web and social media to get its word out.²²⁸ It had a Facebook page that was regularly updated, and it had an elegantly designed, easy-to-use website that made its work reasonably accessible to anyone who wished to look.²²⁹ In fact, CRC members were often heard to remark that they received hundreds of e-mails weekly from the public on their CRC e-mail account.²³⁰

In some other ways, however, the 2017–18 CRC failed to use available technology. Members were required to attend meetings in Tallahassee, an eight-hour drive from Miami, in person unless they submitted in advance a documented reason to be absent; if the

226. See *Constitutional Revision Commission: Matches Between Public Proposals and Commissioner Proposals*, FLA. ST. U.: CONST. REVISION COMMISSION, <http://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCProposalMatches.pdf> (last visited Oct. 22, 2019).

227. See, e.g., Lloyd Dunkelberger, *Florida Constitution Commission Advances More Public Proposals*, NEWS 4 JAX (Oct. 17, 2017), <https://www.news4jax.com/news/florida/constitution-commission-advances-more-public-proposals>.

228. Compare FLA. CONST. REVISION COMM'N 1997–98, <https://fall.fsulawrc.com/crc/> (last visited Oct. 22, 2019), with FLA. CONST. REVISION COMM'N 2017–18, <https://crc.law.fsu.edu/index.html> (last visited Oct. 22, 2019). The official Florida Constitution Revision Commission Facebook page is no longer active but entering that search term on Facebook reveals that many groups and individuals posted about the CRC. See Search Results for “florida constitution revision commission”, FACEBOOK, https://www.facebook.com/search/top/?q=florida%20constitution%20revision%20commission&epa=SEARCH_BOX (last visited Oct. 2, 2019).

229. “Reasonably” accessible because not all of the materials for meetings were posted in advance of those meetings, and transcripts of committee meetings were often slow to appear. However, every CRC meeting, whether committee or plenary, was livestreamed on its website and on the Florida Channel. See *Constitution Revision Commission Video Library*, FLA. CHANNEL, <https://thefloridachannel.org/programs/constitution-revision-commission/> (last visited Oct. 22, 2019).

230. E.g., Interview with Hank Coxe, Member, Constitution Revision Comm'n 2017–18, in Tallahassee, Fla. (Jan. 26, 2018).

documented reason was medical, they were then allowed to appear by video.²³¹ When Hurricane Irma ravaged the entire Floridian peninsula on the weekend of September 10 to 11, 2017, the rules in place did not allow for absence and appearance by video due to damaged or destroyed homes, property, or roads.

C. Judicial Review of 2017–18 CRC Work: Interference by the Judicial Branch?

It has been correctly said that “the countermajoritarian nature of judicial review is never more apparent than when a judge strikes down a law that the electorate itself has made.”²³² The CRC was created to be independent from interference from the legislative and executive branches. In 2018, for the first time, it encountered interference from the judicial branch. The CRC submitted eight bundled amendments which contained twenty discrete constitutional changes to the Secretary of State on May 9, 2018.²³³ Within eight days the first lawsuit was filed challenging a proposed amendment. This was a novel development; no lawsuits had been filed against either the 1978 or 1998 bundled amendments by the CRC.²³⁴ How the court resolved the cases raises questions about when it should intervene in a CRC proposal and the standard of review used. Both the court’s asserted basis to intervene and the standard of review used in the 2018 CRC decisions fail to note that its legal analysis is lifted from cases on citizens’ initiatives and legislative proposals, whose laws have themselves have shifted over time.

The Florida Legislature had the sole authority to propose constitutional amendments or call a plenary constitutional convention before the 1968 revision. The Florida Supreme Court was historically

231. See *Rules of the Const. Revision Comm’n 2017–18*, FL. ST. U. §§ 1.17, 2.11, <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf> (last visited Oct. 22, 2019).

232. Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2756 (2005); see also Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1315–19 (2012) (favoring judicial review before elections).

233. See *Initiatives, Amendments, Revisions Database*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (search Year “2018”, Status “ALL”, Sponsor “Constitution Revision Commission”).

234. The court determined in an advisory opinion when the 1977 CRC would convene, but there was no litigation over CRC proposals. See *In re Advisory Op. of the Governor Request of November 19, 1976 (Constitution Revision Commission)*, 343 So. 2d 17, 23–24 (Fla. 1977).

wary of interfering with amendments proposed by the Legislature, intervening only in cases of clear illegality.²³⁵ The court affirmed its authority to do so, however, in a 1912 case holding its involvement was required because “such determination is necessarily required to be in a judicial forum where the Constitution provides no other means of authoritatively determining such questions.”²³⁶ There was no significant interference by the court in the legislative amendment process until it invalidated a 1955 attempt by the Pork Chop Legislature to tie a number of amendments together on an all-or-nothing daisy-chain.²³⁷ The then-existing 1885 constitution allowed proposed amendments only to a single article.²³⁸ The court found that the Legislature’s tying—in effect bundling—the amendments to different articles together so that either all would pass or all fail violated the single-article restriction.²³⁹ In a companion case, the court refused to invalidate another amendment on the basis that eliminating the daisy-chain amendments left the single, standalone amendment otiose.²⁴⁰ The court wrote:

This is the most sanctified area in which a court can exercise power. Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic law in proposing the amendment²⁴¹

The 1968 revision created three new ways to amend the constitution: by citizens’ initiative, by the recurring CRC, or by a plenary convention called by the voters or the Legislature.²⁴² Unusual for the Florida

235. *E.g.*, *Gray v. Moss*, 156 So. 262, 264 (Fla. 1934).

236. *Crawford v. Gilchrist*, 59 So. 963, 966 (Fla. 1912).

