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DEFINING A FAIR SHARE: THE PROPOSED REVISION TO FLORIDA'S CORPORATE PROFITS TAX

MIRANDA FRANKS AND WILLIAM McVEY SMITH

I. INTRODUCTION

A proposal to limit the scope of Florida's corporate profits tax¹ by constitutional amendment will be one of the issues presented to the voters in the November, 1978, general election.² This proposal³ is the Florida Constitution Revision Commission's response to a recent Florida Supreme Court opinion, *Department of Revenue v. Leadership Housing, Inc.*⁴ In *Leadership Housing*, the court held that Florida's 5% tax on the net income of corporations⁵ applies to all appreciation in the value of corporate property acquired prior to, but sold after, November 2, 1971⁶—the date on which Florida voters approved a constitutional amendment lifting the state's prohibition on taxation of corporate income.

1. FLA. STAT. ch. 220 (1977).

2. Twelve proposed revisions relating to finance and taxation will appear on the ballot as a single question, which reads:

REVISION NO. 7
REVISION OF ARTICLE VII AND ARTICLE X, §12(h)
FINANCE AND TAXATION

Proposing a revision of the Florida Constitution to provide that property owned by a municipality and held for municipal purposes shall be exempt from taxation; to extend the personal property tax exemption to all natural persons, and to extend to widowers the property tax exemption of not less than five hundred dollars; to provide for ad valorem tax exemptions for leasehold interests created prior to January 1, 1978 in government owned property; to provide that leasehold interests in government property leased for public purposes in connection with air, water or ground transportation may be exempt from taxation as provided by law; to permit adjustments to tax assessments relating to stock in trade and livestock, historic property and solar energy systems; to permit the revaluation of property every two years; to authorize the use of tax abatement and increment for redevelopment of slum and blighted areas; to provide that corporate income tax may not be levied against the appreciation of property value occurring prior to November 2, 1971; to permit an annual adjustment to the homestead exemption to maintain a constant value using 1979 as a base year and providing for replacement of revenues to local governments; to provide that state bonds may be used to finance water facilities and may be combined for sale; to provide that revenue bonds may only be issued for fixed capital outlay projects, to place limitations on revenue bonds and bond anticipation notes issued by local governments; and to provide that revenue bonds may be issued for housing and related facilities.

3. Fla. C.R.C., Proposal 140.

4. 343 So. 2d 611 (Fla. 1977).

5. FLA. STAT. § 220.11(2) (1977). Net income is defined in FLA. STAT. § 220.12 (1977).

6. 343 So. 2d at 615. The corporate profits tax applies to gains from the "sale, exchange, or other disposition of property." FLA. STAT. § 220.02(4)(a) (1977). For purposes of this note, the use of any one of these terms incorporates the others.

Proposal 140 is an attempt by the commission to negate the effect of *Leadership Housing* on sales of corporate property occurring after November 7, 1978—the date on which the proposal will be submitted to the voters.⁷ This proposal would, if approved, amend the Florida Constitution by adding, as a new subsection (c), the following language to article VII, section 5:⁸

No tax upon, or measured by, income shall be levied by this state, or under its authority, in respect of the unrealized appreciation in value of any property which occurred prior to November 2, 1971. Absent convincing evidence to the contrary, appreciation in the value of property shall be considered to have occurred ratably over its holding period.

[This section] shall take effect on November 7, 1978, and shall not reduce any tax liability in respect of taxable years ending prior to such date.⁹

The difference between the effect of *Leadership Housing* and the effect of Proposal 140 may be best understood through the use of a simple example. Assume Corporation X purchased 100 acres of Florida real estate¹⁰ on January 2, 1951, for \$100,000. Assume it sold the

7. Transcript of Fla. C.R.C. proceedings 235-36 (Jan. 24, 1978) (remarks of B.K. Roberts).

8. FLA. CONST. art. VII, § 5, presently provides:

SECTION 5. Estate, inheritance and income taxes.—

(a) NATURAL PERSONS. No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

(b) OTHERS. No tax upon the income of residents and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths (3/5) vote of the membership of each house of the legislature or as will provide for the state the maximum amount which may be allowed to be credited against income taxes levied by the United States and other states. There shall be exempt from taxation not less than five thousand dollars (\$5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states.

(c) EFFECTIVE DATE. This section shall become effective immediately upon approval by the electors of Florida.

9. Fla. C.R.C., Rev. Fla. Const. art. VII, § 5(c) (May 11, 1978). This language was originally proposed for addition to art. XII, § 7 as a new subsection (c). On March 6, 1978, the Style and Drafting Committee recommended, and the commission later approved, transfer of the language, without modification, to art. VII, § 5. Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 75 (Mar. 6, 1978).

10. The Florida corporate profits tax is actually a tax on the privilege of conducting business in Florida or being a resident or citizen of the state. The tax is *measured* by net gains received from the sale, exchange, or other disposition of all corporate property, both real and personal. FLA. STAT. § 220.11 (1977). In defining "income," the legislature referred merely to sale, exchange, or other disposition of "property." *Id.* § 220.02(4)(a).

same 100 acres on January 2, 1976, for \$200,000. Under the *Leadership Housing* rationale, the \$100,000 gain which Corporation X "realized"¹¹ from the sale would be subject to the 5% corporate profits tax. The state would then levy a tax of \$5,000.¹²

Under Proposal 140, Corporation X's \$100,000 profit would be prorated over the twenty-five years the corporation held the property prior to sale.¹³ The gain attributable to any period prior to November 2, 1971, the date the constitutional ban on corporate income taxation was lifted, would be excluded from taxation. In the case of Corporation X, \$80,000 (20 years X \$4,000 per year) would be exempt from the corporate profits tax. Only \$20,000—the net profit attributable to post-1971 years—would be taxed. Under Proposal 140, the state would levy a corporate tax of only \$1,000 on this particular sale.

The issue underlying Proposal 140, therefore, is whether the state should be allowed to reach back prior to the removal of the ban on corporate income taxation and tax the appreciation in value occurring while the ban was in effect. The questions raised by this proposal are largely ones of equity and popular intent. Thus, it is necessary to examine the relevant constitutional, legislative, and judicial history which served as the backdrop for the commission's deliberations on the corporate profits tax proposal. This note will analyze and assess the merits of Proposal 140 in light of the history of the Florida corporate profits tax and *Leadership Housing*.

II. THE FLORIDA CORPORATE PROFITS TAX—AN HISTORICAL PERSPECTIVE

In 1924 vast areas of Florida were uninhabited wilderness. Outside capital and new residents were needed for the state to grow and prosper.¹⁴ The mid-1920's was a boom period for the entire nation.¹⁵

11. The court used a tree-fruits analogy to illustrate its view of when income is "realized." Under this analogy, the fruit would be subject to taxation only after being picked from the tree—income would be realized only when the appreciation in value is severed from the underlying asset through sale, exchange, or other disposition. 343 So. 2d at 614.

12. For purposes of this example the mechanics of corporate profits taxation have been overly simplified. FLA. STAT. § 220.12 (1977) requires a determination of the taxpayer's "adjusted federal income." The term "adjusted federal income" is defined in § 220.13 and reflects specified additions and subtractions from the taxable income computed for federal income tax purposes. The first \$5,000 of a corporate taxpayer's net income is exempt from the state corporate profits tax. *Id.* § 220.14.

13. The proposal does not specify whether a daily, monthly, or yearly proration formula is to be used.

14. A 1923 editorial noted: "Capital is Florida's greatest need. Capital, applied to the development of natural resources, has made Florida what it is today. This has been largely outside capital. . . . We must continue to invite and attract this outside capital. Without

Florida was competing with other areas for the flow of investment dollars. In an effort to attract new residents and investors, the 1923 Florida Legislature proposed amending the state constitution to prohibit state income and inheritance taxes.¹⁶

In the months before the proposed amendment was placed on the ballot in the November, 1924, general election, business interests, chambers of commerce, civic groups, and the press campaigned intensively to ensure passage of the amendment.¹⁷ An insert which appeared on the front page of the *Miami Herald* on November 2, 1924, is representative of the views expressed in the state's newspapers of the day. The item stated:

If you wish to extend a cordial invitation to investors to come to Florida and make this state their permanent home, vote "YES" on the proposition to prevent the legislature from ever imposing taxes on inheritances and incomes.

