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Article XII, Section 10: Formerly of the Florida Constitution

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ARTICLE XII, SECTION 10: FORMERLY OF THE FLORIDA CONSTITUTION

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THE CONSTITUTIONAL Revision Commission of 1966-1968 recommended drastic changes to the Florida Constitution. Acting on this recommendation, the Florida Legislature adopted three joint resolutions proposing revisions to the electorate. The voters of Florida accepted those recommendations when they ratified the revised constitution on November 5, 1968.[1] The resolutions embodying the revisions approached the problem of making the transition to the new constitution in different ways.

One joint resolution[2] proposed a new article VIII, relating to local government, which expressly provided: "This article shall replace all of Article VIII of the Constitution of 1885, as amended, except those sections expressly retained and made a part of this article by reference."[3] The second joint resolution[4] proposed a revised article VI, relating to suffrage and elections, but contained no provision regarding its 1885 equivalent.[5] Article V, relating to the judiciary, was carried forward in its entirety from the 1885 constitution, as amended.[6]

The third joint resolution[7] recommended revision of the remaining articles of the constitution. It also proposed a new article XII, section 10, providing: "All provisions [except those in articles V, VI, and VIII] of the Constitution of 1885, as amended, not embraced herein

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1. *Preface* to 25 FLA. STAT. ANN., *Constitution of the State of Florida* at v (West 1970).
2. Fla. SJR 5-2X, 1967 Fla. Laws 529.
3. *Id.* at 532; *see also* FLA. CONST. art. VIII, § 6(a).
4. Fla. SJR 4-2X, 1967 Fla. Laws 528.
5. *See id.*; FLA. CONST. art. VI.
6. *Compare* FLA. CONST. art. V *with* FLA. CONST. of 1885, art. V (as amended through 1968).
7. Fla. HJR 1-2X, 1967 Fla. Laws 536.

which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes."[8]

The Supreme Court of Florida construed the newly ratified article XII, section 10 the following year. In *In re Advisory Opinion to the Governor*,[9] the court determined that the performance of Florida Public Service Commission duties was a legislative rather than an executive function.[10] The court relied on article XVI, section 30 of the 1885 constitution, which empowered the legislature to regulate private businesses engaged in public service.[11] The court reasoned that omission of the provision from the 1968 revised constitution was "immaterial,"[12] because this provision was not a *grant* of power, but "simply an expressed recognition of a power existing in the legislative department of the state government."[13] Nonetheless, quoting article XII, section 10, the court emphasized that the provision *was* still in effect as a statute.[14]

For almost two decades, Florida courts and the Attorney General's Office continued to recognize a body of statutes in effect by operation of article XII, section 10.[15] In 1984, the Supreme Court of Florida revealed the unusual scope of the section's power. In *Flack v. Graham*,[16] the court found judicial power to order the use of state funds to pay compensatory damages to an elected official unlawfully denied office.[17] The court noted its earlier holding that the constitutional proscription against appropriations from the treasury except by law should be construed in conjunction with the constitutional requirement that salaries be duly paid.[18] The court stated:

> Although [the requirement that salaries be duly paid] was not adopted in the 1968 constitutional revision, it continues as a statute until altered or amended by statute or found inconsistent with the revision. Art. XII, § 10, Fla. Const. (1968). Respondents have not identified inconsistencies or alterations; nor have we located any such inconsistencies or alterations. Therefore, article XVI, section 3

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8. *Id.* at 573; *see also* FLA. CONST. art. XII, § 10.
9. 223 So. 2d 35 (Fla. 1969).
10. *Id.* at 40.
11. *Id.* at 37 (citing FLA. CONST. of 1885, art. XVI, § 3).
12. *Id.* at 38.
13. *Id.* at 37.
14. *Id.* The court stated: "So it is that former [article XVI, section 30 of the 1885 constitution] has now become a statute subject to modification or repeal as are other statutes." *Id.*
15. *See infra* notes 28-82 and accompanying text.
16. 453 So. 2d 819 (Fla. 1984).
17. *Id.* at 820.
18. *Id.* (citing State *ex rel.* Williams v. Lee, 131 Fla. 815, 164 So. 536 (1935); FLA. CONST. of 1885, art. XVI, § 3).