237. *See Rivera-Cruz v. Gray*, 104 So. 2d 501, 505 (Fla. 1958); *ADKINS*, *supra* note 63, at 23–24. Until 1982, the court decided cases brought on alleged unclear or misleading ballot summaries by local governments but never any cases regarding an amendment filed by the Legislature. *E.g.*, *Miami Dolphins Ltd. v. Metro. Dade Cty.*, 394 So. 2d 981, 987 (Fla. 1981); *Hill v. Milander*, 72 So. 2d 796, 797–98 (Fla. 1954) (en banc).

238. *See* FLA. CONST. art. XVII, § 1 (1885), *amended* by H.R.J. Res. 118, Reg. Sess. (Fla. 1947); *accord Rivera-Cruz*, 104 So. 2d at 502.

239. *See Rivera-Cruz*, 104 So. 2d at 505.

240. *See Pope v. Gray*, 104 So. 2d 841, 841–42 (Fla. 1958).

241. *Id.*

242. *See* FLA. CONST. art. XI, §§ 2–4 (1968) (providing the three revised ways to amend the constitution: by CRC, by citizens’ initiative, and by citizen-called convention, respectively).

Constitution, both the sections on the citizens' initiative and the citizens' call of convention have explicit language that the "power . . . is reserved to the people," thus making it plain that the power remains with the citizens and is not delegated to the state.²⁴³ The Legislature can also propose amendments, as before, but lost the power to convene a plenary convention.²⁴⁴ Citizens' initiatives alone have the limitation of keeping a single initiative to a single subject.²⁴⁵ The constitution provides that the amendment or revision other than an initiative "shall be submitted" at the next general election unless a supermajority of the Legislature votes for a special election on a single amendment.²⁴⁶ An initiative "shall be submitted" at the next general election if filed before February 1st of the election year.²⁴⁷ The proposed amendment must be published in a newspaper in each county twice: at ten and six weeks before the election.²⁴⁸

The Florida Legislature has promulgated additional laws governing the ballot process for amendments, including that all proposed amendments must contain a title to be printed on the ballot and a short precis describing the amendment.²⁴⁹ This analysis will concentrate on Florida cases dealing with the ballot summary and explanation, setting aside the multitude of cases on the single-subject requirement.²⁵⁰

Florida has used ballot summaries in lieu of the actual text of a proposed amendment since 1895.²⁵¹ While the full text is posted at each polling place, the abbreviated title and summary are all that appear on the voters' ballots.²⁵² The Florida Legislature has amended its ballot title

243. FLA. CONST. art. XI, §§ 3, 4(a).

244. Compare FLA. CONST. art. XI, §§ 1, 4 (1968) (providing the Legislature's ability to propose amendments and the people's power to consider a revision), with FLA. CONST. art. XVII, §§ 1-2 (1885) (providing the Legislature's ability to propose amendments and call for a convention).

245. FLA. CONST. art. XI, § 3.

246. FLA. CONST. art. XI, § 5(a).

247. FLA. CONST. art. XI, § 5(b).

248. FLA. CONST. art. XI, § 5(d).

249. FLA. STAT. § 101.161(1) (2019).

250. See generally Annotation, *Construction and Application of Constitutional or Statutory Requirement as to Short Title, Ballot Title, or Explanation of Nature of Proposal in Initiative, Referendum, or Recall Petition*, 106 A.L.R. 555 (2019) (listing updated coverage of all states' requirements).

251. Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS L. REV. 61, 146 n.465 (2002) (providing that the "summary of a proposed amendment, rather than its text, be printed on the ballot is a requirement that is over 100 years old").

252. See FLA. STAT. § 101.171 (2019).

and summary requirements sixteen times since 1968.²⁵³ Two amendments to those statutes and one constitutional amendment are relevant to this discussion of judicial review of CRC proposals. In an innocuous-appearing statute change in 1977, the Legislature required that all bodies proposing amendments, including plenary conventions and the CRC, submit a statement “of the substance of the amendment” directly to the supervisor of elections for placement on the ballot; however, initiative summaries were still prepared by the Department of State until 1979.²⁵⁴ In 1980, the Legislature again amended the statute, and required that the substance of the amendment (or other public measure, such as a local referendum) “shall be printed in clear and unambiguous language.”²⁵⁵ The submitting body would now also include a ballot title not exceeding fifteen words and an “explanatory statement” not exceeding seventy-five words.²⁵⁶ The explanatory statement would be “of the chief purpose of the measure.”²⁵⁷

In 1986, the Legislature proposed, and the voters adopted, a constitutional amendment expediting the review process that required the supreme court to review all proposed initiatives.²⁵⁸ That court has developed an extensive, if not always consistent, jurisprudence for ballot titles and summaries.²⁵⁹

Regarding its review of ballot titles and summaries, the court states that it only intervenes if “the record shows that the proposal is clearly and conclusively defective.”²⁶⁰ The ballot title and summary must inform

253. Refer to the legislative history accompanying FLA. STAT. § 101.161 (2019).

254. 1977 Fla. Laws 965. Initiative sponsors were required to submit the summary to the Department and approval by the Secretary of State beginning July 1979. 1979 Fla. Laws 1858 (codified as amended at FLA. STAT. § 101.161 (2019)); *see also* 1973 Fla. Laws 38 (requiring legislation proposing constitutional amendments to contain a summary of the amendment’s substance).

255. 1980 Fla. Laws 1342–43.

256. 1980 Fla. Laws 1343.

257. *Id.*

258. P.K. Jameson & Marsha Hoscak, *Citizen Initiatives in Florida: An Analysis of Florida’s Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 426 (1995).

259. *See* Patrick O. Gudridge, *Complexity and Contradiction in Florida Constitutional Law*, 64 U. MIAMI L. REV. 879, 886–87 (2010).