A vote in favor of the amendment insures that your own income will not be taxed in this state and that a very large number of wealthy people will be induced to come to Florida where they will become heavy investors and large taxpayers, thus lightening your own tax burdens and, what is more, contribute to the more rapid development of the whole state.¹⁸

On November 4, 1924, Florida voters overwhelmingly¹⁹ approved the amendment to the state constitution prohibiting the Florida Legislature from levying any "tax . . . upon the income of residents or citizens of this State"²⁰

The absolute constitutional prohibition of a state income tax remained unchanged until 1968, when Florida voters approved the present constitution.²¹ The 1968 revision transferred the income and

it, our growth will be halted and our future hazarded." Tampa Morning Tribune, Apr. 13, 1923, § A, at 6, col. 2.

15. See generally R. HOFSTADTER, W. MILLER, & D. AARON, 2 THE AMERICAN REPUBLIC 395 (2d ed. 1970).

16. Fla. SJR 135 (1923), 1923 Fla. Laws 483.

17. See, e.g., Fla. Times-Union, Nov. 2, 1924, at 4, col. 1; St. Petersburg Times, Nov. 4, 1924, at 1, col. 4; Tampa Morning Tribune, Nov. 3, 1924, § A, at 1, col. 6.

18. Miami Herald, Nov. 2, 1924, § A, at 1, col. 2.

19. On the day following the referendum, the *Miami Herald* estimated that Florida voters approved the amendment by a five to one ratio. Miami Herald, Nov. 5, 1924, § A, at 2, col. 5. The *Florida Times-Union* estimated that the amendment carried by a six to one margin. Fla. Times-Union, Nov. 5, 1924, at 12, col. 3. The official count was 60,640 votes for the amendment, 14,386 against. General election voting records, Nov. 4, 1924 (on file with Fla. Dep't of State, Div. of Elections, Tallahassee, Fla.)

20. FLA. CONST. of 1885, art. IX, § 11 (1924).

21. Voters approved the 1968 revision to the Florida Constitution on November 5, 1968.

inheritance tax provisions from article IX, section 11, to article VII, section 5. In addition, the revision modified the absolute prohibition on income taxation by expanding a contingency provision applicable only to inheritance taxes since 1930. In 1930, a constitutional amendment had deleted the earlier absolute prohibition of inheritance taxes and merely prohibited the state from levying an inheritance tax in excess of the aggregate amount that Congress may allow to be credited against or deducted from any similar federal tax.²²

As approved by the voters in 1968, the new article VII, section 5, read:

No tax upon estates or inheritances or upon the income of residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.²³

The 1968 changes appear to have been presented to the public as "housekeeping" amendments to simplify the language and the application of the income and inheritance tax provision.²⁴ The press treated the revision very perfunctorily. The proposed change apparently generated no controversy.²⁵ Since Congress has not amended

22. FLA. CONST. of 1885, art. IX, § 11 (1930).

23. FLA. CONST. art. VII, § 5 (1968, amended 1971).

24. The reporter's official comments accompanying the 1968 revision of article VII, § 5, state:

This section continues the general prohibition against inheritance and income taxes which appeared in the 1885 Constitution, as amended

. . . . There are two principal changes. First, an income tax may now be levied subject to the same limitations which formerly applied only to estate and inheritances taxes, that is, it may be allowed up to the credit or deduction from other taxes levied. Second, the maximum limit set on the tax is the aggregate credits or deductions allowed not only on a similar tax levied by the United States but also taxes levied by any state.

D'Alemberte, *Commentary*, in 26A, FLA. STAT. ANN. 106 (West 1970).

25. For example, an editorial in the *Florida Times-Union* entitled *What's in the New CONSTITUTION (Articles V, VI, VII)* contained the following explanation of the proposed amendment without further comment: "ESTATE AND INCOME TAXES: Continues the prohibition upon income and inheritance taxes but adds income taxes to estate and inheritance taxes that may be levied if credited upon or deductible from federal income taxes and taxes of other states." Fla. Times-Union, Oct. 11, 1968, § A, at 6, col. 1.

The voters in the 1968 general election were presented with three revision proposals. The income tax revision was not presented as a separate question. Rather, it was included in the Basic Document Proposal, which read:

Proposing a revision of the Constitution of 1885, generally described as the Basic Document, embracing the subject matter of all of the Constitution except for Articles V (Judicial Department), VI (Suffrage and Elections), and VIII (Local Govern-

the Internal Revenue Code to allow a tax credit or a deduction for income taxes collected by the states, the effect of the pre-1968 total prohibition on the taxation of income was unchanged by the 1968 constitutional revision.

Largely as a result of the interaction between the constitutional prohibition on income taxation and the constitutional requirement of a balanced budget,²⁶ Florida became known as a sales-and-excise-tax state.²⁷ In years when expenditures were projected to exceed revenue, the state imposed additional direct consumer and property taxes as the only means of raising revenue sufficient to fund the cost of government. Imposition of a corporate income tax was not viewed as a serious alternative.

When Reubin O'D. Askew launched his campaign for Governor in 1970, Florida was facing a substantial shortfall in projected revenues for the 1971-72 fiscal year.²⁸ A news item in mid-January, 1971, reported that the state would need an additional \$250 million to finance that year's governmental programs.²⁹ In response to what he viewed as an unfair tax burden on consumers, Askew campaigned vigorously for a more equitable tax program in which large multi-state corporations would be required to contribute their fair share to the state's revenue funds for the privilege of doing business in Florida.³⁰ The tax reform issue dominated Askew's first gubernatorial campaign. Through numerous speeches and press releases, Askew presented his "Fair Share Plan" to the people.³¹ Voters re-

ment). Article V (Judicial Department) to be carried over from the present Constitution in its entirety.

Proposal reprinted in Miami Herald, Oct. 29, 1968, § D, at 7, col. 2.

26. FLA. CONST. art. VII, § 1(d). This provision mandates that the legislature provide for "raising sufficient revenue to defray the expenses of the state for each fiscal period." A similar provision has been in effect since the first Florida Constitution was adopted in 1838. See FLA. CONST. of 1838, art. VIII, § 2; FLA. CONST. of 1861, art. VIII, § 2; FLA. CONST. of 1865, art. VIII, § 2; FLA. CONST. of 1885, art. IX, § 2.

27. See Horwich, *Florida Taxation: A State in Chains*, 21 U. MIAMI L. REV. 36, 39 (1966).

28. In a 1971 advisory opinion, the Supreme Court of Florida took judicial notice of the substantial gap between the requested budget and the available revenue for the 1971-72 fiscal period. The court commented that the deficit could result in fiscal chaos unless resolved in an appropriate manner. *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971).

29. St. Petersburg Times, Jan. 17, 1971, § B, at 1, col. 1.

30. The emphasis which candidate Askew placed on tax reform is adequately documented in the press coverage of the 1970 campaign. The following items from the *St. Petersburg Times* are representative: *Askew: Poor Carry Tax Burden, Not Rich, Industry*, Aug. 13, 1970, § B, at 3, col. 1; *Askew Calls for 'Meaningful' Tax Reform*, Aug. 29, 1970, § B, at 12, col. 1; *Tax Loopholes Leak Millions, Askew Charges*, Sept. 2, 1970, § B, at 6, col. 1.