> of the 1885 Constitution is presently in full force and effect as a statute.[19]

The provision at issue in *Flack* was subsequently added to the Florida Statutes as section 111.045.[20] This statute was never enacted by the legislature, but nonetheless appears in the statute books with a citation to *Flack*.[21]

In 1987, the Supreme Court of Florida effectively destroyed established jurisprudence concerning article XII, section 10. In *Dade County v. American Hospital of Miami, Inc.*,[22] the court held that a 1985 revisor bill had repealed all statutes in effect by operation of article XII, section 10 which had not been codified in the statute books.[23] In reaching its decision, the court failed to recognize that equivalent revisor bills had been adopted by the legislature every two years since 1941.[24] According to the court's logic, the 1885 constitutional provisions would have been "enacted" prior to 1969 and would have been "repealed" by the 1971 revisor bill,[25] and *none* of these provisions would be in effect unless they were written into the statute books by 1971. The court recognized neither this result nor the direct conflict between its decision and *Flack*.[26]

This Comment does not analyze the substantive rights destroyed by the *Dade County* decision.[27] Instead, it painstakingly documents the treatment of article XII, section 10 prior to the court's ruling in *Dade County* in order to show that the *Dade County* decision was ill-con-

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19. *Id.* at 820-21.

20. *See* FLA. STAT. § 111.045 (1987).

21. *See id.* § 111.045 hist.

22. 502 So. 2d 1230 (1987).

23. *Id.* at 1232 (citing FLA. STAT. § 11.2422 (1985)). The revisor bill cited by the *Dade County* court provides:

> Every statute of a general and permanent nature enacted by the State or by the Territory of Florida at or prior to the regular and special 1983 legislative sessions, and every part of such statute, not included in the Florida Statutes, 1985, as adopted by s. 11.2421, as amended, or recognized and continued in force by reference therein, or in ss. 11.2423 and 11.2424, as amended, is repealed.

FLA. STAT. § 11.2422 (1985). The *Dade County* court misconstrued the meaning and function of revisor bills. *See infra* notes 107-23 and accompanying text; *accord* Comment, *Revising: The Process of Statutory Revision in Florida*, 6 FLA. ST. U.L. REV. 1427, 1430-32 (1978) (the revisor has broad editorial license but no power to change the meaning of the law).

24. *See, e.g.*, FLA. STAT. § 11.2422 (1989); *id.* § 16.20 (1941).

25. FLA. STAT § 11.2422 (1971).

26. *See Dade County*, 502 So. 2d at 1230.

27. Such an analysis is beyond the scope of this Comment. For reference, the annotated Florida Statutes contain a table of provisions of the 1885 constitution that *have* been written into the statute books and therefore are in force despite the decision in *Dade County*. *See* 26A FLA. STAT. ANN. 154 (West Supp. 1989) (annotation to art. XII, § 10).

ceived and dismantled an innovative and useful constitutional transitional device.

I. EIGHTEEN YEARS OF JURISPRUDENCE

Prior to *Dade County*, article XII, section 10 had been considered numerous times by Florida courts and by the Attorney General. The interpretation of article XII, section 10 in these opinions is at odds with *Dade County*.

A. Cases

Two months after issuing *In re Advisory Opinion to the Governor*,[28] the supreme court addressed article XII, section 10 in another advisory opinion,[29] in which the Governor asked whether he was authorized to appoint a former legislator to be Secretary of Administration.[30] The Governor was uncertain of his appointment powers because article III, section 5 of the 1885 constitution, which prohibited the appointment of legislators to "civil office" during the term for which elected, had been omitted from the 1968 revised constitution.[31] However, given the court's construction of article XII, section 10 in the earlier advisory opinion, the Governor assumed that article III, section 5 of the 1885 constitution had statutory effect. The court agreed that article XII, section 10 had converted the provision to a statute,[32] and therefore declined to answer the Governor's question directly, because the court was without power to render an advisory opinion regarding the Governor's *statutory* powers.[33] The court did, however, address the *constitutional* question of whether the Secretary of Administration was "an officer subject to constitutional and statutory restrictions and qualifications regarding officers of the state government."[34]

Three months later, the Supreme Court of Florida revisited article XII, section 10. In *Kirk v. Brantley*,[35] the court stated: "Section 11 of

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28. 223 So. 2d 35 (Fla. 1969) (discussed *supra* notes 9-14 and accompanying text).

29. *In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969).

30. *Id.* at 514. Specifically, the Governor asked whether the position was a "civil office" for purposes of the provision. *Id.*

31. *See* FLA. CONST. of 1885, art. III, § 5.

32. "Under Fla.Const. art. XII, § 10 (1968), the provisions of Fla.Const. art. III, § 5 (1885), became a *statute*. It has not been modified or repealed by the Legislature and remains in effect as a part of the statutory law of Florida." *Advisory Opinion*, 225 So. 2d at 514 (emphasis in original).

33. *Advisory Opinion*, 225 So. 2d at 514 (citing FLA. CONST. art. IV, § 1(c)).

34. *Id.* at 516 (emphasis omitted).

35. 228 So. 2d 278 (Fla. 1969).