260. *Armstrong v. Harris*, 773 So. 2d 7, 11 n.9 (Fla. 2000) (citing *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982)); *see also In re Advisory Op. to Att’y Gen. re Referenda Required for Adoption and Amendment of Local Gov’t Comprehensive Land Use Plans*, 902 So. 2d 763, 765 (Fla. 2005) (noting in regard to initiatives, “the Court has *no authority* to inject itself in the process, unless the laws governing the process have been ‘clearly and conclusively’ violated” (emphasis added) (quoting *In re Advisory Op. to Att’y Gen. re Right*

the voter of the chief purpose of the amendment and must not mislead the voter.²⁶¹ The court, however, has not been entirely consistent on the source of its authority to police ballot titles and summaries for amendments proposed by the Legislature and CRC, much less a plenary convention.²⁶²

Two key opinions led to the 2018 decisions. In 1982 the Supreme Court of Florida, in *Askew v. Firestone*, invalidated a proposed legislative amendment based on a misleading ballot summary.²⁶³ The Legislature proposed amending a section of the constitution that restricts lobbying for two years by former legislators or statewide elected officials of their former governmental bodies.²⁶⁴ The Legislature's ballot summary stated that the change required financial disclosure during the two-year ban, implying the change made the prohibition more restrictive.²⁶⁵ In fact, the financial disclosure allowed former legislators to instantly lobby.²⁶⁶ The court immediately spotted the self-dealing flimflam, held the ballot summary misleading, and removed the proposed amendment from the ballot.²⁶⁷ The court relied for its authority to do so on the newly enacted 1980 version of section 101.161 of the Florida Code and its prior decisions with municipal referenda.²⁶⁸ Without citing any legal precedent, however, the court held that "[t]he requirement for proposed[] constitutional amendment ballots is the same as for all ballots . . ."²⁶⁹

The application of section 101.161 to all proposed amendments has mostly proceeded unchallenged. In fact, before 2000 only one reported attack occurred on the application of section 101.161 to proposed

to Treatment and Rehabilitation for Non-Violent Drug Offenses, 818 So. 2d 491, 498–99 (Fla. 2002))).

261. Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630, 635–36 (Fla. 2004).

262. Compare, e.g., *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (finding authority to review based on enforcing a statute), with *Armstrong v. Harris*, 773 So. 2d 7, 22 (2001) (finding authority to review implicit in the constitution's ballot accuracy requirement).

263. 421 So. 2d at 156.

264. *Id.* at 153.

265. *Id.* at 155–56.

266. *Id.*

267. *Id.*

268. *Id.* at 154–55.

269. *Id.* at 155.

amendments.²⁷⁰ There, the court merely recited one party's textbook attack against applying section 101.161:

The [sponsor] argues that it has fully complied with all the constitutional provisions, to date, of placing a proposed amendment on the ballot and it cannot constitutionally be prevented from doing so because of any failure, or alleged failure, to meet the additional statutory requirements of section 101.161. In the [sponsor's] view, the ballot summary, while useful, is not a bar to placing the proposed amendment on the ballot for voter consideration.²⁷¹

The court held it need not resolve this argument because it had already decided the ballot title and summary were proper.²⁷²

The second case on which the Supreme Court of Florida based its authority to rule on constitutional ballot summaries was the 2000 case of *Armstrong v. Harris*.²⁷³ In *Armstrong*, the court again confronted whether the ballot summary of a legislatively proposed amendment was misleading.²⁷⁴ The part receiving the court's attention was a forced linkage of Florida interpretations of "cruel and unusual punishment" to U.S. Supreme Court interpretations.²⁷⁵ In a four-to-three decision with two concurring opinions, the seven-member court held the title and summary were both misleading because they failed to inform the voter that the proposed amendment eliminated the more liberal "cruel or unusual" Florida standard in favor of a stricter "cruel and unusual" federal standard.²⁷⁶ The amendment, however, passed by a historically high seventy-two percent passage rate at the November 1998 election before the court began processing the case in 1999 and issuing its opinion in September 2000, thus invalidating an amendment already adopted.²⁷⁷

270. See Advisory Op. to Att'y Gen., Limitation of Non-Econ. Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988).

271. *Id.* at 287; see also Rutherford, *supra* note 251, at 150 n.495 (noting argument raised but not addressed by the court).

272. *Advisory Op. re Limitation*, 520 So. 2d at 287.

273. 773 So. 2d 7, 21–22 (Fla. 2000).

274. *Id.* at 10.

275. *Id.* at 16–18.

276. *Id.* at 18, 21 (emphasis added).

277. See SENATE STAFF, ANALYSIS AND ECONOMIC IMPACT STATEMENT TO SJR 124, Reg. Sess. (Fla. 2001); see also *Preservation of the Death Penalty; United States Supreme Court Interpretation of Cruel and Unusual Punishment*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=2> (last visited Oct. 2, 2019, 9:02 PM) (providing vote totals).

The State filed a supplemental brief arguing that the court lacked authority to invalidate an amendment already approved by the voters.²⁷⁸ Specifically, the Solicitor General contended that section 101.161, which required a ballot title and a clear and unambiguous ballot summary of fewer than seventy-five words, should not control the self-executing provisions for constitutional amendments.²⁷⁹ *Armstrong* is apparently only the second case to challenge the court's authority to intervene on title and summary issues. The court noted there was no argument that it lacked authority to review the amendment or that the issue was not justiciable.²⁸⁰ The court sidestepped the argument that section 101.161 could not control the self-executing constitutional provisions for amendments. In an expansive opinion, the court held that the Florida Constitution found its authority to invalidate a legislatively proposed amendment in an implicit accuracy requirement found in the constitution.²⁸¹ One dissenting justice denied that there is an "implicit" accuracy requirement in the constitution dealing with amendments.²⁸² One commentator has rightly questioned whether the cited constitutional section has an implicit accuracy requirement and wrote: "Pretty plainly, Florida judging drives the development of the ballot summary accuracy requirement."²⁸³

Five years later, the court tied together the two concepts of explicit statutory requirements with the implicit constitutional requirement by holding: "Section 101.161(1) is a codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution."²⁸⁴

While the court had not decided a case on an amendment proposed by the CRC before 2018, it has intervened in proposals originating from the Tax and Budget Reform Commission ("TBRC"), the second recurring body created in the constitution.²⁸⁵ Unlike the CRC, the TBRC has a limited constitutional mandate confined to issues of budget and finance, which led to a decision removing a proposed TBRC amendment on the

278. Brief for Appellants, *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) (No. 95,223), 1999 WL 33626552, at *5.

