

Nova Law Review

Volume 18, Issue 2

1994

Article 26

Some Proposed Changes to the Florida Constitution

Thomas C. Marks*

Alfred A. Colby†

*

†

Copyright ©1994 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

Thomas C. Marks, Jr.
Alfred A. Colby

TABLE OF CONTENTS

I.	INTRODUCTION	1520
II.	ARTICLE I, SECTION 11: SUGGESTED CHANGES REGARDING IMPRISONMENT FOR DEBT	1520
	A. <i>Domestic Relations Support Obligations</i>	1521
	B. <i>Tax Obligations</i>	1527
	C. <i>Recommendation</i>	1528
III.	ARTICLE III, SECTION 8(A): A SUGGESTED CHANGE REGARDING THE GOVERNOR'S VETO POWER	1529
IV.	ARTICLE V, SECTION 3(B)(3): THE CONTINUING PROBLEM OF THE CITATION P.C.A.	1532
V.	ARTICLE VII, SECTION 1(B): AD VALOREM TAXATION OF MOBILE HOMES	1544
	A. <i>Historical Development of the Mobile Home Exemption</i>	1545
	B. <i>Problems Caused by the Exemption</i>	1551
	C. <i>Justifications for the Exemption</i>	1555
	D. <i>Recommendation</i>	1557
	E. <i>Anticipated Impact of Recommendation</i>	1558
VI.	ARTICLE VII, SECTION 10(C): CHANGES IN THE PLEDGING OF PUBLIC CREDIT	1561

* B.S., 1960 Florida State University; LL.B., 1963 Stetson University; Ph.D., 1971 University of Florida. Professor of Law, Stetson University.

** B.S., 1981 Duke University; J.D. Stetson University 1993. Upon admission to The Florida Bar, Mr. Colby expects to become an associate with the firm of Ketchey, Horan, Hearn, Neukamm and Baumann, P.A., in Tampa.

In this article, a number of changes to the Florida Constitution are proposed, and the reasons for proposing them are stated. Due to the fact that this is a collaborative piece, the authors felt that the reader should understand that the sections proposing changes in Florida Constitution article V, section 3(b)(3); article VII, section 10(c) and article XI, section 3 were written by Professor Marks; the sections proposing changes in Florida Constitution article I, section 11; article III, section 8(a) and article VII, section 1(b) were written by Mr. Colby.

VII. ARTICLE XI, SECTION 3: THE REHABILITATION OF THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO PROPOSE CHANGES TO THE FLORIDA CONSTITUTION— UNDOING THE MALIGNANT EFFECT OF <i>FINE V.</i> <i>FIRESTONE</i>	1572
--	------

I. INTRODUCTION

It may be said that each generation should possess the right to construe or interpret our Constitution in the light of his daily needs in a complex society rather than in the light of now obsolete conditions and circumstances of the past. It is unjust to chain modern society to the views and opinions of eminent jurists of former generations not acquainted with our present day problems.¹

In spite of this ability to informally amend the constitution by interpretation, there are situations when formal amendments are needed to ratify these interpretations. There are other situations when the constitution needs to be formally changed to correct either a deficiency that has surfaced in the document itself or in its interpretation by the judiciary. The changes proposed below address each of these situations.

II. ARTICLE I, SECTION 11: SUGGESTED CHANGES REGARDING IMPRISONMENT FOR DEBT

Florida has constitutionally prohibited imprisonment for debt since 1868.² Such prohibitions were added to the constitutions of several states as a reaction to the common abuses of debtor's prisons during the early and middle 1800's.³ However, a number of exceptions to the prohibition have been recognized over the years. In Florida, cases involving fraud are expressly excepted.⁴ In addition, Florida courts have generally allowed

1. Florida Power Corp. v. Pinellas Util. Bd., 40 So. 2d 350, 355 (Fla. 1949).

2. "No person shall be imprisoned for debt, except in cases of fraud." FLA. CONST. art. I, § 11; FLA. CONST. of 1885, art. I, § 16; FLA. CONST. of 1868, art. I § 16.

3. See *Shidlowsky v. National Car Rental Sys., Inc.*, 344 So. 2d 903, 904 (Fla. 3d Dist. Ct. App. 1977) (Hubbart, J., concurring); *Vermont Nat'l Bank v. Taylor*, 445 A.2d 1122, 1124 (N.H. 1982); *Brantley v. Brantley*, 344 P.2d 731, 733 (Wash. 1959).

4. FLA. CONST. art I, § 11; FLA. CONST. of 1885, art. I, § 16; FLA. CONST. of 1868, art. I, § 16.

imprisonment to enforce payment of domestic relations support obligations⁵ and tax obligations,⁶ even though each can easily be characterized as a “debt.”⁷ This section of this article will outline the historical background of each of the court-developed exceptions,⁸ and then recommend changes to article I, section 11.⁹ This article will not address issues involving imprisonment for debts which arise from criminal acts,¹⁰ nor imprisonment for acts which relate to debts, but do not constitute a per se failure to pay the underlying obligation.¹¹

A. *Domestic Relations Support Obligations*

It is almost axiomatic that Florida court orders awarding alimony¹² or child support¹³ may be enforced by civil contempt, whereby the non-paying party is confined to the county jail until he or she pays the ordered support.¹⁴ The rationale for allowing imprisonment for failing to pay

5. See *infra* notes 12-28 and accompanying text.

6. See *infra* notes 29-31 and accompanying text.

7. “A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.” BLACK’S LAW DICTIONARY 363 (5th ed. 1979). Florida courts have yet to precisely define “debt” as it is used in article I, section 11. Instead, they seemingly prefer to define it by pointing out what obligations are not a “debt.” See *infra* text accompanying notes 15 and 30.

8. See *infra* notes 12-28, 29-31 and accompanying text.

9. See *infra* text accompanying notes 32-36.

10. For example, imprisonment imposed for failing to pay fines or penalties. See generally *State ex rel. Lanz v. Dowling*, 110 So. 522 (Fla. 1926) (prohibition applies only to obligations which arise *ex contractu*); *State v. Champe*, 373 So. 2d 874 (Fla. 1978) (requiring payment into victim’s compensation fund as a condition of probation does not violate article I, section 11).

11. The classic example is imprisonment for writing bad checks, which does not implicate the prohibition of imprisonment for debt because “the purpose [of the Legislature] was not for the collection of debts. The purpose was to penalize the evil of putting into circulation certain kinds of worthless commercial paper and thus causing mischief to banks and to trade and commerce.” *Ennis v. State*, 95 So. 2d 20, 23 (Fla. 1957); *State v. Berry*, 358 So. 2d 545 (Fla. 1978).

12. *Bronk v. State*, 31 So. 248 (Fla. 1901); *State ex rel. Krueger v. Stone*, 188 So. 575 (Fla. 1939).

13. *Ex parte J.C.H.*, 17 Fla. 362 (1879); *Spencer v. Spencer*, 311 So. 2d 822 (Fla. 3d Dist. Ct. App. 1975).

14. Of course, since imprisonment is involved, observance of various procedural safeguards is necessary. First, when civil contempt is used to obtain compliance with a court order, the person to be held in contempt must have the ability to comply, or else imprisonment will not serve its coercive purpose. On the other hand, criminal contempt, which is used to punish willful violation of a court order, carries with it the procedural safeguards of

support, in the face of the constitutional prohibition, is that domestic support "is not a debt, within the meaning of the constitutional inhibition against imprisonment for debt. It is regarded more in the light of a personal duty due not alone from the husband to the wife, but from him to society . . ."¹⁵ In addition, imprisonment for failing to pay support obligations has occasionally been based upon the failure of the non-paying party to obey a lawful court order.¹⁶ Regardless, the fact remains that alimony and child support orders have always been, and continue to be, enforceable by contempt.

Since the early 1980's, Florida has expanded the contempt power of the courts beyond enforcement of domestic support orders contained in the dissolution decree proper. Imprisonment is now available to enforce money judgments arising from unpaid support obligations¹⁷ and child support

any criminal proceeding. See *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

A second, and equally important, prerequisite for imposition of contempt is that the party to be held in contempt must be in violation of an express order of the court, and not simply in violation of a provision in an agreement between the parties. See *Solomon v. Solomon*, 5 So. 2d 265 (Fla. 1942) (court has no power to find former husband in contempt for failing to pay alimony, since the court did not expressly order the former husband to comply with the terms of the settlement agreement); *Holmes v. Coolman*, 401 So. 2d 895 (Fla. 4th Dist. Ct. App. 1981) (court order can not hold spouse in civil contempt for violation of a private agreement).

15. *Bronk*, 31 So. at 252.