Article XVI of the Constitution of 1885 [prohibiting extra compensation to legislators for services already rendered unless approved by two-thirds of the members of each house] is carried forward as a general act. It is equal to, but of no greater dignity than, other general acts . . . ."[36] The court approved the disputed compensation measure because the legislature had met the two-thirds approval requirement.[37]

The Supreme Court of Florida next considered article XII, section 10 in 1970. In *State v. City of St. Augustine*,[38] the court observed that the 1885 consitution had imposed a stricter requirement for the approval of local bonds than did the 1968 revised constitution.[39] The court recognized the effect of article XII, section 10,[40] but reasoned that the two provisions were so materially different as to be inconsistent.[41] Thus, the court reasoned, the 1885 constitutional provision was ineffective.[42]

The Supreme Court of Florida revisited article XII, section 10 later that same year. In *Treasure, Inc. v. State Beverage Department*,[43] the court stated: "The Florida Constitution—1968 Revision contains no section equivalent to Article IV, Section 14 of the 1885 Constitution [relating to grants and commissions]. However, the 1885 constitutional provision continues in the form of a statute in accordance with Article XII, Section 10 of the 1968 Revision."[44]

The court considered article XII, section 10 again in 1971. In *Carr v. Dade County*,[45] the court addressed the statutory requirement that counties pay the legal costs of criminal defendants who are not convicted.[46] The court noted that article XVI, section 9 of the 1885 constitution imposed a similar requirement in cases where defendants were "insolvent or discharged," and that this requirement was "still valid as a 'statute' under the 'savings clause' of Fla. Const. art. XII, § 10, of 1968."[47] Three years later, in *Warren v. Capuono*,[48] the court

36. *Id.* at 280 (citation omitted).
37. *Id.*
38. 235 So. 2d 1 (Fla. 1970).
39. *Id.* at 3 (citing FLA. CONST. of 1885 art. IX, § 6 (as amended) (requiring majority approval at an election participated in by a majority of qualified "freeholders" in the local district); FLA. CONST. art. VII, § 12 (1968) (providing that local bonds may be issued only to finance certain projects "when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation" or to refinance outstanding bonds)).
40. *Id.* at 4 & n.6.
41. *Id.* at 4-6.
42. *Id.* at 6.
43. 238 So. 2d 580 (Fla. 1970).
44. *Id.* at 582 n.5.
45. 250 So. 2d 865 (Fla. 1971).
46. *Id.* at 866 (citing FLA. STAT. § 142.09 (1971)).
47. *Id.* at 866 n.3 (quoting FLA. CONST. of 1885, art. XIV, § 9).
48. 282 So. 2d 873 (1973).

reached the same conclusion: "Section 9, Article XVI became a statute pursuant to Section 10, Article XII of the schedule of the 1968 constitutional revision."[49] Between 1974 and 1980, four appellate court decisions reiterated that article XII, section 10 had converted article XVI, section 9 to a statute.[50]

B. *Attorney General Opinions*

In early 1969, the Attorney General was asked whether article XII, section 10 had preserved the notice, publication and journal entry requirements for local and special bills found in article III, section 21 of the 1885 constitution.[51] The Attorney General answered that these requirements were consistent with existing legislation and therefore had the same controlling effect as other statutes.[52]

Later that year, the Attorney General addressed the question of whether proceeds from the sale of state lands could be paid to the state school trust fund.[53] The Attorney General observed that article XII, section 4 of the 1885 constitution authorized distribution of twenty-five percent of such proceeds to the school fund, and stated that the provision was "now a statute . . . by operation of Art. XII, § 10, State Const. as revised, 1968."[54] In 1985, the Attorney General issued another opinion asserting that this provision had statutory effect.[55]

In early 1971, the Attorney General was asked whether an incoming governor was required to execute certain commissions naming persons to appointive office. These commissions had been prepared according to the previous governor's instructions, but not executed.[56] Relying on article IV, section 14 of the 1885 constitution, the Attorney General answered that the unexecuted commissions were merely nominations, not appointments.[57] The Attorney General reasoned that article IV, section 14 of the 1885 constitution, relating to grants and commissions, had been converted to statute by article XII, section 10.[58] Thus,

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49. *Id.* at 874.

50. *See* State v. Nell, 297 So. 2d 90, 90 (Fla. 2d DCA 1974); Benitez v. State, 350 So. 2d 1100, 1102 (Fla. 3d DCA 1977); Goldberg v. Dade County, 378 So. 2d 1242, 1243-44 (Fla. 3d DCA 1979); Hamilton County v. State, 478 So. 2d 394, 395 & n.1 (Fla. 1st DCA 1985).

51. 069-17 Fla. Op. Att'y Gen. 23 (1969).

52. *Id.* at 24.

53. 069-90 Fla. Op. Att'y Gen. 124 (1969).

54. *Id.* at 124.

55. 085-29 Fla. Op. Att'y Gen. 67 (1985).

56. 071-1 Fla. Op. Att'y Gen. 1 (1971).

57. *Id.* at 1.