279. *Id.* at *5, *15.

280. *Armstrong*, 773 So. 2d at 10–11.

281. *Armstrong*, 773 So. 2d at 21 ("The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity.").

282. *Id.* at 26–27 (Wells, C.J., dissenting).

283. Gudridge, *supra* note 259, at 889.

284. Advisory Op. to Att'y Gen. re Referenda Required for Adoption and Amendment of Local Gov't Comprehensive Land Use Plans, 902 So. 2d 763, 770 (Fla. 2005).

285. FLA. CONST. art. XI, § 6.

grounds that it overstepped that authority.²⁸⁶ The Supreme Court of Florida upheld two other TBRC-proposed amendments against accuracy challenges, again with no challenges regarding either the court's ability to do so or the applicability of section 101.161 to ballot titles and summaries.²⁸⁷

Importantly, the Legislature, the CRCs, and the TBRCs may revise and bundle amendments to many parts of the constitution, and the Legislature and CRC may amend the entire constitution.²⁸⁸ The seventy-five word ballot summary is strained to convey "the chief purpose of the measure" in "clear and unambiguous language" when many items are bundled or the entire document revised.²⁸⁹

This constraint was apparently recognized by the Legislature. Immediately prior to the 2000 decision in *Armstrong v. Harris*, the Legislature selectively eliminated the ballot summary requirement for amendments proposed by the Legislature.²⁹⁰ Eleven years later in 2011, the Legislature reasserted that its proposed amendments or revisions must contain one or more ballot statements; that each ballot statement consisting of a ballot title does not exceed fifteen words; and that a ballot summary describing the chief purpose of the amendment or revision is in clear and unambiguous language.²⁹¹ No word limit was imposed.²⁹² The Legislature also gave itself the option to provide the actual text of the amendment or revision instead of a ballot summary; the supervisors of elections were commanded to modify voting machines to accommodate the full length of potential amendments or revisions by the end of 2013.²⁹³ In 2013, the Legislature backtracked and removed the full text option.²⁹⁴ It also limited itself to a seventy-five word ballot summary for a single

286. *Id.* at § 6(d); see *Ford v. Browning*, 992 So. 2d 132, 139–41 (Fla. 2008).

287. See *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008) (holding that the ballot title and summary for proposed Amendment 5 were misleading); *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 620–21 (Fla. 1992) (holding the ballot summary ambiguous and thus in violation of section 101.161).

288. FLA. CONST. art. XI, §§ 1, 2(c), 6(d); *Detzner v. Anstead*, 256 So. 3d 820, 823–24 (Fla. 2018) (*per curiam*).

289. FLA. STAT. § 101.161(1) (2019).

290. 2000 Fla. Laws 4035; accord *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 649 (Fla. 2010); *Sancho v. Smith*, 830 So. 2d 856, 859 (Fla. Dist. Ct. App. 2002); FINAL BILL ANALYSIS, H.R. 7013, 2013 Leg., at 7–8 (Fla. 2013).

291. 2011 Fla. Sess. Law Serv. 416–17 (West).

292. *Id.*

293. *Id.* at 624, 626 (adding presumption that full text option is a clear and unambiguous statement of the amendment).

294. 2013 Fla. Sess. Law Serv. 977 (West) (removing presumption that amendment is clear and unambiguous); FINAL BILL ANALYSIS, H.R. 7013, 2013 Leg., at 8 (Fla. 2013).

amendment or the first ballot summary of multiple amendments, with no specified word limit on the second or subsequent amendments.²⁹⁵ This sequence of events plainly expresses the recognition that seventy-five words may be insufficient for multiple amendments and opens the possibility that the Legislature may bundle multiple amendments in a take-it-or-leave-it revision.

There was no such word-limit flexibility for the 2018 CRC proposals. The five lawsuits filed in 2018 against CRC proposals were brought in the trial court in Leon County, the judicial circuit where the capital is located and assigned to three different trial judges.²⁹⁶ One trial judge upheld one proposed amendment;²⁹⁷ the two other trial judges struck four other amendments from the November 2018 ballot.²⁹⁸ All five trial court rulings were fast-tracked to the supreme court on appeal, bypassing the intermediate court of appeal. Unlike the citizens' initiative review, which occurs in the Supreme Court of Florida on original jurisdiction, a lower court had already ruled upon the accuracy of the amendments.²⁹⁹

The appeals proceeded on accelerated time schedules that did not permit the customary preparation by the parties or deliberation by the court, as the county supervisors of elections needed final ballot information in time to prepare ballots before early voting would begin. The court therefore imposed draconian time limits on briefing, oral argument, and rulings.³⁰⁰ The average time between the Florida

295. 2013 Fla. Sess. Law Serv. 977 (West).

296. See *Cty. of Volusia v. Detzner*, 253 So. 3d 507, 508 (Fla. 2018) (per curiam); *Dep't of State v. Fla. Greyhound Ass'n, Inc.*, 253 So. 3d 513, 517 (Fla. 2018); *Dep't of State v. Hollander*, 256 So. 3d 1300, 1301 (Fla. 2018); *Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803, 804 (Fla. 2018) (per curiam); *Detzner v. Anstead*, 256 So. 3d 820, 822 (Fla. 2018) (per curiam).