31. The major reform proposed in the plan was the enactment of a corporate profits tax. Johnson, *The Fair Share Plan—A Summary of the Corporate Profits Proposal* (Sept. 1, 1971) (unpublished staff report) (on file with Press Section, Office of the Governor, Tallahassee, Fla.).

sponsored by electing Askew Governor over the incumbent Governor, Claude Kirk.

Askew viewed his election as a mandate from the people of Florida for major tax reform.³² He set, as his first priority, implementation of his tax reform proposals.³³ In his 1971 inaugural address, Askew announced his decision to request an advisory opinion from the Florida Supreme Court on the question of whether the constitutional prohibition on the taxation of income protected corporations from this form of taxation.³⁴

The court responded to the Governor's request.³⁵ Six of the seven justices joined in an opinion which interpreted the term "residents and citizens" in article VII, section 5 of the constitution to apply to both natural and artificial persons.³⁶ Only Justice Richard Ervin expressed a contrary point of view.³⁷ Thus, the court concluded that the constitution did indeed prohibit taxation of corporate income.

The Governor called a special session of the legislature on January 27, 1971, three days after the court rendered its advisory opinion. In a proclamation to the house and senate on the opening day of the special session, Askew asked the legislature to approve a proposed constitutional amendment allowing a tax upon, or measured by, corporate income.³⁸ The house and senate had little difficulty agreeing on the language of a proposed constitutional amendment to be submitted to the voters that November. The legislature completed work on the proposed amendment on February 3, 1971.³⁹ An intensive nine-month campaign followed, pitting the Governor against business interests opposed to the amendment. In November, 1971, Florida voters approved the corporate tax amendment by a two to one margin.⁴⁰

With the way clear for the enactment of a corporate profits tax, Governor Askew called the legislature into special session on November 29, 1971, for the express purpose of enacting major tax reform

32. Proclamation by Gov. Reubin O'D. Askew to Joint Session of the Legislature (Nov. 29, 1971), reprinted in *FLA. H.R. JOUR.* 1, 7 (Spec. Sess. Nov. 29, 1971).

33. *Id.*

34. Inaugural Address by Gov. Reubin O'D. Askew at 1-add. 1 (Jan. 5, 1971) (on file with Press Section, Office of the Governor, Tallahassee, Fla.).

35. *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971).

36. *Id.* at 581. Justices joining in the per curiam decision were Chief Justice B.K. Roberts, Vassar B. Carlton, James Adkins, Jr., Joseph A. Boyd, Jr., David L. McCain, and Hal P. Dekle.

37. *Id.* at 581-84.

38. Proclamation by Gov. Reubin O'D. Askew to Joint Session of the Fla. Legislature (Jan. 27, 1971), reprinted in *FLA. H.R. JOUR.* 2, 4 (Spec. Sess. Jan. 27, 1971).

39. *FLA. H.R. JOUR.* 103 (Spec. Sess. Feb. 3, 1971).

40. *Fla. Times-Union*, Nov. 3, 1971, § A, at 1, col. 1.

legislation.⁴¹ On December 8, both houses of the legislature approved a conference committee report outlining the new Florida Income Tax Code.⁴² The Florida Income Tax Code became effective January 1, 1972. It imposes what is widely known as the Florida Corporate Profits Tax.

If the voters approve Constitution Revision Commission Proposal 140 in the November, 1978, election, the corporate profits tax will be applied more restrictively than it is currently applied. Therefore, it is necessary to examine the expressed intent of the legislature in enacting chapter 220, Florida Statutes, as a prelude to discussing *Leadership Housing* and the merits of Proposal 140.

III. CHAPTER 220—THE LEGISLATURE'S INTENT

During the November 29, 1971, special session, the legislature compromised on the provisions it wished to include in the Florida Income Tax Code. One issue upon which the house and senate disagreed was whether the code should offer taxpayers the option of using a formula to compute gain from the sale of property acquired prior to January 1, 1972.⁴³ Use of the formula would, in effect, equate the taxpayer's basis in the property with the fair market value of the property on December 31, 1971.

The house approved a version of the bill which included this valuation formula.⁴⁴ The senate, however, eliminated the formula in one of several amendments to the house bill.⁴⁵ The house, in turn,

41. Proclamation by Gov. Reubin O'D. Askew, *supra* note 32, at 1.

42. FLA. H.R. JOUR. 99 (Spec. Sess. Dec. 8, 1971); FLA. S. JOUR. 55 (Spec. Sess. Dec. 8, 1971); see A. England, Jr., *Corporate Income Taxation in Florida: Background, Scope, and Analysis*, in AN INTRODUCTION TO FLORIDA CORPORATE INCOME TAXATION 4 (FLA. ST. U.L. REV. ed. 1972), for a history of the legislative process which resulted in enactment of the Florida Income Tax Code, FLA. STAT. ch. 220 (1971).

43. The provision in controversy read:

(c) Capital transactions.

(1) At the election of any taxpayer . . . the gain or loss to be taken into account in the computation of gross income or taxable income for any taxable year with respect to any capital asset which has been acquired before January 1, 1972 shall be limited

a. to an amount which shall bear the same ratio to the gain or loss so taken into account as the number of months (or any fraction thereof) after December 31, 1971 shall bear to the number of months (or any fraction thereof) included in the taxpayer's holding period for such capital asset as determined under section 1223 of the Internal Revenue Code, or

b. to the gain or loss which would have been taken into account if the taxpayer's basis for such capital asset, as determined for federal income tax purposes, had been the fair market value of the capital asset on December 31, 1971.

Proposed § 220.13(1)(c), Fla. CS/HB 16-D (1971).

44. FLA. H.R. JOUR. 18 (Spec. Sess. Nov. 30, 1971).

45. FLA. S. JOUR. 23 (Spec. Sess. Dec. 1, 1971).

rejected all the senate amendments.⁴⁶ A conference committee, appointed to recommend a compromise position, recommended deletion of the formula.⁴⁷ Both houses of the legislature adopted the conference committee's report.⁴⁸

Although this legislative history indicates that in 1971 the legislature considered and deleted language which would have exempted from the corporate profits tax appreciation in property value occurring prior to December 31, 1971, the reason for the deletion is unclear. In April, 1972—four months after the legislature passed the Florida Income Tax Code—Arthur J. England, Jr., then Special Tax Counsel to the Florida House of Representatives, published a review and analysis of the legislature's deliberations over the corporate profits tax issue.⁴⁹ He wrote:

[A] proposal was considered to value all property as of December 31, 1971, for the purpose of prohibiting taxation on virtually all accruals or accretions of value prior to 1972. This proposal was rejected as being unnecessary to the Florida scheme of taxation, unduly difficult to administer since all types of property would have to be valued as of December 31, and undesirable from a revenue standpoint.⁵⁰

But comments by 1977-78 constitution revision commissioners who served as legislators during the 1971 special session are also of interest. For example, Commissioner Don Reed stated during commission debate on Proposal 140:

I participated in that bloc [which, if it had] withheld its votes . . . would have essentially killed [the] corporate profit tax.

. . . .
 . . . [N]one of those people, including myself, would have voted for that tax if [he] had any inkling that . . . a bureaucracy of the State would attempt to reach back prior to the effective date for the purpose of determining any kind of valuation on which to base a tax[.]⁵¹

46. FLA. H.R. JOUR. 52 (Spec. Sess. Dec. 6, 1971).

47. FLA. H.R. JOUR. 96 (Spec. Sess. Dec. 8, 1971); FLA. S. JOUR. 53-54 (Spec. Sess. Dec. 8, 1971).

48. FLA. H.R. JOUR. 99 (Spec. Sess. Dec. 8, 1971); FLA. S. JOUR. 55 (Spec. Sess. Dec. 8, 1971).

49. A. England, Jr., *supra* note 42.

50. *Id.* at 21.

51. Transcript of Fla. C.R.C. proceedings 225 (Jan. 24, 1978). *See also id.* at 226 (remarks of Kenneth Plante and James Kynes).