58. *Id.* at 2.

this opinion is consistent with *Treasure, Inc. v. State Beverage Department*.[59]

In June of 1971, the Attorney General considered the status of article XIII, section 3 of the 1885 constitution, requiring counties to provide indigent care "in the manner prescribed by law."[60] The Attorney General concluded that this provision had "the force and effect of law under Art. XII, § 10, State Const., 1968."[61]

Later in 1971, the Attorney General considered whether section 320.015 of the 1971 Florida Statutes, allowing mobile homes to be taxed as real property, was consistent with article VII, section 1(b) of the 1968 revised constitution, prohibiting the ad valorem taxation of motor vehicles.[62] The Attorney General observed that section 320.015 had previously been article IX, section 13 of the 1885 constitution, and cited commentary in the annotated Florida Statutes stating that the provision was consistent with article VII, section 1(b) of the 1968 revised constitution and therefore a statute pursuant to article XII, section 10. Thus, the Attorney General reasoned, section 320.015 was constitutional.[63] In 1974, the Attorney General addressed the status of article IX, section 13 more directly.[64] The Attorney General understood that the provision had only *statutory* effect, and therefore read it in conjunction with section 320.015.[65]

In February of 1972, the Attorney General stated that article XVI, section 9 of the 1885 constitution, requiring counties to pay costs where a criminal defendant is "insolvent or is discharged," had the "status of a statute pursuant to Art. XII, s. 10, State Const. 1968."[66] Six times between 1974 and 1984, the Attorney General reasserted that this provision had statutory effect.[67]

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59. 238 So. 2d 580 (Fla. 1970) (discussed *supra* notes 43-44 and accompanying text).

60. 071-150 Fla. Op. Att'y Gen. 208, 208 (1971) (quoting FLA. CONST. of 1885, art. XIII, § 3). This is the provision at issue in *Dade County*. *See infra* notes 83-87 and accompanying text.

61. 071-150 Fla. Op. Att'y Gen. 208, 208 (1971).

62. 071-213 Fla. Op. Att'y Gen. 304 (1971).

63. *Id.* at 304-05.

64. 074-128 Fla. Op. Att'y Gen. 200, 201 (1974).

65. *Id.* at 201-02.

66. 072-39 Fla. Op. Att'y Gen. 61, 62 (1972) (citing FLA. CONST. of 1885, art. XVI, § 9).

67. 074-301 Fla. Op. Att'y Gen. 488 (1974); 076-183 Fla. Op. Att'y Gen. 350 (1976); 080-37 Fla. Op. Att'y Gen. 94 (1980); 084-71 Fla. Op. Att'y Gen. 178 (1984) (but stating that cost of incarceration is not a taxable cost); 084-94 Fla. Op. Att'y Gen. 237 (1984) (clarifying what costs counties must pay); 085-85 Fla. Op. Att'y Gen. 241 (1985) (holding county responsible for travel expenses of special assistant public defender). These opinions are consistent with *Carr*, *Warren*, *Nell*, *Benitez*, *Goldberg*, and *Hamilton*. *See supra* notes 45-50 and accompanying text.

Two of these opinions clearly indicate that the Attorney General understood revisor bills to have no effect on the operation of article XII, section 10. In the 1976 opinion, the Attorney General stated: "[S]ince I am . . . unaware of any enactment of the Florida Legislature which

In March of 1972, the Attorney General considered the status of article XVIII, section 14 of the 1885 constitution, governing terms of office for elected county officials.[68] The Attorney General observed that a "revisor's note states that this constitutional provision was converted into statutory law by Art. XII, § 10, State Const. (1968)."[69] The Attorney General revisited this provision later that year and reached the same conclusion.[70] However, alluding to a possible inconsistency with the 1968 revised constitution, the Attorney General emphasized the *statutory* nature of law that arises pursuant to article XII, section 10, and declined to "invad[e] the legislative and judicial processes" by ruling on the validity of former article XVIII, section 14.[71] In 1985, the Attorney General recognized that another provision of the 1885 constitution concerning terms of office had statutory effect pursuant to article XII, section 10.[72]

In another March 1972 opinion, the Attorney General addressed the provision at issue in *Kirk v. Brantley*.[73] This provision prohibited payment to legislators for services already rendered or on claims not provided for by pre-existing law, except by supermajority legislative vote.[74] The Attorney General stated: "This provision was not retained in the State Const. 1968. Rather, the exact language thereof was con-

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has subsequently modified or repealed s. 9, Art. XVI, as a statute, it would appear that the restriction established thereby . . . is still applicable." 076-183 Fla. Op. Att'y Gen. 350, 351 (1976). In opinion 084-94, the Attorney General carried this idea even further, showing that he deemed it irrelevant whether a provision converted to statute by article XII, section 10 is ever numbered into the statute books:

> [Article XII, section 10] provides that all provisions of Articles I-IV, VII, and IX-XX of the 1885 Constitution, as amended which are not inconsistent with the 1968 revision shall become statutes subject to modification or repeal as are other statutes. *Section 9, Art. XVI, 1885 Const., has never been republished in the Florida Statutes. See*, Tracing Tables, page 313, Vol. 4, F.S. Nor to my knowledge has this provision been modified or repealed by any statute enacted by the Florida Legislature. The courts of this state have recognized that former s. 9, Art. XVI, 1885 Const., has been preserved as a statute. . . . Therefore, I must presume the continued viability and relevance of these former constitutional provisions . . . .