16. See *Orr v. Orr*, 192 So. 466 (Fla. 1939); *Murphy v. Murphy*, 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979.) However, such a rationale ignores the fact that a court's ability to enforce its own orders is also limited by the prohibition contained in article 1, section 11. Otherwise, rather than enter a money judgment in a non-domestic civil case, a court could order payment, and then hold the debtor in contempt and imprison him for failing to pay the ordered amount.

17. FLA. STAT. § 61.17(3) (1985); *Gibson v. Bennett*, 561 So. 2d 565 (Fla. 1990). Traditionally, enforcement of money judgments by contempt has been prohibited by article I, section 11. See *Tabas v. Hudson*, 175 So. 2d 224 (Fla. 3d Dist. Ct. App. 1965). However, since as early as 1944, Florida allowed foreign money judgments arising from domestic support orders to be domesticated and enforced by contempt. *McDuffie v. McDuffie*, 19 So. 2d 511 (Fla. 1944) (Georgia judgment); *Sackler v. Sackler*, 47 So. 2d 292 (Fla. 1950) (New York judgment). The basis for this exception to the general rule was that:

a judgment for alimony rests largely on public policy in that the husband should be required to support his wife and children, that they should not become derelicts and a charge on the public, that a judgment in equity is more efficacious than a judgment at law in that it may be enforced by attachment or contempt

McDuffie, 19 So. 2d at 513 (citing *Fanchier v. Gammill*, 114 So. 813 (Miss. 1927)). However, in spite of the availability of equitable remedies to enforce foreign judgments, Florida continued to recognize that an enforcing spouse had to choose between equitable and

arrearages that are sought to be enforced after the supported child attains

legal remedies. *Haas v. Haas*, 59 So. 2d 640 (Fla. 1952).

Florida courts continued to follow the traditional rule in cases involving Florida money judgments which were based upon domestic support arrearages, *see State ex rel. Clark v. Muldrew*, 308 So. 2d 136 (Fla. 4th Dist. Ct. App. 1975), although there were some signs that the courts recognized the inconsistency inherent in distinguishing foreign and domestic judgments. *See Grotnes v. Grotnes*, 338 So. 2d 1122 (Fla. 4th Dist. Ct. App. 1976) (receding from *State ex rel. Clark*). Nevertheless, in two cases in the early 1980's, the Florida Supreme Court hinted that equitable remedies in general, and the contempt power in particular, would not be available to enforce domestic money judgments arising from domestic support orders. *See Sokolsky v. Kuhn*, 405 So. 2d 975 (Fla. 1981) (money judgment for child support arrearages is not enforceable by equitable remedy of garnishment because a money judgment does not trigger the domestic support order exception to the general prohibition on garnishment of wages); *see also* FLA. STAT. §§ 61.12, 222.11 (1979); *Lamm v. Chapman*, 413 So. 2d 749, 753 (Fla. 1982). In *Lamm*, the court reasoned that:

In the event that such a [money] judgment is obtained, it constitutes a judgment debt upon which execution may issue and for which traditional enforcement remedies, including liens and levies, may be utilized. The contempt power of the court is no longer available to enforce the child support obligation for those arrearages which have been reduced to a judgment debt for which execution may issue

Id. The Legislature addressed the choice of remedies problem raised by *Lamm* by amending section 61.17 of the Florida Statutes to provide that “[t]he entry of a judgment for arrearages for child support, alimony, or attorney’s fees and costs does not preclude a subsequent contempt proceeding . . . for failure of an obligor to pay the child support, alimony, and attorney’s fees, or cost for which the judgment was entered.” Ch. 86-220, § 125, 1986 Fla. Laws 1603, 1710 (amending Fla. Stat. § 61.17(3) (1987)).

Passage of chapter 86-220, section 125 did not resolve the constitutional issue, however. That was accomplished by the Florida Supreme Court in its decision in *Gibson*, in which the court relied upon the *McDuffie* and *Sackler* line of cases in holding that the use of the contempt power to enforce payment or money judgments based upon domestic support arrearages does not violate article I, section 11. *Gibson*, 561 So. 2d at 565. The court dismissed the language of *Lamm* as dicta, and found that neither *Lamm* nor *Sokolsky* addressed the issue directly. Instead, the court, per Justice Kogan, held that:

[e]stablishing a support decree as a money judgment does not destroy the decree as an order to pay support nor is the obligation reduced to an ordinary judgment debt enforceable only at law. . . . The purpose of the award remains the payment of support to the former spouse or the children regardless of its form or the location of the parties. A decree for support is different than a judgment for money or property: It is a continuing obligation based on the moral as well as legal duty of a parent to support his or her children. Because of this difference, a judgment for support should be enforced by more efficient means than ordinary execution at law.

Id. at 569 (citations omitted). Not only did *Gibson* resolve the constitutional issue, it also resolved the choice of remedies issue originally raised in *Haas* by effectively abrogating the doctrine in cases involving domestic support. *Id.* at 572 (Overton, J., concurring).

majority.¹⁸ Furthermore, the Department of Health and Rehabilitative Services may seek contempt to compel reimbursement of welfare expenditures from non-paying spouses.¹⁹ The justification for each of these

18. *Gibson*, 561 So. 2d at 565. Prior to *Gibson*, Florida courts uniformly followed the rule that contempt was not available to enforce child support arrearages once the supported child reached majority. See *Heath v. Killian*, 556 So. 2d 410 (Fla. 1st Dist. Ct. App. 1989) (question certified due to pendency of *Gibson* in the Florida Supreme Court); *State ex rel. Sipe v. Sipe*, 492 So. 2d 679 (Fla. 1st Dist. Ct. App.), *review dismissed*, 492 So. 2d 1331 (Fla. 1986) (URESA enforcement action); *Smith v. Morgan*, 379 So. 2d 1052 (Fla. 1st Dist. Ct. App. 1980); *Gersten v. Gersten*, 281 So. 2d 607 (Fla. 3d Dist. Ct. App. 1973); *Wilkes v. Revels*, 245 So. 2d 896 (Fla. 1st Dist. Ct. App. 1970). The rationale for such a rule was that the supported children were no longer in need of support when they attained majority, and therefore, the justification for allowing the use of the extraordinary remedy of contempt in the face of article I, section 11, no longer existed. *Wilkes*, 245 So. 2d at 898; *Heath*, 556 So. 2d at 412.

The *Gibson* court, while acknowledging a split on the issue among other states, chose to align itself with those which allow contempt to be used to enforce child support arrearages post-majority. *Gibson*, 561 So. 2d at 572. The court relied mainly upon a public policy argument:

Upon emancipation of a minor child, the support-dependent parent is not magically reimbursed for personal funds spent nor debts incurred due to nonpayment of child support. Hardships suffered by a family do not disappear. A family's feelings of indignation from abandonment by the nonpaying parent or from past reliance on public assistance are not forgotten. Society's interest in ensuring that a parent meets parental obligations must not be overlooked simply because the child has attained the age of majority. The support obligation does not cease; rather it remains unfulfilled. The nonpaying parent still owes the money.

Today, support-dependent parents and the courts often experience great difficulty obtaining compliance with support orders while a child is a minor even though the remedy of contempt is available. If the courts lack the power to enforce child support orders through contempt proceedings after the child reaches majority, a nonpaying parent may escape his or her support obligation entirely, especially a parent with little or no property subject to attachment in an action at law. If a parent dependent on support is left with less effective civil action, the non paying parent may be encouraged to hide assets or purposefully elude the court until the child attains age eighteen, preferring the civil action on a debt rather than a contempt proceeding. As this court has previously stated, we have no desire to make this state a haven for those who wish to avoid their support obligations.

Id. (citation omitted). The court also relied to a lesser extent upon the provision of the Revised Uniform Reciprocal Enforcement of Support Act, which allows the post-majority enforcement of child support arrearages by contempt. *Id.* at 572 n.6 (citing FLA. STAT. § 881.101 (1989)).