Although interesting, the subsequent explanations of persons who participated in the 1971 enactment of the corporate profits tax are not determinative on the issue of legislative intent.⁵² Instead we must look to the expression of intent approved by the legislature and incorporated into the Florida Income Tax Code.

Chapter 220 contains a lengthy exposition of legislative intent. Several of the intent sections are relevant to the discussions of *Leadership Housing* and Proposal 140 which follow. In part, section 220.02, Florida Statutes, provides:

(3) It is the intent of the legislature that the income tax imposed by this Code shall utilize, to the greatest extent possible, concepts of law which have been developed in connection with the income tax laws of the United States

(4) It is the intent of the legislature that the tax imposed by this Code shall be prospective in effect only. Consistent with this intention and the intent expressed in subsection (3), it is hereby declared to be the intent of the legislature that:

(a) "Income," for purposes of this Code, including gains from the sale, exchange, or other disposition of property, shall be deemed to be created for Florida income tax purposes at such time as said income is realized for federal income tax purposes;

(b) No accretion of value, no accrual of gain, and no acquisition of a right to receive or accrue income which has occurred or been generated prior to November 2, 1971, shall be deemed to be "property," or an interest in property, for any purpose under this Code; and

(c) All income realized for federal income tax purposes after November 2, 1971, shall be subject to taxation in full by this state and shall be taxed in the manner and to the extent provided in this Code.⁵³

In analyzing these statements of legislative intent, it is evident that one means of deriving "income" is to sell, exchange, or otherwise dispose of property. And yet the legislature expressly provided that no appreciation in value which occurred prior to November 2, 1971, may be deemed to be "property" or an interest in property for any purpose under the Florida Income Tax Code. Thus, when the statutory definition of "income" is considered in conjunction with the caveat regarding property values which accrued prior to Novem-

52. See *Gulf Power Co. v. Bevis*, 296 So. 2d 482, 486 (Fla. 1974); *Security Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939). See also 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 48.16, at 222 (1973).

53. FLA. STAT. § 220.02 (1977).

ber 2, 1971, it appears arguable at least that only the amount of gain attributable to post-November 2, 1971, appreciation was intended to be subject to taxation. This argument is supported by the statutory construction rule that specific provisions control more general provisions.⁵⁴ Here, the term "property" is used in the section defining realization of income. The statute then immediately defines "property," for purposes of the Florida Income Tax Code, to exclude accruals of gain generated prior to November 2, 1971. Therefore, although income may have been realized for federal tax purposes, the more specific provision defining property indicates that such realization does not generate income within the meaning of the Florida statute.

But the legislature included additional language which creates an ambiguity and makes an accurate interpretation of legislative intent difficult, if not impossible.⁵⁵ Section 220.02(4)(c) incorporates federal tax law concepts and provides that *all* income realized for federal tax purposes after November 2, 1971, shall be fully subject to taxation by the state.⁵⁶

All that seems clear after careful consideration of the expressions of legislative intent is that the intent section of the Florida Income Tax Code provides more questions than answers. It is uncertain from the language of section 220.02 whether the legislature intended the corporate profits tax to apply only to appreciation in value accruing after November 2, 1971, or whether the legislature intended to tax all gain derived from a post-November 2, 1971, sale, exchange, or other disposition of corporate property, regardless of when the appreciation in value accrued.

It is not surprising that even the participants in the 1971 tax

54. See 2A C. SANDS, *supra* note 52, § 47.19, at 112. This rule of statutory construction has been applied to tax statutes, including the Internal Revenue Code. See, e.g., *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

55. Assistant Attorney General Daniel C. Brown expressed a different view in a memorandum distributed to the commission's Finance and Taxation Committee members. He wrote:

The purpose for including Section 220.02, Florida Statutes, in the Income Tax Code is clear. The language of that section makes it clear that the tax imposed by Chapter 220 is in no way a tax upon the accrued value of property, but is rather a tax upon the income derived from the sale of property. Thus the clear intention of the legislature was to include all accretions to value, whether occurring [*sic*] before or after November 2, 1971, in the income taxable as capital gains, if such accretions to value were realized as income by sale of the property subsequent to November 2, 1971.

Brown, *Considerations in Regard to Proposal to Exclude Income Tax on Capital Gains Accrued but not Realized Prior to November 2, 1971 by Constitutional Prohibition 2-3* (Oct. 24, 1977) (memorandum presented to Fla. C.R.C. Finance and Taxation Committee) (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

56. FLA. STAT. § 220.02(4)(c) (1977).

reform special session have differing recollections of what the legislature intended. Therefore, perhaps it also is not surprising that neither the court in *Leadership Housing* nor the proponents of Proposal 140 in presentations to the commission found it necessary to rely on the murky expression of legislative intent contained in chapter 220 for their respective interpretations of the scope of the corporate profits tax. As will be discussed in the following sections of this note, the court chose to focus on the expediency and consistency offered by the federal definition of "income." In contrast, the advocates of Proposal 140 relied on what they presumed to be the intent of the voters who adopted the 1924 constitutional prohibition of income taxation.

IV. *Leadership Housing*—THE COURT'S INTERPRETATION OF CHAPTER 220

*Department of Revenue v. Leadership Housing, Inc.*⁵⁷ provided the impetus that eventually resulted in Proposal 140. In that case, two corporations maintained they owed taxes on only a portion of the gain received when they sold property in 1972 and 1973. The Department of Revenue sought to tax the full amount of the gain. The corporations, *Leadership Housing, Inc.* and *Leadership Communities, Inc.*,⁵⁸ had purchased the property between 1924 and 1971. The taxpayers' position was that no corporate income tax could be imposed on appreciation occurring prior to removal of the constitutional ban on taxation of corporate income on November 2, 1971.⁵⁹

The Florida Department of Revenue maintained that the entire gain realized was subject to the tax, including appreciation that had accrued prior to the date on which the voters approved the constitutional amendment permitting the tax.⁶⁰ Facing similar problems with other property purchased prior to 1971,⁶¹ the corporations filed an action in Broward County Circuit Court seeking an interpretation of the statute.⁶²

The trial court granted summary judgment in favor of the taxpayers on the grounds that the constitutional prohibition of an income

57. 343 So. 2d 611 (Fla. 1977).

58. *Leadership Housing, Inc.* is a Delaware corporation with its principal place of business in Broward County, Florida. *Leadership Communities, Inc.* is a Florida corporation with its principal place of business in Broward County, Florida.

59. Brief of Appellees at 11, *Department of Revenue v. Leadership Hous., Inc.*, 343 So. 2d 611.

60. Brief of Appellant at app. 2-3, *Department of Revenue v. Leadership Hous., Inc.*, 343 So. 2d 611.

61. *Id.* at 3.

62. Brief of Appellant, *supra* note 60, at 1.

tax prohibited taxing increases in the value of property occurring prior to November 2, 1971, regardless of the date the increases were realized by sale or exchange.⁶³ The court concluded that the 1924 constitutional prohibition prevented the 1971 legislature from passing a retroactive taxing statute. According to the court, the statute's retroactive operation constituted an impairment, without due process of law, of rights constitutionally vested, thereby violating the fourteenth amendment to the United States Constitution as well as article I, section 9 of the Florida Constitution. The court held that the tax could be imposed only upon appreciation occurring after November 2, 1971, and allowed the taxpayers to deduct from the gain realized on the sale of the property an amount equal to the fair market value of the property on that date.⁶⁴

On appeal to the Florida Supreme Court,⁶⁵ the Department of Revenue argued that the time of actual appreciation was irrelevant and that the tax was not retroactive because it was not imposed until income was realized.⁶⁶ The department also argued that, since no tax is imposed until a gain is realized, the taxpayer controls his own tax liability.⁶⁷ Relying on a 1919 United States Supreme Court case, *Eisner v. Macomber*,⁶⁸ the department maintained that a "sale or exchange at a gain is the event upon which the incidence of tax is made to depend."⁶⁹

In contrast, the taxpayers asserted that the constitutional prohibition of income taxation, in effect between 1924 and 1971, was intended to apply to "income" in the broadest sense of the term.⁷⁰ They conceded that construction of the term "income" to include appreciation in value would permit the legislature to tax such appreciation as it accrues but assumed the legislature would refrain from doing so.⁷¹ The taxpayers asked that property acquired prior to 1971 be given a basis equal to the fair market value at the time the constitutional prohibition of income taxation was removed.⁷² Since gain realized is computed by taking the excess of the price received from a sale or other disposition of property over the tax-

63. 343 So. 2d at 613.