084-94 Fla. Op. Att'y Gen. 237 (1984) (emphasis added) (citing Benitez v. State, 350 So. 2d 1100 (Fla. 3d DCA 1977), *cert. denied*, 359 So. 2d 1211 (Fla. 1978); Warren v. Capuano, 269 So. 2d 380 (Fla. 4th DCA 1972), *aff'd*, 282 So. 2d 873 (Fla. 1973)). In Hamilton County v. State, 478 So. 2d 394 (Fla. 1st DCA 1985), the court explicitly "adopt[ed] the reasoning of [opinion 84-94]." *Id.* at 395. This reasoning is consistent with Flack v. Graham, 453 So. 2d 819 (Fla. 1984) (discussed *supra* notes 16-21 and accompanying text).

68. 072-94 Fla. Op. Att'y Gen. 163, 163 (1972).
69. *Id.*
70. 072-410 Fla. Op. Att'y Gen. 697 (1972).
71. *Id.* at 697.
72. 085-20 Fla. Op. Att'y Gen. 47 (1985).
73. 228 So. 2d 278 (Fla. 1969) (discussed *supra* notes 35-37 and accompanying text).
74. 072-99 Fla. Op. Att'y Gen. 167 (1972) (citing FLA. CONST. of 1885 art. XVI, § 11).

verted to stautory law by Art. XII, § 10, of the [1968 revised constitution]."[75]

However, the Attorney General emphasized the *statutory* nature of law that arises pursuant to article XII, section 10: "[T]his section is carried forward as a general act *equal to but of no greater importance than* other general acts."[76] Because the supermajority requirement for certain claim bills seemed inconsistent with the *constitutional* majority requirement for "any bill," the Attorney General reasoned that the statute was unconstitutional to that extent.[77] Moreover, the Attorney General questioned whether the supermajority requirement had *ever* been converted to statute, since article XII, section 10 converts only provisions *not* inconsistent with the 1968 revision.[78] But the Attorney General revisited this provision five times between 1975 and 1985, and each time indicated that it was a statute by operation of article XII, section 10.[79] Thus, the constitutional questions raised by the Attorney General were directed toward only that part of the provision which seemed inconsistent with the revised constitution.

In December of 1972, the Attorney General addressed the question of whether the legislature could provide for jury commissioners to be appointed by county commissioners.[80] The Attorney General noted that article III, section 27 of the 1885 Constitution, requiring county officials to be elected by the people or appointed by the governor, had "the force and effect of a statute under Art. XII, § 10, State Const. 1968. As a statute it may, of course, be superseded by another later statute to the extent of any conflict."[81] Thus, the Attorney General reasoned, the legislature could provide for another method of appointing jury commissioners.[82]

II. THE "JURISPRUDENCE ASH CAN"

In *Dade County v. American Hospital of Miami*,[83] the Supreme Court of Florida held that article XIII, section 3 of the 1885 constitution, requiring counties to provide indigent care "in the manner pre-

75. *Id.* at 168.
76. *Id.* (emphasis added) (citing *Kirk*, 228 So. 2d at 278).
77. *Id.* (citing FLA. CONST. art. III, § 7 (1968)).
78. *Id.*
79. 075-224 Fla. Op. Att'y Gen. 386, 386-87 (1975); 081-98 Fla. Op. Att'y Gen. 261, 262 (1981); 082-28 Fla. Op. Att'y Gen. 68, 70 (1982); 084-58 Fla. Op. Att'y Gen. 142, 143 (1984); 085-57 Fla. Op. Att'y Gen. 161, 162 (1985).
80. *See* 072-420 Fla. Op. Att'y Gen. 710 (1972).
81. *Id.* at 711.
82. *Id.*
83. 502 So. 2d 1230 (Fla. 1987).

scribed by law," was not a statute by operation of article XII, section 10 because it had been repealed by subsequent revisor bills.[84] The court outlined the hospital's arguments:

> In arguing that article XIII, section 3, remains effective, American asserts that section 11.2422 does not control because it is expressly limited to statutes "enacted by the State" and, consequently, has no effect on the former 1885 constitutional provison. American also maintains that, because the 1968 constitution expressly recognizes the former constitutional provision as a statute, it is continued in force by reference."[85]

The court rejected these arguments.[86]

The respondent in *Dade County* aptly commented: "Without a single citation of authority, nor a whit of analysis—without any explanation as to its reasoning whatsoever—this court has, with a single sentence, relegated eighteen years of legal precedent to the jurisprudence ash can."[87]

III. ANALYSIS

Article XII, section 10 of the Florida Constitution was an innovative and useful constitutional transitional device. It was written to serve a number of important functions. In addition to providing a smooth transition from the 1885 constitution to the 1968 revised constitution, it provided a mechanism whereby many provisions of the 1885 constitution that were useful, but no longer worthy of constitutional status, were preserved. It also served an efficiency function: the framers assumed that the legislators would want to retain more sections than not. This transitional device would require the legislature to revisit only those laws that needed revision.