297. *Cty. of Volusia*, 253 So. 3d at 508.

298. *Greyhound Ass'n*, 253 So. 3d at 517; *Hollander*, 256 So. 3d at 1301; *League of Women Voters*, 256 So. 3d at 804; *Anstead*, 256 So. 3d at 822.

299. See Advisory Opinion to the Att'y General re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 902 So. 2d 763, 764 (Fla. 2005) (noting the initiative comes directly to the supreme court through the Attorney General).

300. Compare Order for Brief Schedule, 253 So. 3d 507 (Fla. 2018) (allowing eight initial days, six days to answer, and three days to reply), Order for Brief Schedule, 253 So. 3d 513 (Fla. 2018) (allowing eight initial days, six days to answer, and three days to reply), Order for Brief Schedule, 256 So. 3d 1300 (Fla. 2018) (allowing two initial days, one day to answer, and three days to reply), Order for Brief Scheduling, 256 So. 3d 803 (Fla. 2018) (allowing five initial days, two days to answer, and two days to reply), and Order for Brief Scheduling, 256 So. 3d 820 (Fla. 2018) (allowing five initial days, four days to answer, and three days to reply), with FLA. R. APP. P. 9.110(f) (allowing seventy days for initial brief), and FLA. R. APP. P. 9.210(f) (allowing thirty days for answer brief and thirty days for reply brief).

Supreme Court receiving the notice of the appeal and the filing of the initial brief in the five cases was approximately six days, and the average time between notice of the appeal and oral argument in the three cases argued was fifteen days.³⁰¹ The court, on average, issued rulings within forty-one days from the notice of appeal being filed. In all five cases the average time between the original filing of the lawsuit in the trial court and the Florida Supreme Court's ruling was eighty-nine days.³⁰²

It is of interest that, unlike the Florida Solicitor General's 2000 supplemental brief, no party in any of the five lawsuits ever raised at the trial or appellate level the issues of either justiciability over a self-executing constitutional process or the inapplicability of section 101.161 to the CRC proposals. The Florida Attorney General, the sole mandatory member of the CRC, was a party in four cases defending the CRC proposed amendments. The Attorney General never suggested that the CRC amendments could not or should not be reviewed by the courts.³⁰³ All the briefs filed in the litigation challenging the 2018 amendments assumed the validity of section 101.161, which required a ballot title and clear and unambiguous ballot summary of less than seventy-five words.

On appeal the court reversed three rulings that had struck amendments and restored them to the ballot.³⁰⁴ The court also sustained one ruling to maintain a proposal on the ballot.³⁰⁵ Therefore, four of the five challenged amendments were returned to the ballot for voting. The gravamen of all four cases were objections to bundling items and misleading summaries.³⁰⁶ The court concluded that the single-subject rule in the constitution did not apply to the CRC and that CRCs may

301. See *Online Public Docket*, FLA. CTS., <https://www.flcourts.org/Florida-Courts/Online-Public-Docket> (last visited Oct. 4, 2019).

302. See *id.*

303. Brief for Petitioner at 1–2, *Dep't of State v. Fla. Greyhound Ass'n, Inc.*, 253 So. 3d 513 (Fla. 2018) (No. SC 18-1287) (urging the court to apply the statute as a standard); Brief for Petitioner, *Dep't of State v. Hollander*, 256 So. 3d 1300 (Fla. 2018) (No. SC 18-1366); Brief for Petitioner, *Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803 (Fla. 2018) (No. SC 18-1368); Brief for Appellant, *Detzner v. Anstead*, 256 So. 3d 820 (Fla. 2018) (No. SC 18-1513).

304. *Fla. Greyhound*, 253 So. 3d at 525; *Hollander*, 256 So. 3d at 1311; *Anstead*, 256 So. 3d at 825.

305. *Cty. of Volusia v. Detzner*, 253 So. 3d 507, 513 (Fla. 2018) (per curiam).

306. *Id.* at 510–11 (rejecting arguments that the amendment title and summary were misleading); *Fla. Greyhound*, 253 So. 3d at 518–20 (rejecting arguments that the amendment title and summary were misleading); *Hollander*, 256 So. 3d at 1306, 1311 (rejecting arguments that the amendment title and summary were misleading and disregarding one party's objection to violating the single subject requirement); *Anstead*, 256 So. 3d at 823 (rejecting arguments that the amendments were bundled or that they had misleading summaries).

bundle dissimilar proposals; it also noted, accurately, that prior CRCs had bundled items.³⁰⁷ The court also acknowledged the CRC's plenary power to propose amending the entire constitution as a reason to allow bundling: "The power to amend the whole constitution in one proposal necessarily includes the lesser power to amend parts of the constitution in one proposal."³⁰⁸ In a concurring opinion in one case, three justices expressed their extreme dislike of bundling, especially for dissimilar proposals.³⁰⁹ Bundling may now be vulnerable if the bundle summary is determined to be misleading or insufficiently clear,³¹⁰ although the Legislature's 2013 changes may selectively remove this concern from legislative proposals. Bundling, therefore, can frustrate both deliberation of the proposing body and the understanding of the public debate over the proposal.