64. *Id.*

65. FLA. CONST. art V, § 3(b)(1) authorizes direct appeal to the Florida Supreme Court from any trial court decision initially and directly passing on the validity of a statute.

66. Brief of Appellant, *supra* note 60, at 12, 23.

67. *Id.* at 13. According to the appellant, a taxpayer may choose either to incur tax liability by completing a sale or to avoid taxation by retaining ownership of the property.

68. 252 U.S. 189 (1919).

69. Brief of Appellant, *supra* note 60, at 14.

70. Brief of Appellees, *supra* note 59, at 11, 17-27.

71. *See* 343 So. 2d at 613.

72. *Id.* at 614.

payer's basis in the property,⁷³ this adjustment in basis would provide a method of taxing only the appreciation occurring between 1971 and the date of sale.

In reversing the trial court, the Florida Supreme Court based its decision solely "on the meaning of income with respect to capital appreciation."⁷⁴ The court upheld the constitutionality of the statute and held that "appreciation in value of a capital asset is not income until it is realized from a sale, exchange or other disposition of the asset"⁷⁵ Thus, since the taxpayers received no "income" during the time that the constitutional prohibition was in effect, there was nothing improper about taxing the entire amount of appreciation after it was converted into "income" at the time of sale.

The court began by acknowledging that various scholars have disagreed as to whether capital appreciation is income to the owner of the property as the appreciation accrues and as to whether the appreciation may be taxed as it accrues without violating any federal constitutional prohibitions.⁷⁶ The court refused to hold that appreciation constitutes income as the appreciation accrues, stating that such a holding could create tax liability for many taxpayers.⁷⁷ The court chose not to elaborate on how such a liability might occur. Presumably, however, such a holding would impose no liability unless and until the legislature decided to levy a tax on the appreciation, without regard to whether the income was realized.

The court next discussed the taxpayers' claim that bases in assets acquired prior to 1971 should be readjusted to reflect value in 1971. Again the court said that such a holding would impose a liability on many taxpayers. "The practical effect of the judicial decision asked for by the appellees," the court noted, "could require a downward valuation of assets which had depreciated, imposing greater tax liability on some taxpayers."⁷⁸ Justice Overton, for the majority, explained that the basis adjustment asked for by the tax-

73. See generally I.R.C. § 1001.

74. 343 So. 2d at 614.

75. *Id.* at 612.

76. *Id.* at 613-14. The court cited for comparison: Lowndes, *Current Conceptions of Taxable Income*, 25 OHIO ST. L.J. 151 (1964); Mullock, *The Constitutional Aspects of Realization*, 31 U. PITTS. L. REV. 615 (1970).

77. 343 So. 2d at 614.

78. *Id.* This effect can be illustrated by the following example: Assume that taxpayer A purchased an asset in 1924 for \$100. Assume that by 1970 the asset had depreciated in value to \$50 and was finally sold at that price in 1975. The taxpayer's basis in the property would be adjusted from \$100 to \$50—the fair market value of the asset in 1971. Thus, although A would have suffered a \$50 economic loss, he would receive no deduction for the loss because his basis and amount realized would be equal. See I.R.C. § 1001.

payers was unlike those allowed under some federal tax sections which adjust the basis to the greater of cost or fair market value.⁷⁹ This construction would eliminate the problem that the court thought would be created by a strict fair market value adjustment. But in holding the statute constitutional, the court was not required to determine the basis issue. As the rationale for its holding, the court accepted the appellant's position that capital appreciation is not "income" until it is severed from the capital asset and the taxpayer enjoys some economic benefit.⁸⁰

Distinguishing various United States Supreme Court cases that have expanded the meaning of sale or exchange, thereby expanding the meaning of income realization, the court stated that "[n]o assertion is made in these cases that appreciation in and of itself is taxable."⁸¹ This statement typifies the fundamental misconception in the court's analysis, namely, that the term "income" within the meaning of the Florida constitutional prohibition and the term "income" with respect to realization and imposition of the tax must necessarily have identical definitions.

The fundamental issue in the case should have been whether the term "income" in the constitutional prohibition included capital appreciation, not whether capital appreciation constitutes income generally. Had the court narrowed its analysis to this issue, it could have avoided entirely the issue of whether capital appreciation may constitutionally be taxed and also could have avoided entirely the doctrine of realization.⁸² If the constitutional prohibition was meant

79. 343 So. 2d at 614.

80. *Id.* The court expressly approved the definition of "income" developed in *Eisner v. Macomber*, 252 U.S. 189 (1919).

81. 343 So. 2d at 614.

82. It is interesting to note that the court's "realization" analysis appears to have led to some confusion in a recent Florida Supreme Court case involving capital gains for which recognition was deferred pursuant to I.R.C. § 1033. In *S.R.G. Corp. v. Florida Dep't of Revenue*, No. 52,491 (Fla. June 30, 1978), 27 FLA. L.W. 326 (Fla. July 7, 1978), the taxpayer received a condemnation award in 1963 but elected to defer recognition of the gain realized by reinvesting the amount received in similar property in 1965, pursuant to I.R.C. § 1033. The taxpayer's basis in the new property was equal to his basis in the old property, as provided by § 1033.

When the taxpayer sold the new property in 1975, he paid federal income tax on the entire gain realized—the excess of the price received over the basis in the old property. I.R.C. § 1001. The taxpayer asserted, however, that for purposes of the Florida tax, only that portion of the gain equal to the excess of the price received from the sale over the amount received in the condemnation award was subject to taxation. The taxpayer claimed that it had "realized" gain at the time of the condemnation award; thus, the realization of gain occurred at a time when the constitution prohibited taxation of corporate income.

A majority of the Florida Supreme Court agreed, stating that realization of gain is the event which brings the gain within the constitutional prohibition, regardless of recognition. Justice England, who had recused himself from the *Leadership Housing* decision at the taxpayers' request because of his involvement in drafting the corporate profits tax legislation, see De-

to envelop capital appreciation within its protection, then the issue of when a tax may be imposed on capital appreciation, absent a state constitutional ban, becomes irrelevant.

Justice B.K. Roberts attempted to make this distinction in his dissenting opinion.⁸³ His analysis focused on whether capital appreciation was constitutionally immune from tax during the period in which the prohibition was in effect. In stating that such appreciation was immune from tax, Justice Roberts noted that it is immaterial that the sale or exchange triggering the imposition of the tax occurred after 1971.⁸⁴ In support of his position, he stated that when the voters approved the constitutional prohibition of income taxation in 1924, they were familiar with the federal income tax law which imposed "a tax on income 'from all sources,' including 'gains or profits and income derived from any source whatever.'"⁸⁵ According to Justice Roberts, "[I]t cannot be doubted that, in adopting the constitutional prohibition against income taxes, the people of this state intended to prohibit the taxation of increases in capital assets, as well as other gains and profits, as income."⁸⁶ He viewed taxing gains which accrued during the constitutional ban on income taxation as a breach of faith:

To break faith with those corporations (and with natural persons, should the people of this state ever see fit to repeal the income-tax prohibition altogether) who invested their capital in this state in reliance on that constitutional covenant would unquestionably be morally wrong and, in our opinion, legally impermissible as violative of the manifest purpose and intent of the 1924 income-tax prohibition and the constitutional rights therein guaranteed.⁸⁷

Only Justice Adkins concurred in the dissent.