19. *Lamm*, 413 So. 2d at 749. Traditionally, Florida courts have recognized "the basic principle that only obligations of the parties to the marriage relationship, owed to each other,

expansions of the contempt power is the state's vital interest in the efficient enforcement of support obligations, regardless of the form such obligations take.²⁰ As a result, there can be little doubt that Florida now allows enforcement by contempt of any obligation related to domestic support,²¹

are to be treated differently from 'debts' for which imprisonment may not be imposed under the constitution." *Price v. Price*, 382 So. 2d 433, 437, (Fla. 1st Dist. Ct. App. 1980) (footnote omitted). However, in 1976, the Legislature enacted chapter 76-220, section 4, of the Laws of Florida, which provided that upon the payment of public assistance moneys for the benefit of a support-dependent child, the Department of Health and Rehabilitative Services ("HRS") became subrogated to the rights of the custodial parent to the extent of the public assistance, and that such payment created a "debt due and owing" to HRS from the non-paying supporting parent, but made no provision for the use of contempt by HRS. FLA. STAT. § 409.2561 (1977) (the Legislature revised section 409.2561 in 1982, changing "debt" to "obligation", and providing expressly for the use of contempt in enforcement actions.) The main issue raised by section 409.2561 as it was originally enacted was whether contempt is a remedy available to HRS to obtain reimbursement from a nonpaying parent, and the Second and Third District Courts of Appeal split on the issue, creating a conflict. *Chapman v. Lamm*, 388 So. 2d 1048 (Fla. 3d Dist. Ct. App. 1980) (the state has no greater right to enforce a debt as a third party assignee than does a private litigant); *Andrews v. Walton*, 400 So. 2d 790 (Fla. 2d Dist. Ct. App. 1981) (the fact that the state, rather than the supported parent, prosecutes an action to enforce support does not change the support nature of the obligation).

In *Lamm*, the Florida Supreme Court agreed with the rationale of the Second District in *Andrews*, holding that HRS could seek enforcement of a reimbursement action by contempt without violating article I, section 11 of the constitution. *Lamm*, 413 So. 2d at 750. First the court found no legislative intent to prohibit the use of contempt in its use of the word "debt" in the statute. The court then turned to the public policy argument.

[T]he state has historically occupied two roles with respect to family matters: that of an interested party in matters pertaining to the custody, support, and welfare of children and that of the sovereign having a *parens patriae* interest in the well-being of the minor child. . . . While it is true that . . . a private third party cannot use civil contempt to enforce a debt which is grounded in an assignment of a financial obligation resulting from a marriage dissolution or child support order, the state is not the same as a third party bank. The state is acting both as an interested party and as *parens patriae* to further the best interest of the dependent child.

Id. at 753.

20. See *Gibson*, 561 So. 2d at 565; *Lamm*, 413 So. 2d at 749; see generally *supra* notes 17-19.

21. Florida law provides for the award of attorney's fees and court costs ("suit money") in domestic cases where the requesting party can show need and the other party's ability to pay. FLA. STAT. § 61.14 (1991). Such awards are considered "support" for purposes of determining whether they may be enforced by contempt, since such fees and costs are a necessity to the spouse receiving the award. *Orr*, 192 So. 2d at 466. Of course, many types of property arrangements between parties to a divorce may be considered "necessities" as well. See *infra* notes 22-26 and accompanying text.

even if the obligation is not an order in a dissolution decree. Further, such enforcement does not implicate the prohibition on imprisonment for debt.

However, even with the expansion of contempt power described above, property settlements are not generally subject to enforcement by contempt.²² Yet, the courts have, on occasion, used their contempt power to enforce provisions of property settlements where the provision is an action required of one of the parties²³ or where the property provision may be characterized as support.²⁴ Furthermore, with the adoption of equitable

22. See *State ex rel. Cahn v. Mason*, 4 So. 2d 255 (Fla. 1941); *Finney v. Finney*, 603 So. 2d 92 (Fla. 5th Dist. Ct. App. 1992); *Marks v. Marks*, 457 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1984); *Carlin v. Carlin*, 310 So. 2d 403 (Fla. 4th Dist. Ct. App. 1975); *State ex rel. Gillham v. Phillips*, 193 So. 2d 26 (Fla. 2d Dist. Ct. App. 1966). Whether a payment required by a dissolution decree involves support or property is to be determined based on the function served by the payment, and not only upon the labels used in the decree. *Howell v. Howell*, 207 So. 2d 507 (Fla. 2d Dist. Ct. App. 1968).

23. See *Riley v. Riley*, 509 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1987) (failure to name former spouse beneficiary of a life insurance policy); *Pennington v. Pennington*, 390 So. 2d 809 (Fla. 5th Dist. Ct. App. 1980) (failure to convey interest in marital home); *Firestone v. Ferguson*, 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979) (failure to sign sale papers on property); *Burke v. Burke*, 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976) (failure to execute documents). The justification for the use of contempt in these situations is that the party failing to act is in willful disobedience of a court order requiring such action. *Riley*, 509 So. 2d at 1366. Of course, if the action required is the payment of money, then traditional concerns involving imprisonment for debt are implicated and should be raised. See *supra* note 16. *But see* *Murphy v. Murphy*, 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979) (former husband could be held in contempt for failing to pay wife \$108,000 as a special equity upon a showing by the former wife that such failure was willful and that the former husband had the ability to make the payment); *Hazelwood v. Hazelwood*, 345 So. 2d 819 (Fla. 4th Dist. Ct. App. 1977) (former husband held in contempt for failing to pay former wife for her interest in intangible marital property).

24. See *Pabian v. Pabian*, 480 So. 2d 237, 238 (Fla. 4th Dist. Ct. App. 1985). The *Pabian* court stated:

We believe that the husband's obligation to pay the wife's automobile payments is in the nature of support rather than a settlement of property rights because of the prominent role which an automobile plays in our everyday life. Like food, clothing and shelter it has become a virtual necessity and thus falls within the penumbra of support and maintenance.

Id.; *Cobb v. Cobb*, 399 So. 2d 479 (Fla. 1st Dist. Ct. App. 1981) (failure to make ordered payments on household furnishings). In addition, Florida courts have generally held that "lump sum alimony," which is often used as a means to equitably distribute property, is supportive in nature, and therefore enforceable by contempt. See *McCombes v. McCombes*, 440 So. 2d 683 (Fla. 1st Dist. Ct. App. 1983) (lump sum alimony awarded in lieu of award of marital home enforceable by contempt, even though the decree expressly provided for alimony); *Zuccarello v. Zuccarello*, 429 So. 2d 68 (Fla. 3d Dist. Ct. App. 1983) (payments of \$20,000 lump sum alimony in 120 installments of \$222 is support, even though agreement

distribution principles in Florida,²⁵ an argument can be made that all property arrangements ought to be considered supportive in nature,²⁶ since property determinations during a dissolution are no longer independent of support obligations, but instead are part of an integrated whole.²⁷ Nevertheless, since the Florida courts have yet to make an unequivocal pronouncement on this issue, and also because the distinction between property and support is important in other areas,²⁸ any changes to article I, section 11 should be limited to support obligations only.

B. Tax Obligations

As with alimony and child support orders, Florida courts have long held that imprisonment for non-payment of taxes does not violate the

waived alimony). *But see* *Viega v. State*, 561 So. 2d 1335 (Fla. 5th Dist. Ct. App. 1990) (contempt is not available to enforce payment of lump sum alimony if it is for the purpose of effectuating an equitable distribution of marital assets).

25. FLA. STAT. § 61.075 (1991); *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991) (starting point of equitable distribution is an equal division of marital assets.); *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (use of lump sum alimony to allow equitable distribution); *Duncan v. Duncan*, 379 So. 2d 949 (Fla. 1980) (companion case to *Canakaris*).

26. In fact, the suggestion that property settlement provisions be enforceable by contempt has been made at least twice. *See* *Marks v. Marks*, 457 So. 2d 1137, 1138 (Fla. 1st Dist. Ct. App. 1984) (Joanos, J., concurring); *Schminkey v. Schminkey*, 400 So. 2d 121 (Fla. 4th Dist. Ct. App. 1981) (follows general rule regarding property provisions, but certifies the question).

27. *Canakaris*, 382 So. 2d at 1197. In *Canakaris*, the Florida Supreme Court emphasized its intent that the overall result of the dissolution process be equitable, and that courts not be hampered in achieving that result by inflexible rules.

The Judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme.

Id. at 1202. The intent of *Canakaris* was carried into the statutory scheme, wherein one of the factors which a trial court must consider in awarding alimony is "the financial resources of each party, the non-marital and marital assets distributed to each [party]." FLA. STAT. § 61.08(2)(d) (1991).

28. *See, e.g.*, 11 U.S.C. § 523(a)(5) (1993) (support obligations not dischargeable in bankruptcy); 26 U.S.C. §§ 71, 215 (1988) (alimony considered income to supported party, and is deductible to paying party).

prohibition on imprisonment for debt.²⁹ The rationale used to justify imprisonment for non-payment of taxes is similar to that used in domestic support cases.