A prevailing rule of constitutional construction is that when a constitution is revised or amended, anything from the prior constitution that is omitted is presumed to be intentionally omitted, and no longer

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84. *Id.* at 1232 (citing FLA. STAT. § 11.2422 (1985)). The 1985 revisor bill provided:

> Every statute of a general and permanent nature enacted by the State or by the Territory of Florida at or prior to the regular and special 1983 legislative sessions, and every part of such statute, not included in Florida Statutes 1985, as adopted by s. 11.2442, as amended, or recognized and continued in force by reference therein or in ss. 11.2423 and 11.2424, as amended, is repealed.

FLA. STAT. § 11.2422 (1985).

85. *Dade County*, 502 So. 2d at 1232.

86. *See id.*

87. Respondent's Motion for Rehearing or Clarification at 4-5, Dade County v. American Hospital of Miami, Inc., 502 So. 2d 1230 (Fla. 1987) (No. 83-1445) (footnote omitted).

in effect.[88] The framers of the 1968 revised constitution sought to avoid this general rule and preserve certain omitted portions of the 1885 constitution as statutes.[89]

The court's rationale in *Dade County* is unsound. If revisor bills have the effect that the court attributed to them, then article XII, section 10 was operative only until the passage of the 1971 revisor bill.[90] Thus, applying the court's logic, this transitional device saved only those provisions written into the statute books by 1971. The court's reasoning conflicts directly with the purpose of article XII, section 10, which was to preserve certain provisions of the 1885 constitution until the legislature repealed them. The court's interpretation renders the section meaningless.[91]

A fundamental rule of constitutional construction is that every provision has a meaning and purpose. The Supreme Court of Florida recognized this in *Plante v. Smathers*:[92] "A constitutional provision is to be construed in such a manner as to make it meaningful. A construction that nullifies a specific clause will not be given unless absolutely required by the context."[93]

Because *Dade County* nullified article XII, section 10, *Plante* directs us to ask whether the court's construction was "absolutely required by the context."[94] It was not. Prior to *Dade County* and following the effective date of the 1969 revisor bill,[95] the Supreme Court of Florida had considered the section seven times; each time the court had treated the section as unaffected by revisor bills.[96] Thus, in *Dade County*, the court seems to have ignored the rule of construction it set forth in *Plante*.

A. Eighteen Years of Precedent

The *Dade County* court ignored yet another basic rule of constitutional construction. When a constitutional provision has traditionally

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88. *See, e.g., In re* Advisory Opinion to the Governor, 112 So. 2d 843, 847 (Fla. 1959); Levinson, *Florida Constitutional Law*, 28 U. MIAMI L. REV. 551, 558 (1974).

89. *Accord* Levinson, *supra* note 88, at 558.

90. FLA. STAT. § 11.2422 (1971).

91. Even if the court's position was that *only* the 1985 revisor bill had the claimed effect, article XII, section 10 is certainly meaningless now.

92. 372 So. 2d 933 (Fla. 1979).

93. *Id.* at 936 (citing Gray v. Bryant, 125 So. 2d 846 (Fla. 1960)).

94. *Id.*

95. The effective date was July 5, 1969. Ch. 69-352, 1969 Fla. Laws 1233; *see supra* note 90 and accompanying text.

96. *See* Flack v. Graham, 453 So. 2d 819 (Fla. 1984); Warren v. Capuano, 282 So. 2d 873 (Fla. 1973); Carr v. Dade County, 250 So. 2d 865 (Fla. 1971); Treasure, Inc. v. State Beverage Dep't, 238 So. 2d 580 (Fla. 1970); State v. City of St. Augustine, 235 So. 2d 1 (Fla. 1970); Kirk v. Brantley, 228 So. 2d 278 (Fla. 1969); *In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969).

been interpreted in a certain manner *by any branch of the government*, that interpretation is "presumptively correct unless manifestly erroneous."[97] In *Amos v. Mosley*,[98] the supreme court stated:

> [W]here there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force that is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution . . . it is not to be denied that a strong presumption exists that the construction rightly interprets the intention.[99]

For eighteen years, Florida's executive and judicial branches consistently and frequently construed article XII, section 10 as unaffected by revisor bills.[100] Moreover, the legislative branch concurred in this construction. The 1972 revision of the Florida Constitution contained a virtually identical transitional device in article V, section 20(g). The legislature responded quickly by expressly repealing all statutes in effect thereby.[101] This demonstrated a legislative understanding that such transitional devices are unaffected by revisor bills.