Dissatisfied with the court's decision, the taxpayers decided to present the issue to the Florida Constitution Revision Commission.

partment of Revenue v. Leadership Hous., Inc., 322 So. 2d 7 (Fla. 1975), wrote a dissenting opinion more appropriate to the court's reasoning in *Leadership Housing*. Justice Sundberg joined in this dissent, which emphasized the basis adjustment involved in deferring recognition of gain. Since the basis in the new property was identical to that of the old, the gain realized upon sale of the new property included the deferred gain as well as the subsequent appreciation. Therefore, the dissent stated, since the deferred gain and subsequent appreciation were both realized at a time when there was no longer a constitutional prohibition on taxation, the entire gain should be subject to the Florida corporate profits tax. No. 52,491, slip op. at 13-14.

83. 343 So. 2d at 616 (Roberts, J. [retired], dissenting).

84. *Id.* at 616-17.

85. *Id.* at 618 (quoting a 1913 federal income tax law).

86. *Id.* at 618.

87. *Id.*

The next section of this note traces the history of Proposal 140 before the commission.

V. PROPOSAL 140—THE COMMISSION'S RESPONSE

Proponents of a constitutional amendment to limit the reach of Florida's corporate profits tax first presented their views to the Florida Constitution Revision Commission in public hearings held on February 21-23, 1978. The commission heard testimony both for and against an amendment to limit the scope of Florida's corporate profits tax constitutionally.⁸⁸ On September 28, 1977, commissioners voted to include the corporate profits tax issue in the list of suggestions from the public that would receive further consideration.⁸⁹ The issue was formally introduced as "Proposal 140."

The Finance and Taxation Committee considered Proposal 140 on November 14, 1978.⁹⁰ Representatives of Associated Industries of Florida, an influential lobbying group for business interests, presented arguments in favor of the proposal.⁹¹ One speaker, Martha Barnett,⁹² traced for committee members the constitutional, legislative, and judicial history which prompted the introduction of Proposal 140. Her arguments in favor of the proposal, in large part, focused on the equitable considerations involved. She stated:

In 1924, the people limited the power of the Legislature by prohibiting an income tax. That limitation remained in effect for 47 years, until 1971, when the people through a constitutional amendment, partially lifted it as it applied to corporate income. To now say that the Legislature can "look back" and capture the income it constitutionally could not touch, is a violation of our basic concept of fair play and due process.⁹³

Barnett argued that the voters in 1924 viewed "income" in the

88. University of Florida Center for Governmental Responsibility, Public Testimony Before the Florida Constitution Revision Commission, Summaries of Points Raised at Hearings February 21, 22, and 23, 1978, at 41 (Mar. 2, 1978) (part of official C.R.C. record on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

89. Fla. C.R.C., Constitution Revision Commission Issue List (List of 232) 16 (Sept. 28, 1977).

90. Members of the Finance and Taxation Committee were: Commissioners Plante (chairman), Burkholz, Ausley, Platt, N. Reed, Thayer, Ware, Gardner, and DeGrove.

91. Fla. C.R.C., Finance and Taxation Committee, tape recording of proceedings (Nov. 14, 1977) (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

92. Attorney representing Consolidated-Tomoka Land Company.

93. M. Barnett, Remarks Given by Martha W. Barnett on Behalf of Consolidated-Tomoka Land Company Before the Fla. C.R.C. Finance and Tax Committee 5 (Nov. 14, 1977) (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) [hereinafter cited as Excerpts of Remarks by Martha Barnett].

broadest sense of the term and that they intended to prohibit taxation of increases in value as well as gains and profits realized.⁹⁴ No one presented formal statements in opposition to the proposal. Committee members questioned the speakers on the proposal's fiscal impact⁹⁵ and queried whether the issue might more appropriately be a legislative rather than a constitutional matter.⁹⁶ Apparently persuaded by the proponents' arguments, the committee endorsed the proposal by a vote of five to one and sent it to the commission for debate.⁹⁷

Commissioner Kenneth Plante was the chief proponent of Proposal 140 during floor debate. His arguments highlighted the same equitable considerations raised before the Finance and Taxation Committee and in Justice Roberts' *Leadership Housing* dissent.⁹⁸ Commissioner Plante stated: "I think . . . that the legislature has broken faith . . . with the people of the State of Florida."⁹⁹

94. *Id.* at 7.

95. The fiscal impact which Proposal 140 will have if approved by the voters cannot be accurately determined. See Letter from Harry L. Coe, Jr., Executive Director, Fla. Dep't of Revenue, to Talbot D'Alemberte, Chairman, Fla. C.R.C., with attached staff report by Dep't of Revenue on fiscal impact of Proposal 140 (Dec. 21, 1977) (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). The attachment regarding Proposal 140 states:

In order to determine the fiscal impact of this proposal, the following factors would be necessary:

1. Cost basis of all property held by corporate taxpayers which was acquired prior to November 2, 1971.
2. Date of acquisition for each piece of property acquired prior to November 2, 1971.
3. Date of sale or other disposition of property which was acquired prior to November 2, 1971, and disposed of after November 7, 1978.
4. Dollar amount of all sales or other dispositions of property acquired prior to November 2, 1971, and sold after November 7, 1978.

The attachment to Coe's letter also contains the following information on the potential fiscal impact of Proposal 140:

During the period of time the *Leadership Housing* case was in litigation . . . the Department denied 412 claims for refund totaling \$15,673,285 and made approximately twenty assessments for additional tax totaling \$2,870,008. All of these claims and refund denials represent the tax . . . on the appreciation of property prior to November 2, 1971. This represents approximately ½ of one percent of the number of corporate income tax filers, and gives some indication of probable consequences.

96. Commissioner Jan Platt, the only committee member to vote against Proposal 140, indicated that she did so because, in her view, the matter more properly belonged with the legislature. Fla. C.R.C., Finance and Taxation Committee, tape recording of proceedings (Nov. 14, 1977) (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

97. Committee members voting for the proposal were Burkholz, N. Reed, Thayer, Ware, and Gardner. Commissioner DeGrove did not attend the meeting.

98. Transcript of Fla. C.R.C. proceedings 213-51 (Jan. 24, 1978) (remarks of Kenneth Plante).

99. *Id.* at 221.

B.K. Roberts, in his role as a member of the commission, reiterated many of the points he made in his *Leadership Housing* dissent. He argued that a constructive fraud had been perpetrated on the people who were induced to invest and settle in Florida as a result of the 1924 constitutional ban on income taxation.¹⁰⁰

Speaking in opposition to the proposal, Commissioner Overton, author of the majority opinion in *Leadership Housing*, pointed out that in 1971 the legislature had rejected the proposal the commission was considering. "It can be presented to the legislature again," Overton said. "It . . . should not be a subject for concern of [this Commission]."¹⁰¹

Commission Chairman Talbot "Sandy" D'Alemberte also spoke in opposition. He said that the legislature has the staff and facilities to determine more accurately the implications of the proposal.¹⁰² The chairman also addressed the breach of faith issue. He stressed that prior to 1971 the constitution did not refer to persons or corporations. It referred only to citizens and residents. According to D'Alemberte, who was a member of the legislature when the corporate tax was enacted, "there was considerable doubt until 1971 as to whether or not there was any constitutional prohibition against taxation of corporate property There was no Constitution holding out to corporations there would be no taxation. We didn't know what the law was until 1971"¹⁰³ Implicit in his remarks was the argument that, since there was no assurance that the income tax prohibition applied to corporations, there had been no breach of faith.

Ultimately, the commission approved Proposal 140 by a vote of twenty to eleven.¹⁰⁴

Before completing its work, the commission decided not to submit Proposal 140 and the other finance and taxation issues to the voters as separate items on the November ballot. Instead, the commission incorporated all finance and taxation issues in a single proposal for presentation to the voters.¹⁰⁵ Included in this proposal are several

100. *Id.* at 233.