The act of paying a constitutionally levied tax is nothing more (nor less) than a bearing of the taxpayer's share of the necessary expenses of government. It is a *contribution* toward the governmental machinery of our democratic way of life and is essential to its preservation. Such payment or contribution does not amount to the satisfaction of a civil debt in the legal significance of that term. It is more in the nature of a privilege, or the fulfillment of a moral obligation, of citizenship. Such privilege, or obligation, if not voluntarily enjoyed or discharged, may be enforced by the will of the majority through the exercise of inherent sovereign power.³⁰

Although the exception for tax obligations is clear, what constitutes a tax obligation may not be. At least one Florida court has distinguished between a tax and a service fee, holding that the latter is not subject to enforcement by imprisonment.³¹

C. Recommendation

The Florida courts have clearly carved out exceptions to the constitutional prohibition on imprisonment for debt contained in article I, section 11 in cases involving payment of domestic support obligations³² and payment of tax obligations.³³ In each case, the courts justified the exception by distinguishing the obligation owed from a "debt" as contemplated by section 11.³⁴ A more modern approach to the problem might be to justify the exceptions on the basis of a compelling governmental interest in the payment of domestic support or payment of taxes.³⁵ However, regardless

29. *Gaulden v. Kirk*, 47 So. 2d 567 (Fla. 1950) (broad-based constitutional challenge to the state sales tax).

30. *Id.* at 579 (emphasis added).

31. *Turner v. State ex rel. Gruver*, 168 So. 2d 192 (Fla. 3d Dist. Ct. App. 1964) (imprisonment for failure to pay county garbage collection fees violates constitutional prohibition on imprisonment for debt because fee is in the nature of a contractual obligation due for services rendered).

32. See *supra* notes 12-28 and accompanying text.

33. See *supra* notes 29-31 and accompanying text.

34. See *supra* text accompanying notes 15 and 30.

35. All rights enumerated in the Declaration of Rights, article I of the Florida Constitution, are considered to be fundamental. Hillsborough County Governmental

of the justification, the exceptions have been created and should be accounted for in the express language of the constitutional provision. Therefore, article I, section 11 should be formally amended to expressly allow imprisonment for failing to pay domestic support obligations and tax obligations.³⁶

III. ARTICLE III, SECTION 8(A): A SUGGESTED CHANGE REGARDING THE GOVERNOR'S VETO POWER

Under the 1968 Florida Constitution, the Governor has seven days in which to veto a bill following its presentment to him by the Legislature.³⁷ In the absence of an express veto, a bill without the Governor's signature becomes law seven days after presentment.³⁸ The only express exceptions to the seven day time frame are when the Legislature adjourns sine die, or takes a recess of greater than thirty days, within the seven day period following presentment.³⁹ In such a situation, the Governor is allowed an additional eight days to veto the bill.⁴⁰ If the Governor fails to sign or

Employees Ass'n v. Hillsborough County Aviation Auth., 522 So. 2d 358, 362 (Fla. 1988). Thus, any government action which runs counter to the prohibition on imprisonment for debt must be justified by a compelling governmental interest, and must achieve its means through the use of the least intrusive means. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

36. As revised, article I, section 11 would read: "No person shall be imprisoned for debt, except in cases of involving fraud, domestic support or taxes."

37. Article III, section 8(a) states:

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill.

FLA. CONST. art. III, § 8(a). The purpose for allowing the Governor time to deliberate is to "safeguard the executive's opportunity to consider all bills presented to him." *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119-20, (Fla. 1986) (citing *Edwards v. United States*, 286 U.S. 482, 486 (1932)).

38. FLA. CONST. art. III, § 8(a).

39. *Id.*

40. *Id.* The additional time granted affords the Governor the opportunity to sufficiently handle the annual flood of bills passed in the waning hours of a legislative session. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120.

veto the bill during the additional time allotted, the bill becomes law.⁴¹

Article III, section 8(a), does not give the Governor additional time to sign bills which are presented *after adjournment*,⁴² even though a significant number of the bills passed at the end of the legislative session are presented to the Governor after adjournment.⁴³ In spite of this express constitutional language, Governors used the expanded time period in such situations without challenge until 1983.⁴⁴

In May of 1983, the Legislature passed Senate Bill 168, which, *inter alia*, allowed board certified optometrists to administer and prescribe certain prescription drugs.⁴⁵ The bill was presented to the Governor on June 14, one day after the Legislature had adjourned *sine die*, and the Governor vetoed the bill fifteen days later, on June 29.⁴⁶ The Florida Optometric Association filed a petition for a writ of mandamus to require the publishing of Senate Bill 168 as a law, based on its contention that the Governor's authority to veto the bill under the express language of article III, section 8(a) expired on June 21, seven days after presentment.⁴⁷ The circuit court dismissed the petition with prejudice, construing article III, section 8(a) as providing the Governor with the extended fifteen day time period to veto bills presented after adjournment.⁴⁸ The district court, basing its decision upon the express language of article III, section 8(a), reversed the trial court and ordered the Secretary of State to publish Senate Bill 168 as a law.⁴⁹ However, recognizing the potential impact of the decision on the legislative

41. Compare U.S. CONST. art. I, § 7, cl. 2, which provides the President the power to veto a bill by not signing it if the Congress, by adjourning, has prevented the president from returning the bill to the Congress. The Florida Constitution affords the Governor no such "pocket veto" power.

42. FLA. CONST. art. III, § 8(a). The only exception to the seven day period is for bills which are pending before the Governor when the Legislature adjourns or takes a recess.

43. See *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120 ("It is evident from the record that in a typical session of the Florida Legislature some 60 percent of all bills passed during the session are presented to the Governor just before or immediately after adjournment, with the bulk submitted after adjournment.").

44. In fact, in at least one instance, the Florida Supreme Court tacitly approved the Governor's use of the extended time period where the Legislature adjourned prior to presentment. See *In re Advisory Opinion to the Governor*, 374 So. 2d 959, 963 (Fla. 1979).

45. *Florida Optometric Ass'n v. Firestone*, 465 So. 2d 1319, 1320 n.1 (Fla. 1st Dist. Ct. App. 1985), *rev'd sub nom. Florida Soc'y of Ophthalmology*, 489 So. 2d at 1118.

46. *Florida Optometric Ass'n*, 465 So. 2d at 1320.

47. *Id.*

48. *Id.*

49. One judge dissented and would have upheld the trial court's decision. *Id.* at 1323 (Zehmer, J., dissenting).

and executive branches, the district court certified the question to the Florida Supreme Court,⁵⁰ which accepted jurisdiction and reversed.⁵¹

Although faced with plain and unambiguous language requiring application of a seven day period, Justice Barkett, writing for the majority, nevertheless construed article III, section 8(a), so as to allow the Governor fifteen days to veto bills presented after adjournment.⁵² While the suitability of constitutional construction as a means of reaching this result is open to debate,⁵³ it is clear that the result reached was appropriate,⁵⁴ given the volume of last minute bills presented to the Governor.⁵⁵ Therefore, the next Revision Commission should consider amending article III, section 8(a) to expressly allow the Governor fifteen days to veto bills presented after the Legislature adjourns sine die or after it takes a recess of more than thirty days.⁵⁶

50. *Id.* The question certified was: "Whether Article III, Section 8(a), Florida Constitution, allows the Governor seven or fifteen consecutive days to act on a bill presented to him after the Legislature adjourns sine die, and, if he is allowed only seven days thereafter, should the effect of an opinion so holding have only prospective application?" *Id.* Clearly, even though not comfortable with the potential difficulties its decision would engender, the majority of the district court panel nevertheless felt compelled to uphold the language of article III, section 8(a).

51. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120.

52. *Id.* Rather than viewing article III, section 8(a), as an explicit rule with an explicit exception, Justice Barkett's analysis viewed the provision as one which merely failed to account for a particular circumstance, thus removing it from the plain language rule of construction. This having been accomplished, Justice Barkett then relied upon the underlying purpose of the extended veto period, and upon the long-standing construction given article III, section 8(a) by the Executive branch, to justify reading an expanded veto period into article III, section 8(a) in those situations when the Legislature presents a bill to the Governor after adjournment.

53. Justice Boyd, dissenting from the majority opinion in *Florida Soc'y of Ophthalmology*, held to the view that the language of article III, section 8(a) was precise, certain, and unambiguous, and therefore not amenable to judicial interpretation. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1124 (Boyd, J., dissenting).

54. Even Justice Boyd agreed that the result reached by the majority in *Florida Soc'y of Ophthalmology* was "reasonable and logical." *Id.* at 1124.

55. See *infra* note 43 and accompanying text.

56. As revised, article I, section 8(a) would read:

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, or if the bill is presented to the governor after the legislature adjourns sine die or during a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill.

IV. ARTICLE V, SECTION 3(B)(3): THE CONTINUING PROBLEM OF THE CITATION P.C.A.⁵⁷

The problem of the citation P.C.A. began in 1956 with the creation of the district courts of appeal by constitutional amendment. These courts were intended to be "error correcting courts," while the basic role of the supreme court was changed to that of a "law declaring court."⁵⁸ The district courts of appeal were, except for the specific instances of supreme court jurisdiction set out in the constitution, to be the appellate courts of last resort.⁵⁹

Because the district courts of appeal were not required by the constitution to write an opinion explaining why they had affirmed judgments of the circuit courts⁶⁰ and because the supreme court was a "law making

57. The phrase "citation P.C.A." means a decision of a district court of appeal that in its entirety states, "*per curiam, affirmed*" and then references one or more cases.