The court, however, also upheld a trial court ruling that had struck an education amendment from the ballot. In its opinion, styled *Detzner v. League of Women Voters of Florida*, the court repeated its conclusion that Section 101.161 is a codification of the implicit accuracy requirement; "otherwise, voter approval would be a nullity."³¹¹ It also repeated dicta from its *Armstrong v. Harris* decision on legislative amendments: that the accuracy requirement applies to all amendments, presumably even amendments from a plenary constitutional convention.³¹² The amendment struck from the ballot was broadly understood to allow the Legislature to establish charter schools separate from the locally based school districts. A four-member majority of the court concluded that the summary failed "to inform voters of [the] true

307. *Anstead*, 256 So. 3d at 823; *accord* Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d 235, 242 (Fla. 2015) (noting that only petition initiatives have the single subject restriction); *Charter Rev. Comm'n of Orange Cty. v. Scott*, 647 So. 2d 835, 837 (Fla. 1994) ("Only proposals originating through a petition initiative are subject to the single-subject rule.").

308. *Anstead*, 256 So. 3d at 824.

309. *Id.* at 825–28 (Pariante, J., concurring); *see also Hollander*, 256 So. 3d at 1312 (Pariante, J., dissenting). "A voter cannot intelligently cast his or her ballot if multiple issues of varying complexity and clarity are lumped together under one general amendment—especially when presented through defective ballot summary language." *Detzner v. League of Women Voters of Fla.*, 256 So. 3d 803, 816 (Fla. 2018) (Lewis, J., concurring).

310. *Cty. of Volusia*, 253 So. 3d at 512 ("It follows that the bundling of measures creates a defect only if the measures are presented on the ballot in a misleading way.").

311. *League of Women Voters*, 256 So. 3d at 807 (quoting *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000)).

312. *Id.* (citing *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000)).

meaning and ramifications” of the amendment.³¹³ Specifically, the court held the summary failed to inform the voters “who or what, other than district school boards, currently has the authority to establish public schools, which categories of public schools will be affected, and who or what will have the authority to establish future public schools” under the amendment.³¹⁴ Three of the justices forming the *Detzner v. League of Women Voters* majority retired from the court less than three months later under Florida’s then-mandatory retirement age of seventy.³¹⁵ The three-member dissent found the summary advised the public of the “constitutional status quo” that local school boards currently operate all schools.³¹⁶ The dissent argued that the summary then informed the voters that the amendment would allow local school boards to continue in that capacity but would also allow a separate category of schools to be created and operated outside of local school boards.³¹⁷

The court’s conclusion that the ballot summary was misleading was ironic given the effort put forth by the CRC on that issue. The Style and Drafting Committee studied the ballot summaries and engaged a “hall of fame group” of outside lawyers to review the proposed summaries.³¹⁸ The CRC rules allowed its Style and Drafting Committee to recommend the grouping of any related proposals.³¹⁹ The Chair of the Style and Drafting Committee explained the education changes were bundled to meet the seventy-five word limit.³²⁰ The full commission carefully debated the title

313. *Id.* at 809.

314. *Id.*

315. The 2018 proposed amendment, extending the mandatory retirement age, excluded judges or justices facing retirement in January 2019, as it provided it would not take effect until July 1, 2019. *Proposed Constitutional Amendments and Revisions for the 2018 Election*, FLA. DIVISION ELECTIONS (Jan. 1, 2019), <https://dos.myflorida.com/media/699824/constitutional-amendments-2018-general-election-english.pdf>. This amendment was adopted to the state constitution. See FLA. CONST. art. V, § 8.

316. *League of Women Voters*, 256 So. 3d at 817 (Canady, J., dissenting).

317. *Id.*

318. Transcript of Proceedings at 1, 6–7, 68–69, Const. Revision Comm’n (Apr. 16, 2018), [https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETING S/TRANSCRIPTS/Transcript03-20-2017.pdf](https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETING%20S/TRANSCRIPTS/Transcript03-20-2017.pdf). It is also interesting that Ballotpedia calculated that the Florida CRC’s proposals had the easiest readability level of ballot titles of the 167 statewide ballot measures in the nation. *Ballot Measure Readability Scores*, BALLOTPEDIA (2018), https://ballotpedia.org/Ballot_measure_readability_scores_2018.

319. FLA. CONSTITUTION REVISION COMM’N 2017–18 RULES § 5.4(2), <https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf>.

320. Transcript of Proceedings at 171–72, Const. Revision Comm’n (Apr. 16, 2018), [https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETING S/TRANSCRIPTS/Transcript03-20-2017.pdf](https://crc.law.fsu.edu/PublishedContent/ADMINISTRATIVEPUBLICATIONS/MEETING%20S/TRANSCRIPTS/Transcript03-20-2017.pdf).

and summary to the bundled education proposal and was assured that a number of legal experts had opined it met the standards.³²¹

Key assumptions supporting the majority *Detzner v. League of Women Voters* opinion may have gone unexamined during the harried CRC litigation cycle. One assumption is that section 101.161 applies to all proposed constitutional amendments. It is difficult to believe that the court would reach the same result if, instead of a CRC, this had been an extensive constitutional revision proposed by a citizen-called convention. There is the added practical problem of whether a substantial revision of the constitution can be summarized in seventy-five words and whether it is sound public policy to have voters decide on a major overhaul based on a short summary. Ballot integrity does not appear to be at stake, as the Legislature has exempted itself from the word limit for multiple items. Finally, it is questionable that the court would have authority to refuse the voters an opportunity to decide on the results of a plenary convention, and the CRC is not far removed from a plenary convention. Indeed, the CRC was designed to “impose a more orderly and stringent process for amendment of the 1968 constitution.”³²²

IV. SUGGESTED REFORMS

Public frustration with constitutional reform is nothing new.³²³ Voters mistrust not only their elected representatives but also members of what Gais and Benjamin have called the “government industry”: agency administrators, political party leaders, and “good government” advocates.³²⁴ Florida’s experience with its most recent CRC reflects this mistrust. The mistrust began with the realization that all of the major appointing authorities shared one political party, in a divided state; it continued when the great majority of the people actually appointed shared that same political party. The failure, at least on the surface, of the CRC members to adopt public proposals only made the mistrust worse. When the proposals were finalized, and the public saw that almost every proposal contained several individual amendments—an attempt, arguably, at providing comprehensive areas of constitutional reform—

321. *Id.* at 149–52.