101. *Id.* at 230.

102. *Id.* at 246.

103. *Id.* at 248.

104. *Id.* at 251 (announcement of vote on final passage). Commissioners voting for Proposal 140 were: Annis, Ausley, Barron, Birchfield, Brantley, Gardner, Hollis, James, Kynes, J. Moore, R. Moore, Oliva, Plante, Polak, D. Reed, Roberts, Ryals, Spence, Thayer, and Ware. Commissioners voting against the proposal were: Apthorpe, Collins, DeGrove, Douglass, Grooms, Harrison, Moyle, Overton, Platt, Shevin, and the chairman. Commissioners for whom no vote was recorded were: Barkdull, Burkholz, Clark, McCrary, Mathews, and N. Reed.

105. See note 2 *supra* for text of the finance and taxation proposal that will be placed on

proposed revisions which, if approved, would directly or indirectly benefit Florida's businesses and industries. Also included is a proposal which would tie the state's homestead exemption to an inflation index.¹⁰⁶

Governor Askew has publicly criticized the commission for linking the homestead exemption issue—which will doubtless be popular with homeowners—to the proposals offering substantial tax breaks to industry.¹⁰⁷ In a prepared statement to the press, Askew referred to the tax breaks as “nothing more than unjustified, multi-million dollar gifts to the special interests of this state which serve only to increase the taxes on the people.”¹⁰⁸ He asked, “Is there any doubt . . . that the overriding strategy of these special interests . . . was to tie their proposal for tax breaks with the homestead exemption proposal knowing their tax breaks standing alone will have very little appeal to the people?”¹⁰⁹

VI. PROPOSAL 140—ANALYSIS AND ASSESSMENT

Proposal 140 would allow corporations to prorate any gain realized on the sale of property acquired before November 2, 1971, between the years prior to and after that date. Only that portion of the gain attributable to the period following November 2, 1971, would be taxable.¹¹⁰ The proposal would create a rebuttable presumption that appreciation in the value of property occurred ratably over its holding period.¹¹¹

If enacted by the voters, Proposal 140 would take effect on November 7, 1978. It would not operate retroactively. That is, corporations such as Leadership Housing, Inc. which sold property in the period between the January 1, 1972, effective date of the corporate

the ballot. See also Note, *Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property*, *infra* this issue.

106. See Note, *The False Promise of Homeowner Tax Relief*, *infra* this issue.

107. R. Askew, news release (May 5, 1978) (on file with Press Section, Office of the Governor, Tallahassee, Fla.).

108. *Id.* at add. 1.

109. *Id.* at 1.

110. Although the effective date of the Florida Income Tax Code is January 1, 1972, appreciation in value attributable to the period between November 2, 1971, and January 1, 1972, would be subject to taxation when gain is realized from a post-January 1, 1972, sale since no constitutional prohibition of taxation of corporate income was effective after November 2, 1971.

111. The proposal states: “Absent convincing evidence to the contrary, appreciation in the value of property shall be considered to have occurred ratably over its holding period.” Fla. C.R.C., Rev. Fla. Const. art. VII, § 5(c) (May 11, 1978). Presumably, more than a preponderance of the evidence would be required to rebut the presumption of ratable appreciation.

profits tax, and November 7, 1978, would have to pay tax on the entire gain from the sale. No rebates are intended.¹¹²

It is difficult to determine what impact Proposal 140 will have on state revenues. Department of Revenue officials are unable to make a dollar estimate of the taxes that will be lost if the measure is enacted.¹¹³ However, assuming that there is some corporate property in the state with untaxed pre-1972 appreciation, some revenue will be lost.¹¹⁴ This loss will have to be offset—either through increases in other taxes or by a reduction in state services. In addition, it seems clear that the proposal would result in a lengthier, more cumbersome system of auditing corporate tax returns.¹¹⁵ Moreover, the cost of administering the state's tax system would inevitably increase, thereby compounding the problem of lost revenues. Thus, it is clear that Proposal 140 would relieve some, and perhaps many, corporations of a portion of their tax obligation. But the effect of this relief on state revenues is unknown.

Although it is difficult to measure the economic significance of Proposal 140, there are strong arguments both for and against the proposal. On one side of the issue is Governor Askew's professed goal of making corporations bear their "fair share" of the state's tax burden. On the other side is the view that a corporation's "fair share" of taxes does not include taxation of that portion of property appreciation which accrued while the state constitution banned the taxation of corporate income.

In essence, the arguments on both sides of the issue reduce to differing definitions of the term "income." Supporters of Proposal 140 assert that the term includes unrealized appreciation in the value of property.¹¹⁶ They claim that when the voters approved the constitutional ban on income taxation in 1924, the voters understood the term "income" to include any increase in property value, whether or not the gain was converted into cash through a sale.¹¹⁷

112. The last paragraph of the proposal reads: "[This section] shall take effect on November 7, 1978, and shall not reduce any tax liability in respect of taxable years ending prior to such date." *Id.* at Schedule to Article VII, Section 5. For a discussion of the rebate issue, see Transcript of Fla. C.R.C. proceedings 222-24, 231, 236-39 (Jan. 24, 1978).

113. See note 95 *supra* for information contained in the fiscal impact statement prepared by the Department of Revenue.

114. *Id.*

115. For example, the Department of Revenue will have to develop, and taxpayers will have to comply with, procedures for determining the value of real and personal corporate property on November 2, 1971.

116. Transcript of Fla. C.R.C. proceedings 216 (Jan. 24, 1978) (remarks of Ben Overton and Kenneth Plante). See also Excerpts of Remarks by Martha Barnett, *supra* note 93, at 6.

117. Transcript of Fla. C.R.C. proceedings 231-33 (Jan. 24, 1978) (remarks of B.K. Roberts).

To support their position, proponents draw various inferences from items which appeared in the press in the months preceding the 1924 referendum.¹¹⁸ For example, Barnett, in her remarks to the Finance and Taxation Committee, claimed:

The people who voted to exempt income were laymen. They did not understand, or care, about economic theory or technical tax accounting concepts. . . . It is reasonable to assume that the people viewed income in its broadest sense, in the plain, ordinary, common usage of an increased economic value, money in their pockets.

. . . Surely, in adopting the prohibition on income taxes, the people of the state intended to prohibit taxation of increases in capital assets, as well as gains and profits, as income.¹¹⁹

Thus, the proponents' major argument is that, since unrealized appreciation in property value is income, absent express authorization in the 1971 constitutional amendment, the legislature was prohibited from enacting a taxing statute allowing the state to reach back to tax the "income" which accrued to corporate property while the constitutional prohibition was in effect. Proponents assert that the legislature is prevented from doing indirectly that which it is prohibited from doing directly.¹²⁰

Backers of the amendment recognize that the definition of income which they espouse would allow a future legislature to tax the unrealized appreciation which accrues to corporate property after 1971.¹²¹ As a practical matter, however, they apparently believe that the legislature would choose not to tax such income.¹²² No doubt any legislative efforts toward imposing such a taxing policy would be opposed by many of the same people who support Proposal 140.

Thus, in large measure the proponents of Proposal 140 argue the equity of the issue. They state that it is a breach of faith for the state to have induced the public to invest large sums of capital in the state by promising an income tax prohibition, and then, in subsequent years, to reach back to tax the appreciation which accrued

118. The appendix accompanying appellee's brief to the Supreme Court of Florida in *Leadership Housing* reproduces several 1924 news items which vigorously urged voter approval of the constitutional amendment banning income taxation. Brief of Appellees app., Department of Revenue v. Leadership Hous., Inc., 343 So. 2d 611 (Fla. 1977).

119. Excerpts of Remarks by Martha Barnett, *supra* note 93 at 7.

120. *Id.* at 3.