58. See *State v. Grawien*, 362 N.W.2d 428 (Wis. 1985) where these terms are used. See also the following from *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) as quoted in *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

The new [article V] embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice

Jenkins, 385 So. 2d at 1357-58.

59. In *Ansin*, again as quoted in *Jenkins*, this jurisdiction was described as "review by the district courts in most instances being final and absolute." 101 So. 2d at 810. The reader should, of course, recognize that, in most instances, the circuit courts exercise appellate jurisdiction over judgments of county courts. See FLA. STAT. § 26.012 (1) (1992).

60. Although the author has been able to discover no supreme court rule covering the matter, the court has from time to time taken the position that it has authority to require, or at least request, a district court of appeal to write an opinion in a case it had earlier affirmed without one. See, e.g., *Hoisington v. Kulchin*, 172 So. 2d 586 (Fla. 1965). The district court of appeal had issued a *per curiam* affirmance "on the authority of" a series of earlier cases. The supreme court, having waded through the "record proper" under the *Foley* doctrine, was still unsure of its jurisdiction based on direct conflict of decisions. *Foley v. Weaver Drugs*, 177 So. 2d 211 (Fla. 1965). It therefore decided that its "final decision in this cause would be greatly facilitated by an expression of the district court of appeal upon the theory and reasoning upon which its judgment is bottomed and a request by this court is not unreasonable or improper." *Hoisington*, 172 So. 2d at 588 (citation omitted).

The supreme court went on to state: "request is respectfully made to the [district court of appeal] that it reconsider the cause and render an opinion setting forth the basis and reasoning upon which its decision in the cause is reached" *Id.* (Emphasis added).

Interestingly enough, the district court "respectfully declined at this late date, to reconsider the cause and set forth the basis and reasoning for [their] decision," and then proceeded to tell the supreme court what it apparently wanted to know. *Hoisington v. Kulchin*, 178 So. 2d 349, 351-52 (Fla. 3d Dist. Ct. App. 1965).

court,”⁶¹ the issue of what purpose could be served by supreme court review of a simple “per curiam affirmed” decision, not accompanied by an explanatory opinion was bound to arise. Put somewhat differently, what “law” would be made by the supreme court’s review, pursuant to conflict jurisdiction, of a decision with no language?⁶² Such decisions have no precedential value in the law of Florida, except perhaps for the circuit judge whose judgment had been affirmed and the lawyers in the case. Even then, these participants to the proceedings in the trial court might not know on what basis the affirmance had come about.⁶³

As was suggested above, the issue arose in the context of the supreme court’s conflict jurisdiction.⁶⁴ Although the supreme court in that case, *Lake v. Lake*,⁶⁵ purported to find that, as a “law making court,”⁶⁶ it had no business looking for conflict in a case where the district court wrote no opinion, it, most unwisely as it turned out, “left room for the camel to get its nose into the tent.”⁶⁷

There may be exceptions to the rule that this court will not go behind

See also *infra* text following note 131 for further discussion of the supreme court’s power to request or require that a district court write an opinion when it has not chosen to do so.

61. *See supra* note 58.

62. From its inception in 1956, the supreme court’s discretionary review jurisdiction, which is where “conflict” is located, was “by certiorari.” With the 1980 amendment, the words “by certiorari” have been dropped. One now merely petitions for review. *See* FLA. R. APP. P. 9.120 and 9.900.

63. *See infra* text accompanying notes 80-83. At times, a district court of appeal may attempt to enlighten the circuit judge and the lawyers involved as to the basis of their affirmance by citing one to perhaps two or three cases from which the basis for their decision can perhaps be gleaned. *See infra* text accompanying note 96 for a discussion of these “counsel advising” citations to authority.

64. Since the creation of the district courts of appeal in 1956, one of the bases of the supreme court’s “law making” function was to resolve conflicts, or at least important conflicts, in the law enunciated by different district courts of appeal or between a district court of appeal and the supreme court. Between 1972 and 1980 the supreme court had jurisdiction to review intradistrict conflict, *i.e.*, conflict between panels of the same district court. Since 1980, intradistrict conflict is a basis for an en banc review by a district court of appeal. *See* *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90 (Fla. 1985); *see also* FLA. R. APP. P. 9.331.

65. 103 So. 2d 639 (Fla. 1958).

66. *See supra* note 58.

67. It is an Arabic proverb that “[i]f the camel once get [sic] his nose in the tent, his body will soon follow.” TRIPP, *THE INTERNATIONAL THESAURUS OF QUOTATIONS* 114 (1970).

a [decision] per curiam, consisting only of the word ‘affirmed’ which [therefore] does not reflect a decision that would interfere with settled principles of law rendered by a district court of appeal. . . . Conceivably [however] it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen with resulting injustice to the immediate litigant. In that event the exception, not the rule, would apply.⁶⁸

This statement clearly appears to ignore the conceded role of the supreme court, subsequent to the creation of the district courts of appeal, as a “law making” court.⁶⁹ Justice Thomas, the author of the *Lake* opinion, apparently realizing the opening the above statement created, attempted damage control of sorts.

But if the supreme court undertakes to go behind a [decision] on the tenuous theory that it must see that justice is done instead of giving to the judgment the verity it deserves and assuming that justice *has been done* the system that has been overwhelmingly approved by the people will be undermined and weakened.⁷⁰

The attempted damage control did not work, not in the least because the language “assuming that justice *has been done*,”⁷¹ is diametrically opposed to the role of the district courts of appeal as “error correcting” courts.⁷² Within seven years, not just the camel’s nose, but the entire camel was in the tent.⁷³

Upon reconsideration of this entire matter, we have concluded that our appellate court decisions may be kept truly harmonious and uniform only by giving to the per curiam decisions without opinion of such courts the same ‘verity’ that we give to their decisions supported by an opinion. By subjecting such per curiam decisions to the same scrutiny on the ‘record proper’—that is the written record of the proceedings in the court under review except the report of the testimony—as we give to the opinion upon which a district court of appeal decision is based, it may be concluded that a direct conflict exists which may forthwith be resolved by this court; or such scrutiny may show “the probable

68. *Lake*, 103 So. 2d at 643.

69. *See supra* note 58.

70. *Lake*, 103 So. 2d at 643 (emphasis added).

71. *Id.*

72. *See supra* note 58.

73. *See supra* note 67.

existence of a direct conflict between the two decisions” which can definitely be determined only by remanding the cause to the appellate court with the request that a supporting opinion be written. [74] This is what we have, in fact, been doing heretofore. And we think the jurisprudence of this state will be best served by modifying the policy as to per curiam decisions [without opinion] announced in *Lake v. Lake*. . . . We hereby do so, and we hold that this court may review by conflict certiorari,[75] a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such a per curiam affirmance is to create conflict with a decision of this court or another district court of appeal.⁷⁶

It is appalling that the supreme court failed to understand that its *Foley* decision had distorted its role as a “law making” court⁷⁷ and had in fact allowed it to assume the role of an “error correcting” court.⁷⁸ Remember the words in *Lake* about “injustice to individual litigants” caused by a *per curiam* affirmance without an opinion.⁷⁹ To the extent that the supreme court assumed this role that it was not intended to play, it diluted that very error correcting role which the 1956 Amendment to article V intended for the newly created district courts of appeal. This is illustrated by Justice Drew’s total misunderstanding of the precedential value of the words “*per curiam*, affirmed” when there is no district court opinion to give the court’s reason for the affirmance.

We must assume, in the absence of something in the record to indicate a contrary view, that an affirmance of a *decision* of a trial court by a decision of the District Court of Appeal makes the trial court decision the decision of the district court. So far as the trial judge is concerned and so far as the Bench and Bar who are familiar with the decision of the trial judge are concerned, such a judgment is the law of that jurisdiction.⁸⁰

To this misunderstanding, Justice Thornal in his dissent in *Foley*, gave an irrefutable rebuttal. “How can one word ‘affirmed’ be a decision on the

74. See *supra* note 60.

75. See *supra* note 62.

76. *Foley*, 177 So. 2d at 225.