Thus, all three branches had concurred in a construction that was *not* "manifestly erroneous," given the elusive wording of revisor bills.[102] Therefore, the *Dade County* court should have deferred to the established construction. It did not do so. In fact, in overturning nearly eighteen years of established jurisprudence, the court did not even mention prior constructions of article XII, section 10.[103]

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97. Florida Soc'y of Opthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118 (Fla. 1986).

98. 77 So. 619 (Fla. 1917).

99. *Id.* at 625 (quoting T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 102 (7th ed. 1903)).

100. *See supra* notes 28-82 and accompanying text.

101. Ch. 73-303, 1973 Fla. Laws 682.

102. *See infra* text accompanying notes 107-23.

103. A cynic might suggest that the subject matter of the former constitutional provision at issue in *Dade County* was the reason the court failed to follow established precedent. That provision had been used in conjunction with statutes to impose on counties the duty to provide post-emergency medical care to indigent patients. *See* FLA. CONST. of 1885, art. VIII, § 3; Cleary v. Dade County, 37 So. 2d 248 (Fla. 1948). However, concern for county funds *should not* have driven the decision, because the court itself noted that the provision was not self-executing and required subsequent legislative action to place any burden on Florida counties. Dade County v. American Hospital of Miami, Inc., 502 So. 2d 1230, 1232-33 (Fla. 1987).

Even more perplexing is the court's failure to reconcile, or even mention, *Flack v. Graham*,[104] where, less than thirty months earlier, the court had invoked article XII, section 10 to give force to a provision of the 1885 constitution that *was not recorded in the statute books*.[105] In fact, the legislature *never* enacted that provision; nonetheless, it now appears in the Florida Statutes with a citation to *Flack v. Graham*.[106]

Dade County and *Flack* are obviously in direct conflict. Unfortunately, the *Dade County* court did not even acknowledge the conflict, much less provide any guidance to its resolution. The court should have recognized that it was overturning eighteen years of established jurisprudence, and explained why the established construction of the section was "manifestly erroneous."

B. Revisor Bills

In *Dade County*, the court held that section 11.2422 of the 1985 Florida Statutes, a so-called "revisor bill," repealed those statutes in effect by operation of article XII, section 10 not appearing in the statute books.[107] Section 11.2422, Florida Statutes, provides:

> Every statute of a general and permanent nature *enacted* by the State or by the Territory of Florida at or prior to the regular and special 1983 legislative sessions, and every part of such statute, not included in Florida Statutes 1985, as adopted by s. 11.2421, as amended, or recognized and *continued in force by reference therein* or in ss. 11.2423 and 11.2424, as amended, is repealed.[108]

Revisor bills have been enacted every other year since 1941.[109] Application of the court's interpretation of the effect of revisor bills on the operation of article XII, section 10 leads to the ludicrous conclusion that the revisor bill which passed on July 5, 1969, roughly seven months after the the 1968 revised constitution went into effect, repealed all provisions of the 1885 constitution not contained in the 1968 revised constitution.[110]

For almost eighteen years, all three branches of the government had understood this type of transititonal device as being unaffected by re-

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104. 502 So. 2d 1230 (Fla. 1987).
105. *See id.* (giving force to article XVI, section 3 of the 1885 constitution).
106. *See* FLA. STAT. § 111.045 hist. (1987).
107. *Dade County*, 502 So. 2d at 1232.
108. FLA. STAT. § 11.2422 (1985) (emphasis added).
109. *See id.* § 11.2422 hist. (1985).
110. *See supra* note 90 and accompanying text.

visor bills.[111] This interpretation of the effect of revisor bills on the operation of article XII, section 10 is *not* "manifestly erroneous" under the standard of *Amos* and *Florida Optometric*.[112] The revisor bill invoked by the *Dade County* court expressly repealed *only* those statutes *enacted* by Florida.[113] The provisions converted to statutes by article XII, section 10 were never enacted. Article XII, section 10 was *adopted* by the electorate, thereby *converting* the 1885 provisions to statutes. Thus, revisor bills, by their express terms, should not affect provisions of the 1885 Constitution *converted* to statutes by operation of article XII, section 10. The court rejected this argument.[114]

Moreover, revisor bills also except statutes "continued in force by reference" in the Florida Statutes.[115] Each edition of the Florida Statutes is required by statute to include the Florida Constitution.[116] Thus, provisions of the 1885 constitution should be "continued in force by reference" in the Florida Statutes and excepted from the sweep of revisor bills. The court rejected this argument[117] even though the purpose for including this exception in revisor bills seems to be to accommodate devices such as article XII, section 10.