322. *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 568 (Fla. 1980) (Sundberg, J., dissenting).

323. *See, e.g.*, Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 478 (2000).

324. Gais & Benjamin, *supra* note 12, at 1304.

the public reacted angrily. Accustomed to the single-subject restriction that applies to citizens' initiatives, members of the public and newspaper editorial-page writers accused the CRC of dishonesty.³²⁵

The framers of Florida's constitution envisioned a CRC with complete freedom and independence—but its brainchild has not been able to keep that promise. In light of not only the public frustration with attempts at constitutional reform, but also of the specific problems identified both in structure and in practice of Florida's CRC, this Article suggests some reforms that could help not only Florida but other state constitution commissions or conventions be more effective and more readily accepted by the public.

A. *Selection of Members*

A CRC or convention must, as a first step, have members who have the confidence of the public. A first step would be to ensure fair representation of the populace.³²⁶ The current system allows the party in charge complete control over appointees. Political disciples who care more for partisan advancement than for the long-term good of the state could be appointed. An official could appoint only people from one profession or trade, or from one geographical area. Citizens from the Florida Keys or the Florida Panhandle could find their region entirely unrepresented. And, as has happened consistently, a CRC could be dominated by members of one political party.

A CRC or convention should attempt to ensure bipartisanship by requiring that its membership reflect party and non-party affiliation patterns of the registered voters. In Florida, at the time of writing, that breakdown would be approximately 37.4% Democratic, 35.3% Republican, and 27.3% non-party-affiliated.³²⁷ In contrast, the 2017–18 CRC makeup, based solely on the party affiliations of the appointing authorities, was at least 89% Republican and no more than 11% Democratic.³²⁸ A fairly apportioned CRC in Florida in 2017 would have

325. *E.g., Editorial: Just Vote No (Except for Amendment 4)*, *supra* note 194.

326. *See Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964) (“[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.”).

327. *Voter Registration – By Party Affiliation*, FLA. DEP'T ST., <https://www.dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/> (last visited May 24, 2019).

328. It has been difficult to ascertain the party affiliation of every 2017–18 CRC member. Therefore, these calculations presume that each appointer chose members from his own party except that the Chief Justice, who has no party affiliation, chose three Democrats.

had fourteen Democrats, thirteen Republicans, and ten minor-party or non-party-affiliated members.

A fair apportionment could be required as an outcome, by allowing the currently authorized officeholders to retain their right to choose so long as they reach the outcome. This method, however, would require coordination among the appointing authorities. Alternatively, a fair apportionment could be approximated by adding minority-party appointers from each branch, adjusting the number of appointments each authority receives according to voter-registration patterns, and allowing those authorities to choose their allotted number freely.

While this adjustment would solve for party affiliation, it would not solve for geography. One solution would be to require that at least one member be chosen from each of the twenty judicial circuits throughout Florida. If thirty-seven members must represent twenty geographic areas, the risk of clustering in one area would be minimized. This method, too, would require coordination among the appointing authorities.

Other desirable controls might be for race, gender, age, professional background, or educational background. Interestingly, since the 1977–78 CRC women and minorities have been represented reasonably well, even without mandates: the 1977–78 CRC had a total of five women, three African-Americans (including one woman), and one Latino member. The 1997–98 CRC had a total of twenty-seven men and ten women; three African-American members, including one woman; and five Latino members, all men.³²⁹ The 2017–18 CRC had a total of twenty-two men and fifteen women; six African-American members, of which three were women; and five Latinx members, of which two were women.³³⁰ While some diversity has been accomplished voluntarily, no mechanism is in place to assure it. A fair-apportionment scheme similar to those mentioned by party affiliation might be a viable way to assure diversity.

The Governor's selection of the CRC Chair allows the Governor some control over the process as the executive officer of the state. Yet the process contains a weakness: not only may the Governor appoint a politically like-minded Chair, which is only to be expected, but may also

See supra text accompanying note 132. The percentages set forth in the text presume three Democrats, thirty-four Republicans, and no unaffiliated members.

329. *See Commissioners & Alternates 1997–1998*, FLA. ST. U.: FLA CONST. REVISION COMM'N, <https://fall.fsulawrc.com/crc/members.html> (last visited Oct. 2, 2019).

330. *See Commissioners*, FLA. ST. U.: CONST. REVISION COMMISSION 2017–2018 <https://crc.law.fsu.edu/Commissioners.html> (last visited Oct. 2, 2019).

appoint a Chair out of political patronage. Would a system in which the CRC members elect the chair avoid this potential or the appearance of it?

B. Advance Preparation

Florida's CRC is built into the constitution to occur on a regular basis. Similarly, in many states, constitutional conventions are built in at intervals. Therefore, these occurrences, though momentous, are anything but a surprise. They can be planned for. And, if they are to be an effective use of the members' time and the taxpayers' money, they should be planned for.

The best example of CRC planning in Florida's history is the 1997–98 CRC Steering Committee. The Governor, nearly one year before the CRC would convene, created by executive order a Steering Committee composed of the appointing authorities (with the exception that, instead of the Governor, the Governor's General Counsel attended and was Chair) and the Attorney General.³³¹ The group met regularly.³³² It set up a tentative set of rules, ensured the Legislature allotted money for the CRC, and tentatively decided what the committees should be.³³³ The result was that when it was time for the CRC to begin, it had at least a tentative structure in place. In contrast, in both 1977 and 2017, the CRC members took their seats with little to no planning having been done.³³⁴ In 1977, because the timing of the CRC itself was in question and the subject of a governor's request to the Florida Supreme Court for an advisory opinion, planning was difficult.³³⁵ In 2017, no reason existed to not plan.