77. See *supra* note 58.

78. *Id.*

79. See *supra* note 68 and accompanying text.

80. *Foley*, 177 So. 2d at 230 (Drew, J., concurring specially.). See *supra* text accompanying note 63.

same 'point of law' in conflict with some other decision? If it can be, what 'point of law' does the one word 'affirmed' decide?"⁸¹ An even more devastating critique of Justice Drew's concurrence has subsequently been written.⁸²

It [referring to the *Foley* majority, but more directly to Justice Drew's concurring opinion] is based on the indefensible assumption that trial judges assume that district courts issue per curiam affirmances [without opinion] only when they agree with the trial judge's reasons for ruling a certain way. That assumption is not only fallacious as a matter of simple logic, but it has, since *Foley*, been expressly rejected by the district courts themselves. Both the Second and Third District Courts of Appeal have expressly stated that trial judges can make no assumptions as to the basis on which a per curiam affirmance without opinion is rendered.⁸³

Even if there were a scintilla of accuracy to the view that a per curiam affirmance of a trial court judgment unaccompanied by an opinion would or could create conflict of a precedential nature,⁸⁴ the supreme court, by allowing itself to go behind the decision and into the "record proper," destroyed the finality with which most decisions of district courts of appeal were supposed to be vested.⁸⁵ As chronicled in *Jenkins v. State*,⁸⁶ opposi-

81. *Foley*, 177 So. 2d at 231 (Thomal, J., dissenting).

82. See *supra* text accompanying note 80.

83. Florida Greyhound Owners & Breeders Ass'n, v. West Flagler Assoc., 347 So. 2d 408, 410-11 (1977) (England, J., concurring) (citation omitted).

84. "To my mind, there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention." *Id.* at 411 (England, J., concurring) (footnote omitted).

85. Justice Thomal, in his dissenting opinion in *Foley*, stated:

All of this simply means that the district court decisions are *no longer final* under any circumstances. It appears to the author that the majority view is an open invitation to every litigant who loses in the district court, to come up to the supreme court and be granted a second appeal—the very thing that many feared would happen—the very thing which we assured the people of this state would *not* happen when the judiciary article was amended in 1956.

.....

If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a district court. Under the majority decision today, there is always the potential opportunity to obtain another examination of the record by the supreme court with the hope that it will in some way differ with the district court.

Foley, 177 So. 2d at 234 (Thomal, J., dissenting).

tion to the *Foley* rule began to grow as the membership of the supreme court changed. The overturning of *Foley* became one of the chief reasons for the 1980 Amendment to the judicial article of the Florida Constitution.⁸⁷ Specifically to deal with the juxtaposition of the supreme court's conflict jurisdiction⁸⁸ and per curiam affirmances of the trial court where the district court chooses not to write an opinion, the word "expressly" was added to the constitutional language so that conflict review of decisions of district courts of appeal could be had only if they "expressly and directly"⁸⁹ conflicted with the decision of another district court or the supreme court. The six justices⁹⁰ of the supreme court who joined in the *Jenkins* decision clearly envisioned no exceptions to the rule that the supreme court under the 1980 Amendment, could not review a *per curiam* affirmance if it was not accompanied by an opinion.

[O]pponents of the [1980] amendment broadcast from one end of this state to the other that access to the Supreme Court was being "cut off," and that the district courts of appeal would be the only and final courts of appeal in this state. With regard to review by conflict certiorari [sic.]⁹¹ of per curiam decisions rendered without opinion, they were absolutely correct.⁹²

86. 385 So. 2d 1356, 1358 (Fla. 1980); see also Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

87. *Foley*, 385 So. 2d at 1358.

88. See *supra* note 64.

89. The requirement that decisions directly conflict is discussed in *Neilson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1969) and *Wale v. Barns*, 278 So 2d 601, 604 (Fla. 1973).

90. Only Justice Adkins dissented, 385 So. 2d at 1363-66 (Adkins, J., dissenting).

91. See *supra* note 62.

92. *Jenkins*, 385 So. 2d at 1359. The court further stated:

The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." The single word "affirmed" comports with none of these definitions.

Id. (citation omitted).

The supreme court went on to exclude from its constitutional powers of review those per curiam affirmances that did not have a majority opinion, but did contain concurring and/or dissenting opinions. "Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not

Jenkins did not consider the so called "Citation PCA," that is to say, a *per curiam* affirmance by a district court of appeal that, although not accompanied by an opinion, cites one or more cases. It has generally been thought, although the author knows of only anecdotal evidence of this, that the purpose of the district court in citing cases was to let the appellants know the basis for the decision against them.⁹³ The question of the citation P.C.A. arose in *Dodi Publishing Company v. Editorial America*.⁹⁴ The supreme court, with great emphasis⁹⁵ and apparently without exception, refused to accept the argument that if the cited case or cases conflicted with a decision of the supreme court or another district court of appeal, reviewable conflict was created.

We reject the assertion that we should reexamine a case cited in a *per curiam* decision to determine if the contents of that cited case now conflict with other appellate decisions. *The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority.*⁹⁶

This rule was extended slightly in *Robels Del Mar, Inc. v. Town of Indian Shores*⁹⁷ to include the situation where the referenced case is "filed contemporaneously with the citation P.C.A."⁹⁸ In the *Robels Del Mar* situation, however, the case had not been reversed by, and was not pending review in, the supreme court.⁹⁹

The drafters of the 1980 Amendment had apparently not considered the

the *decision* of the district court of appeal." *Id.* Perhaps it was this rationale that sowed the seeds of *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

93. On rare occasions, district courts will *per curiam* reverse the decision of a trial court and cite one or more cases. It is the author's opinion that this practice should be stopped by a rule issued by the supreme court. If a trial court decision is to be reversed by a district court of appeal, the judge and the parties are owed the courtesy and utility of an opinion explaining the reversal.

94. 385 So. 2d 1369 (Fla. 1980).

95. Only Justice Adkins dissented, *id.* at 1369 (Adkins, J., dissenting).

96. *Dodi*, 385 So. 2d at 1369 (Emphasis added).

97. 385 So. 2d 1371 (Fla. 1980).

98. *Id.*

99. "[T]he cited . . . decision, which was filed the same day as the instant *per curiam* opinion, is a final decision of the district court." *Id.* (citing *Epifano v. Town of Indian River Shores*, 379 So. 2d 966 (Fla. 4th Dist. Ct. App. 1979)). In other words, it was not pending review in, nor had it been reversed by, the supreme court.

problem of what to do if a case cited in a per curiam affirmance was pending review in the supreme court or had been reversed by it. The opinion in *Robels Del Mar*,¹⁰⁰ it can be argued, hints at this problem when the court describes the cited case as a final decision of the district court. The opinion in *Dodi*¹⁰¹ fails to mention the problem at all. However, should review by the supreme court of a citation P.C.A. be denied when the case upon which it is predicated¹⁰² has been reversed by the supreme court or is pending review there with reversal as a possible outcome? To unthinkingly follow the *Jenkins - Dodi - Robels Del Mar* rule would be morally intolerable in the event of the ultimate reversal of a predicate case.

This issue arose in *Jollie v. State*.¹⁰³ Although the facts are somewhat unique and it was bitterly criticized by Justice Boyd¹⁰⁴ as being in violation of the clear import of the *Jenkins - Dodi - Robels Del Mar* rule, *Jollie* vividly illuminated the problem referred to above.

Very simply stated, the Fifth District Court of Appeal had before it four cases involving an identical issue, whether the supreme court's rule on requested jury instructions was mandatory.¹⁰⁵ It wrote an opinion in one of the cases affirming the trial court's ruling, because even though it found the supreme court rule regarding requested jury instructions was mandatory, the failure of the trial court to follow the rule was found to be harmless error.¹⁰⁶ It then issued per curiam affirmances in the other three cases, and tied them to the opinion case with a citation to that case.¹⁰⁷ Conflict review was sought by the appellant in the case in which the opinion was written.¹⁰⁸ Two of the three citation P.C.A.'s were able to seek conflict review before the effective date of the 1980 Amendment¹⁰⁹ to article V of the Florida Constitution which, of course, cut off review by the supreme

100. *Id.* at 1371.

101. 385 So. 2d at 1361.

102. At this point in the discussion, P.C.A. citations that are merely cited for counsel advisory purposes are to be considered distinguishable. See *infra* text accompanying notes 124, 126-27.

103. 405 So. 2d 418 (Fla. 1981).

104. *Id.* at 421-25 (Boyd, J., dissenting).

105. The issue was whether the supreme court's rule on requested instructions was mandatory. *Id.* at 419.

106. *Id.* (discussing *Murray v. State*, 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980), *quashed* by *Murray v. State*, 403 So. 2d 417 (Fla. 1981)).

107. *Id.*

108. *Jollie*, 405 So. 2d at 419 (describing *Murray v. State*, 403 So. 2d 417 (Fla. 1981)).