121. Transcript of Fla. C.R.C. proceedings 216-17 (Jan. 24, 1978) (remarks of Ben Overton and Kenneth Plante).

122. Department of Revenue v. Leadership Hous., Inc., 343 So. 2d at 613.

while the ban on income taxation was in effect.¹²³

Although they acknowledge that the people of Florida had every right to amend the constitution to remove the prohibition on the taxation of corporate income,¹²⁴ proponents of the proposal imply that without express constitutional authorization, the state is prohibited from reaching back, after a post-1971 sale of corporate property, to tax "income" which accrued prior to removal of the constitutional ban on corporate income taxation.¹²⁵

The arguments against Proposal 140 also focus on the definition of "income." Opponents of the proposal adopt the definition of the term which the Supreme Court of the United States developed in *Eisner v. Macomber*.¹²⁶ Under the Court's definition, there is "income" only when property is sold or otherwise disposed of and a gain realized. Mere appreciation in property value is *not* "income" for taxation purposes.¹²⁷ Thus, under the "realization doctrine," until a gain is realized through the sale or other disposition of property, the property owner has merely an inchoate interest in the unrealized appreciation.¹²⁸

Opponents of the measure assert that *any* gain resulting from a sale of corporate property becomes "income" only at the time of sale, and, if the sale occurred after 1971, the gain is fully taxable.¹²⁹ Since, in their view, mere appreciation in value is not "income," property not disposed of during the constitutional prohibition of corporate income taxation is not protected from taxation.¹³⁰ The opponents point to numerous federal and state cases in which the courts have consistently held that increases in the value of property are "income" in the year the gain is realized—not at the time it

123. Transcript of Fla. C.R.C. proceedings 231-34 (Jan. 24, 1978) (remarks of B.K. Roberts).

124. Excerpts of Remarks by Martha Barnett, *supra* note 93, at 10.

125. This argument ignores the well-recognized view that state constitutions are limiting documents rather than documents which grant powers. See 1 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 2.03, at 19-20 (1972). Absent a provision in either the state or federal constitution limiting the state's inherent powers, a state may enact *any* law, without limitation. Therefore, arguably at least, when the constitutional prohibition on corporate income taxes was lifted, the legislature was free to define for itself the scope of the newly enacted corporate tax. The prior constitutional limitation was no longer binding on the legislature.

126. 252 U.S. 189 (1919).

127. *Id.* at 207.

128. See Brief of Appellant, *supra* note 60, at 25.

129. One of these opponents, Justice Overton, who wrote the majority opinion in *Leadership Housing*, served as a member of the Constitution Revision Commission. His remarks during floor debate on Proposal 140 built upon the views he expressed in *Leadership Housing*. See Transcript of Fla. C.R.C. proceedings 216-20 (Jan. 24, 1978) (remarks of Ben Overton).

130. Brief of Appellant, *supra* note 60, at 20, 23.

accrues.¹³¹ They also point to the intent section of the Florida Income Tax Code which specifically incorporates definitions applicable to the Federal Income Tax Code.¹³²

In addition, Proposal 140's opponents argue that this is a legislative issue which does not merit elevation to constitutional status.¹³³ They direct attention to the language which the 1971 Florida Legislature considered and rejected when enacting the corporate tax statute.¹³⁴ Had it been enacted into law, this language would have excluded from taxation all appreciation accruing prior to December 31, 1971. They argue that the supporters of Proposal 140 are attempting to accomplish by constitutional amendment an alternative which the legislature considered and rejected in 1971.¹³⁵ This being the case, they state that the legislature is the proper forum in which to amend laws or to nullify court opinions by enacting new law.¹³⁶

It is interesting to note that the opponents of Proposal 140 do not find it necessary, as do the proponents, to look to the popular intent behind the 1924 constitutional ban on income taxation for their interpretation of the term "income." In floor debate, however, Chairman D'Alemberte presented an argument to counter the proponents' contention that taxing pre-November 2, 1971, accruals in value is a breach of faith, emphasizing the doubt that existed prior to 1971 about the scope of the constitutional ban.¹³⁷

Unfortunately, after the popular vote in November, we still will have no clear indication of the way in which voters perceived the issues raised by Proposal 140. The corporate tax proposal will be placed on the ballot in a grouping with eleven other finance and

131. See, e.g., *MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244 (1932); *Eisner v. Macomber*, 252 U.S. 189 (1919); *Lynch v. Hornby*, 247 U.S. 339 (1918); *Fullerton Oil Co. v. Johnson*, 39 P.2d 796 (Cal. 1934); *Kellems v. Brown*, 313 A.2d 53 (Conn. 1972); *Norman v. Bradley*, 160 S.E. 413 (Ga. 1931); *City Nat'l Bank v. Iowa State Tax Comm'n*, 102 N.W.2d 381 (Iowa 1960); *Fidelity & Columbia Trust Co. v. Reeves*, 154 S.W.2d 337 (Ky. 1941); *Olvey v. Collector of Revenue*, 99 So. 2d 317 (La. 1957); *Tiedemann v. Johnson*, 316 A.2d 359 (Me. 1974); *Shangri-La, Inc. v. State*, 309 A.2d 285 (N.H. 1973); see *Brown*, *supra* note 55, at 4-5. Proponents respond that case law from other jurisdictions is not on point since Florida is the only state which constitutionally prohibited the taxation of income. See *Horwich*, *supra* note 27, at 38.

132. See *Brown*, *supra* note 55, at 2-3. FLA. STAT. § 220.02 (1977).

133. Transcript of Fla. C.R.C. proceedings 215, 239, 244, 246-48 (Jan. 24, 1978) (remarks of Ben Overton, John DeGrove, and Talbot "Sandy" D'Alemberte).

134. *Id.* at 215, 230. See note 43 *supra* for the language considered and rejected by the 1971 Florida Legislature.

135. Transcript of Fla. C.R.C. proceedings 215, 230 (Jan. 24, 1978) (remarks of Ben Overton).

136. Transcript of Fla. C.R.C. proceedings 244, 246-48 (Jan. 24, 1978) (remarks of John DeGrove and Talbot "Sandy" D'Alemberte).

137. See text accompanying note 103 *supra* for remarks of Commissioner D'Alemberte.

taxation measures, including a homestead exemption issue that promises to generate much voter support.¹³⁸ Since the prior legislative and popular intent surrounding the corporate profits tax issue is unclear, and the equitable and legal considerations are balanced, it is unfortunate that voters will not have the opportunity to decide the corporate tax issue separate and apart from the other taxation proposals.

VII. CONCLUSION

This note has traced the constitutional, legislative, and judicial history which served as the backdrop against which Proposal 140 was presented to the Florida Constitution Revision Commission. The arguments for and against the proposal have been presented. In November, Florida voters will be asked to make what is largely a policy decision. They will decide whether the state will exempt from taxation all appreciation accruing to corporate property while the constitutional ban on corporate income taxation was in effect. This decision will directly affect state revenues. A vote in favor of the proposal would reduce the amount of corporate profits tax revenue that will be collected in future years, although the extent of the fiscal impact is uncertain.¹³⁹

A more subtle effect of the voters' decision will be an implicit affirmation or rejection of the Florida Supreme Court's recent interpretation of the term "income."¹⁴⁰ A vote against the corporate tax proposal may be read as an affirmation of the court's view that accrued gains on property are not "income" for taxation purposes until the property is disposed of and the gain realized. Approval of Proposal 140 would indicate implicit rejection of this definition of "income" and implicit approval of a definition which views all appreciation in value as "income" at the time it accrues. If Proposal 140 is approved, only time and the whims of future legislatures will tell what effects, if any, a change in the concept of "income" will have on Florida's tax structure.

138. See note 2 *supra* for the language of the proposal which will be presented to the voters.

139. See note 95 *supra*.

140. Department of Revenue v. Leadership Hous., Inc., 343 So. 2d 611 (Fla. 1977).