Planning is better. At least CRC or convention members can have a place from which to start. Even if the budget is inadequate and the rules wrong-headed, the body has a starting point—and the benefit of a few people invested in the process who have had months to think about it.

331. Exec. Order No. 96-194 (Fla. 1996).

332. *Id.*

333. *Id.*

334. See *supra* text accompanying notes 145–46; Interview with Sherry Plymale, *supra* note 186; Interview with Jacqui Thurlow-Lippisch, Member, Const. Revision Comm'n 2017–18, and Carolyn Timmann, Member, Const. Revision Comm'n 2017–18, in Lake Buena Vista, Fla. (June 20, 2019).

335. See *supra* text accompanying note 218.

C. Timing of the CRC or Convention

The 1997–98 CRC’s agenda nearly fell apart when the Legislature convened before the CRC had finished its job. Yes, the CRC had voted to place matters on the ballot, but events convened to take some of those matters right back off because powerful legislators lobbied hard for that result. The CRC should meet at a time when the Legislature is not meeting. Even in an era when the Legislature is active year-round and communications are ubiquitous, it would benefit a CRC to not be actively meeting in the capital when the Legislature is also actively meeting in the capital.

D. Rule Creation

Constraining the CRC as to how it makes its rules—or what rules it makes—smacks of exerting too much influence on the independence of the CRC. Yet the examples of the 1977–78 CRC, in which proposals could reach the ballot on a mere fifty-percent-plus-one vote of the CRC membership and then failed to be adopted by the public,³³⁶ and the 2017–18 CRC, in which the committee-kill rule meant that most members never got to debate most constitutional proposals³³⁷—give us pause. Perhaps the CRC should be subject to a few limits on its rules, to ensure plenary debate on every proposal. After all, the CRC does not exist to pass laws, as a Legislature does. It exists to review and potentially alter the fundamental organizing document of state government.

E. Approval of Proposals

Despite the universal complaining by the public and the newspaper editorial boards about the bundling of CRC amendments, all of the seven proposals of the 2017–18 CRC that remained on the ballot passed comfortably by more than the 60% margin required by the Florida Constitution.³³⁸ Given the complaining and unpopularity, and editorials admonishing voters to defeat the proposals, this result may seem weird

336. See Transcript of Proceedings at 368, 386, Const. Revision Comm’n (Sept. 27, 1977); *Initiatives / Amendments / Revisions Database*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited Oct. 2, 2019).

337. See *supra* text accompanying notes 153–55.

338. FLA. CONST. art. XI, § 5(e); *Initiatives / Amendments / Revisions Database*, FLA. DIVISION ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited May 25, 2019).

for anyone who had been paying attention in Florida during the summer and fall of 2018. Should constitutional amendments be required to pass, not only by the overall 60% margin, but also by a wide geographical array of voters? Would sixty percent approval from each congressional district ensure that all Floridians, broadly speaking, actually approved an amendment? Or, more granular still, 60% approval from each of the twenty judicial circuits? The answer can lie only in the soul of a state. Does it honor the wishes of its citizens in numbers primarily, in accordance with *Baker v. Carr* and *Reynolds v. Sims*? Or does it demand that all regions approve, more apposite to the Electoral College?

F. Judicial Review: Create Time Schedule and Restrict Scope

Although the Florida Constitution contains no provision that would give courts the power to review the CRC's work, Florida's trial and appellate courts have assumed jurisdiction anyhow. Because that is already the case, Florida's constitution should provide rules for timing of court challenges and for jurisdiction, perhaps restricting the scope of judicial review over the work of a CRC.

G. Combining Proposals

It seems that a CRC should retain the ability to make comprehensive constitutional reform. But this kind of reform needs an understanding by the populace. As Kogan, Gais, and Benjamin have explained, voters tend to approve single-subject amendments and reject more comprehensive reform.³³⁹ In Florida in 2018, the ability of the CRC to bundle and combine related proposals was specifically questioned in lawsuits.³⁴⁰ Yet, the only readily available alternative is citizens' initiatives, which must be only about a single subject, leaving the CRC (and Florida's Taxation and Budget Reform Commission) as the only alternative to the Legislature or a full-blown convention. How can this gap be bridged? Can a campaign of public information designed to explain comprehensive constitutional reform help the public to gain confidence in future CRCs or conventions? Perhaps that end is worth pursuing.

339. Kogan, *supra* note 40, at 891; Gais & Benjamin, *supra* note 12, at 1291.

340. *E.g.*, *Detzner v. Anstead*, 256 So. 3d 820, 823 (Fla. 2018) (*per curiam*).

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H. Should the CRC Be Restricted to a Defined Standard as to What Is “Constitutional”?

Another point of resistance by the public to the work of the CRC has been the complaint that the proposals are simply policy items more suited to the work of a Legislature than to a CRC or convention.³⁴¹ Perhaps the CRC should be presented with a set of standards setting out the difference between what is “constitutional” and what is merely “legislative.” Or, perhaps Florida could siphon off some of the citizens’ desired policy reforms by creating a citizens’ initiative to pass statutes.

V. CONCLUSION

Constitution revision commissions have great potential as tools for comprehensive constitutional reform. Yet, as the Florida example shows, the very freedom and amorphousness of a plenary CRC can get in the way of its effectiveness. Restrictions that would ensure its political independence, though paradoxical in principle, may be a way to save the CRC and improve its effectiveness.

341. See e.g., *1/26/18 Constitution Revision Commission Ethics and Elections Committee*, FLA. CHANNEL, <https://thefloridachannel.org/videos/1-26-18-constitution-revision-commission-ethics-elections-committee/> (last visited Oct. 2, 2019).