109. *Id.*

court of per curiam affirmances in which no opinion was written.¹¹⁰ Because of “delayed processing through the district court,”¹¹¹ the third citation P.C.A., *Jollie*'s, did not reach the supreme court until after the effective date of the 1980 Amendment.¹¹² With that one exception, *Jollie*'s situation was the same as the other two citation P.C.A.'s which had beat the deadline. For this reason, and because *Murray v. State*,¹¹³ the case in which the opinion was written, was pending review in the supreme court and thus, might be, and indeed was, reversed, the supreme court simply created an exception to the clear meaning of the 1980 Amendment¹¹⁴ and agreed to hear *Jollie*'s petition for review.¹¹⁵ Thus, there was presented the classic circumstance where hard cases can make bad law.¹¹⁶ *Jollie*'s three companion cases were reversed, but *Jollie*'s case would have been allowed to stand unless the supreme court did something. But did this hard case really make bad law or did it call attention to a flaw in the operation of the 1980 Amendment?

The supreme court got around the rule by finessing it in an extralegal manner. The court applied an earlier rule¹¹⁷ which should have been modified by the 1980 Amendment. The supreme court conveniently ignored this fact.

We thus conclude that a district court of appeal per curiam opinion

110. FLA. CONST. art. V, § 3(b)(3).

111. *Jollie*, 405 So. 2d at 419.

112. *Id.*

113. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

114. See the perfectly correct dissent of Justice Boyd. *Jollie*, 405 So. 2d at 421-25 (Boyd, J., dissenting.)

115. It is interesting to note that by the time the court got around to considering *Jollie*'s problem, it had already reversed the Fifth District Court of Appeal's decision in *Murray* and the other two citation P.C.A.'s on the ground that, although the Fifth District was correct in holding the supreme court's rule regarding requested jury instructions was mandatory, it had erred in considering the trial court's refusal to give instructions harmless error. See *Id.* at 419.

116. *Northern Sec. Co., v. U.S.*, 193 U.S. 197, 364 (1904).

117. The *Jollie* court stated:

Prior to the 1980 Amendment, a PCA decision which referenced another district court decision that this Court had reversed or quashed, was prima facie grounds for conflict jurisdiction. This long-standing policy decision was in effect well before the “record proper” doctrine was conceived and adopted in *Foley*. . . .

The reasoning behind that policy decision continues to have validity. Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it.

Jollie, 405 So. 2d at 420.

which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.¹¹⁸

The supreme court might have added “In this context, the 1980 Amendment to the Judicial Article does not apply.” The court, however, clearly envisioned this exception in light of the *Jollie* problem alone.

The situation presented in this cause ordinarily applies only to a limited class of cases. The problem arises from the practical situation which faces all appellate courts at one time or another - that is, how to dispose conveniently of multiple cases involving a single legal issue without disparately affecting the various litigants. Traditional practice in dealing with a common legal issue in multiple cases, both in district courts and here, has been to author an opinion for one case and summarily reference that opinion on all the others. Being time - [sic] and laborsaving for a court, that practice should not be discouraged.¹¹⁹

The problem was, and still is, broader than the supreme court envisioned when it created the *Jollie* exception. First, a district court of appeal in affirming without opinion a judgment of a trial court need not be faced with the multiple case - single issue *Jollie* situation. It can simply decide that one of its own earlier decisions is controlling, or indeed, an earlier decision of another district court of appeal is persuasive and should be followed. An example of the first situation is *Hamman v. Worling*¹²⁰ where the Fifth District Court of Appeal issued a per curiam affirmance not accompanied by an opinion on the authority of one of its earlier decisions in which an opinion was written.¹²¹

An example of the second is *Stupak v. Winter Park Leasing, Inc.*¹²² where the Fifth District Court of Appeal *affirmed without opinion*, “on the

118. *Id.*

119. *Id.*

120. 525 So. 2d 933 (Fla. 5th Dist. Ct. App. 1988), *approved by* *Hamman v. Worling*, 549 So. 2d 188 (Fla. 1989).

121. *McCullough v. Central Florida Y.M.C.A.*, 523 So. 2d 1208 (Fla. 5th Dist. Ct. App. 1988) *reviewed sub nom.* *Shearer v. Central Florida YMCA*, 546 So. 2d 1050 (Fla. 1989). *McCullough* was pending review in the supreme court and was ultimately approved. This led to the approval of *Hamman*, the citation P.C.A. *Hamman v. Worling*, 549 So. 2d 188 (Fla. 1989).

122. 563 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1990), *quashed by* *Stupak v. Winter Park Leasing, Inc.*, 585 So. 2d 283 (Fla. 1991).

authority of *Kraemer v. General Motors Acceptance Corporation*,¹²³ a Second District Court of Appeal decision decided with a written opinion the year before. This evolution of cases obviously goes beyond the limited situation envisioned by the supreme court in *Jollie*. It also blurs the distinction between the "on the authority of" citation P.C.A. and the more common "counsel advising" citation P.C.A.¹²⁴

Obviously, the more time that elapses after the opinion case cited by the P.C.A. is decided, the less likely it is that the opinion case will be pending review in the supreme court. It is also far more likely that if the case the district court of appeal wishes to cite has been reversed by the supreme court, the district court would be aware of that fact.

The second scenario is admittedly highly unlikely, but there is at least one example known to the author where the supreme court overruled one of its own prior decisions and, years later, relied on the overruled decision as controlling precedent.¹²⁵

Given these possibilities together with the rigid "expressly" language¹²⁶ regarding conflict review, no matter how it arises, where a citation P.C.A., whether the "on the authority of" variety or the mere "counsel advising" variety¹²⁷ (assuming that a clear distinction can be drawn) cites a case that is pending review in or has been reversed by the supreme court, *that* citation P.C.A. should be reviewable. The same rule should obviously hold true in the much rarer situation where the cited case

123. *Id.* (discussing *Kraemer v. General Motors Acceptance Corp.*, 556 So. 2d 431 (Fla. 2d Dist. Ct. App. 1989). There is an interesting twist in this situation since the supreme court described *Kraemer* as being "subsequently accepted for review." *Stupak*, 585 So. 2d at 283. This could mean subsequent to the decision in *Kraemer* being made or subsequent to the Fifth District Court of Appeal's reliance on it in *Stupak*. The former seems more likely but this situation clearly suggests that the supreme court follow its own suggestion in *Jollie*; that the mandates in citation P.C.A.'s should be withheld until the cited case is either accepted for review by the supreme court and affirmed or reversed, or time has run out for seeking review in the cited case. *Jollie*, 405 So. 2d at 420.

124. *See supra* text accompanying note 93.

125. In *Cause v. Canal Authority*, 209 So. 2d 865 (Fla. 1968), the supreme court overruled, *State ex rel Watson v. Lee*, 8 So. 2d 19 (Fla. 1942), to the extent that it held that the supreme court's all writs power (currently article V, section 3(b)(7)) may not be invoked until the supreme court obtained jurisdiction over the case at issue on another basis. In *Shevin ex rel State v. Public Service Comm'n*, 333 So. 2d 9, 12 (Fla. 1976), *State ex rel Watson v. Lee* was cited as controlling authority for the very proposition that was overruled in *Canal Authority*.

126. *See supra* text accompanying note 92.

127. The distinction between the "on the authority of" P.C.A. and the "counsel advising" P.C.A. is not always clear.

is pending review in or has been reversed by the United States Supreme Court. That citation P.C.A. should also be made clearly reviewable by the supreme court.

Thus I suggest that the following italicized language be placed in article V, section 3(b)(3) of the Florida Constitution.

May review any decision of a district court of appeal that expressly . . . and directly conflicts with a decision of another district court of appeal, or of the Supreme Court of Florida *or of the Supreme Court of the United States* on the same question of law. *The supreme court may review district court of appeal decisions rendered without opinion when a case is cited as authority for the decision, or merely to advise counsel as to the basis for the decision, and that case is either pending review in the supreme court or has been reversed by the supreme court. The same rule will apply if the cited case is pending review in, or has been reversed by the Supreme Court of the United States.*¹²⁸

A second aspect of the citation P.C.A. problem, which can only arise in a *Jollie* type context, deserves different treatment. This problem, and the supreme court's proposed solution, is succinctly set out in the *Jollie* opinion.¹²⁹

We recognize that no litigant can guide the district court's selection of the lead case, and that the randomness of the district court's processing would control the party's right of review unless the citation PCA is itself made eligible for review by this Court.¹³⁰

What the supreme court was apparently concerned about was the situation where the lead case, the one in which the opinion was written, was never taken to the supreme court. Thus, it would never be pending review or reversed by that court. Such a situation seems superficially unfair because the party may feel: "If only the district court had selected my case as the opinion case, I'd have sought review." The fact remains, however, that under the 1980 Amendment, the district court decision was supposed to become final. That was the point of the amendment. The district courts were intended to be the courts of last resort in most instances, and this

128. Such an amendment would alleviate Justice Boyd's very valid complaint in his *Jollie* dissent; that the word "expressly" in article V, section 3(b)(3) meant exactly what it said. *Jollie*, 405 So. 2d at 421-25 (Boyd, J., dissenting).