The court did not provide a reason for rejecting these arguments. Perhaps the court was opposed to having statutes in effect that were not recorded in the statute books. While such a set of statutes may have been sufficiently unusual to warrant characterizing article XII, section 10 as innovative, it was not unique. The statutory laws of England as of July 4, 1776 are in effect in Florida even though they are not recorded in Florida's statute books. Section 2.01, Florida Statutes, provides:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.[118]

Thus, if the "common and statute laws of England" are continued in force by reference in the Florida Statutes and are unaffected by subse-

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111. *See supra* notes 97-106 and accompanying text.
112. *See supra* notes 97-99 and accompanying text.
113. FLA. STAT. § 11.2422 (1985).
114. *See Dade County*, 502 So. 2d at 1232.
115. FLA. STAT. § 11.2422 (1985).
116. FLA. STAT. § 11.242(4)(b) (1987). This requirement was in effect at the time of the *Dade County* decision. *See id.* § 11.242(4)(b) (1985); *id.* § 11.242 hist. (1987).
117. *See Dade County*, 502 So. 2d at 1232.
118. FLA. STAT. § 2.01 (1987).

quent revisor bills, the same should be true of those statutes created by operation of article XII, section 10. It is unreasonable to conclude that the legislature would intend that only a statute, and not a constitutional provision, could have the power to continue statutes in force by reference for purposes of revisor bills.

In fact, the court's rationale in *Dade County* is simply not an accurate assessment of the purpose of section 11.2422. That section is merely part of boilerplate language enacted every two years by the Florida legislature to implement the new edition of the Florida Statutes.[119] The purpose of section 11.2422 is to repeal the *previous two-year edition* and implement the new edition, not to nullify article XII, section 10.

The *Dade County* court misconstrued the function and effect of revisor bills. The revision process is supervised by the Joint Legislative Management Committee,[120] which lacks the power to omit statutes from the new edition on its own initiative. The Florida Statutes define the Committee's powers, duties and functions:

> (1) To conduct a systematic and continuing study of the statutes and laws of this state for the purpose of reducing their number and bulk, removing inconsistencies, redundancies and unnecessary repetitions and otherwise improving their clarity and facilitating their correct and proper interpretation; and for the same purpose, to prepare and submit to the Legislature revisor's bills and bills for the amendment, consolidation, revision, repeal or other alterations or changes in any general statute or laws or parts thereof of a general nature and application of the preceding session or sessions which may appear to be subject to revision. *Any revision, either complete, partial or topical, prepared for submission to the Legislature shall be accompanied by revision and history notes relating to the same, showing the changes made therein and the reason for such recommended change.*
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> . . . .
>
> (5) In carrying on the work of statutory revision and in preparing the Florida Statutes for publication:
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> . . . .
>
> (h) Grammatical, typographical and like errors may be corrected and additions, alterations and omissions, *not affecting the construction or meaning of the statutes or laws,* may be freely made.
>
> (i) *All statutes* and laws, or parts thereof, which have expired, become obsolete, been held invalid by a court of last resort, have had

119. *See id.* § 11.2421 ("Florida Statutes 1987 adopted"); *id.* § 11.2422 (repealing certain statutes enacted during or prior to the 1985 Regular Session).

120. *Id.* § 11.147 (1987).

> their effect or have served their purpose, or *which have been repealed or superseded, either expressly or by implication, shall be omitted through the process of revisor's bills duly enacted by the Legislature.*[121]

Nowhere is the Committee given the power to omit, delete or substantively change any statute. The Committee does not even have the power to omit a statute that has been held unconstitutional by the Supreme Court of Florida; the committee's function with respect to omission or repeal of statutes is to make recommendations to the legislature.[122] Only the legislature has the authority to repeal statutes.[123] The Joint Committee has never recommended repealing the statutes in force by operation of article XII, section 10, and the legislature has never taken any such action. Thus, the *Dade County* court's revisor bill rationale is substantively wrong.

IV. CONCLUSION

The Supreme Court of Florida has effectively destroyed a useful constitutional transitional device. In doing so, the court failed to follow established rules of constitutional construction, ignored years of precedent, and misconstrued Florida's process of statutory revision. Future Constitutional Revision Commissions should avoid the effect of this decision by explicitly stating that provisions converted to statutes will not be affected by revisor bills.

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121. *Id.* § 11.242(1), (5)(h), (i) (emphasis added).

122. *Id.* § 11.242(5)(i) (providing that such statutes shall be omitted); *id.* § 11.242(1) (providing that omission shall be by legislative action on bills submitted by joint committee); *see* Comment, *supra* note 23, at 1430-31.

123. Jones v. Christina, 184 So. 2d 181, 184 (Fla. 1966).