129. 405 So. 2d 418 (Fla. 1981).

130. *Id.* at 421.

situation should be one of those instances. Under article V, the supreme court is given no opportunity to review such a case unless the aggrieved party seeks review. The supreme court should abandon what it describes as this "second aspect of the [Jollie] problem."¹³¹ No change in constitutional language should be necessary to accomplish this.

Finally, to insure that the supreme court does not drift back to its old bad habits, I recommend that a section be added to article V of the Florida Constitution, that will prohibit the supreme court from asking or directing a district court of appeal to write an opinion in a case where it has not done so.

V. ARTICLE VII, SECTION 1(B): AD VALOREM TAXATION OF MOBILE HOMES

Florida has traditionally been a haven for mobile homes¹³² which provide relatively inexpensive shelter¹³³ for many, and in particular, for Florida's large population of retirees.¹³⁴ A majority of mobile homes in

131. *Id.*

132. As of 1990, occupied mobile homes accounted for 575,455, or 11.2% of the 5,134,869 occupied housing units in Florida. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1992 FLORIDA STATISTICAL ABSTRACT, tbls. 2.06, 2.35 at 69, 88. By comparison, in 1987, mobile homes accounted for 5,267,000, or only 5.8% of the 90,888,000 occupied housing units nationally. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl. 1230, at 721 (1992).

133. As of 1991, the median sales price of a mobile home in the United States was \$27,800, which represented a 162% increase over the 1975 average sales price of \$10,600. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl. 1216, at 712 (1992). By comparison, over the same time period, the median sales price of a new single family home increased 184% from \$39,300 to \$120,000, and the median sales price of an existing single family home increased 205% from \$35,300 to \$100,300. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbls. 1215, 1217, at 712 (1992).

134. As of 1991, persons over the age of 65 made up 18.3% of Florida's population, as compared to a national figure of 12.6%. Compare BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1992 FLORIDA STATISTICAL ABSTRACT, tbl. 1.36, at 24 (1992) with BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl 12, at 14 (1992). One mobile home advocate estimates that as many as 75% of all retirees coming to Florida move into mobile homes. Steve Garbarino, *Mobile They Aren't, and with 20 Percent of Florida Residents Under Their Roofs They're Here to Stay*, ST. PETERSBURG (FLA.) TIMES, June 28, 1987, at 1H [hereinafter *Mobile They Aren't*].

the state are located in rental parks,¹³⁵ in which the owner of the mobile home rents space from the owner of the park. Although mobile homes in rental parks are subject to sales tax and an annual license tax, they are exempt from ad valorem taxation as personal or real property under current Florida law.¹³⁶ Mobile homes outside of rental parks do not benefit from the ad valorem tax exemption.¹³⁷

This section of this article will trace the history of the mobile home exemption,¹³⁸ and describe some of the problems currently caused by it.¹³⁹ We will then look at justifications commonly advanced in support of the exemption,¹⁴⁰ and recommend a substantial revision to article VII, section 1(b) of the Florida Constitution.¹⁴¹ Finally, we will briefly discuss the anticipated impact of the proposed revision.¹⁴²

A. *Historical Development of the Mobile Home Exemption*

Florida's organic law has always allowed the ad valorem taxation of

135. In 1990, there were 5388 rental parks for mobile homes in Florida, accounting for approximately 544,367 mobile homes, *Did You Know?*, ST. PETERSBURG (FLA.) TIMES, Mar. 21, 1993, *Hernando Times*, at 8, or 71.4% of the 762,855 mobile homes (occupied and unoccupied) in the state. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1991 FLORIDA STATISTICAL ABSTRACT, tbl. 2.36, at 18 (1991) ("MH" registration stickers normally should be sold only to mobile homes located in rental parks).

136. FLA. CONST. of 1968, art. VII, § 1(b) ("Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes."); see FLA. STAT. ch. 212 (1991 & Supp. 1992) (tax on sales, use, and other transactions); FLA. STAT. ch. 320 (1991 & Supp. 1992) (motor vehicle licenses).

137. The mobile home exemption does not apply to mobile homes which are permanently affixed to land owned by the owner of the mobile home. FLA. STAT. §§ 193.075(1), 320.015(1) (1991). Ownership of the underlying land need not be legal ownership. See *Mikos v. King's Gate Club, Inc.*, 426 So. 2d 74, 76 (Fla. 2d Dist. Ct. App. 1983) (equitable ownership through share ownership in non-profit corporation which held legal title to the underlying land). Furthermore, a mobile home need only be tied down and connected to the "normal and usual" utilities to be considered permanently affixed. FLA. STAT. § 193.075(1) (1991) (minimum tie-down requirements are provided for in FLA. STAT. § 320.8325 (1991)). The only exception to the ownership rule is for mobile home dealers who use the mobile home for display purposes at their sales location. Ch. 93-132, § 6, 1993 Fla. Laws 761, 763 (amending FLA. STAT. § 193.075(1) (1991)).

138. See *infra* notes 143-65 and accompanying text.

139. See *infra* notes 166-88 and accompanying text.

140. See *infra* notes 189-203 and accompanying text.

141. See *infra* notes 204-14 and accompanying text.

142. See *infra* notes 215-32 and accompanying text.

real and tangible personal property.¹⁴³ Over the years, a number of exemptions to ad valorem taxation have been adopted,¹⁴⁴ and, in 1930, the voters of the state adopted an exemption for motor vehicles.¹⁴⁵ Over time, the motor vehicle exemption was expanded to cover other transportation-related property, such as airplanes,¹⁴⁶ boats,¹⁴⁷ and trailers.¹⁴⁸ In each case, it was the transportation-related purpose of the property which justified its classification as a "motor vehicle."¹⁴⁹ At the outer limit of the motor vehicle exemption was a legislatively granted exemption from ad valorem

143. Originally, the constitution provided no limitation on the types of taxation available to the Legislature for state purposes. FLA. CONST. of 1838, art. VIII, § 1; FLA. CONST. of 1861, art. VII, § 1; FLA. CONST. of 1865, art. VIII, § 1; FLA. CONST. of 1868, art. XII, § 2; FLA. CONST. of 1885, art. IX, § 2 (amended 1940). The early constitutions also required the Legislature to authorize local governments to levy for local purposes those types of taxes available to the state. FLA. CONST. of 1838, art. VIII, § 4; FLA. CONST. of 1861, art. VII, § 4; FLA. CONST. of 1865, art. VIII, § 4; FLA. CONST. of 1868, art. XII, § 6; FLA. CONST. of 1885 art. IX, § 5. In 1940, the Constitution of 1885 was amended to provide that "after December 31st A.D. 1940, no levy of ad valorem taxes upon real or personal property except intangible property, shall be made for any State purpose whatsoever." FLA. CONST. of 1885, art. IX, § 2 (1940). Thus, after 1940, local governments had the exclusive authority to levy taxes on real and tangible personal property. See FLA. CONST. art. VII, § 1(a) ("No state ad valorem taxes shall be levied upon real estate or tangible personal property.").

144. FLA. CONST. art. VII, § 6 (homestead exemption of \$25,000); FLA. CONST. art. VII, § 3(a) (exemption for those portions of property which are used "predominantly for educational, literary, scientific, religious or charitable purposes"); FLA. CONST. art. VII, § 3(b) (minimum exemption of \$1000 for "household goods and personal effects").

145. FLA. CONST. of 1885, art. IX, § 13 (1930, amended 1965, revised 1968). The purpose of the amendment was to prevent the "double taxation" of motor vehicles both as vehicles and as tangible personal property. See *McLin v. Florida Auto. Owner's Protective Ass'n*, 141 So. 147, 148 (1932) ("The amount of the 'license tag' tax . . . is not only collected as an excise tax on the privilege of using the roads, but as a property tax in substitution of the previously levied ad valorem taxes which were applicable to motor vehicles prior to the constitutional amendment.").

146. *L.B. Smith Aircraft Corp. v. Green*, 94 So. 2d 832 (Fla. 1957) (approving legislative classification of aircraft as motor vehicles).

147. 1962 FLA. ATT'Y GEN. ANN. REP. 97 (approving legislative classification of boats as motor vehicles).

148. *Wood v. Club Transp. Serv., Inc.*, 196 So. 843, 843 (1940). The case involved "aerocars," two wheeled semi-trailers which were used to transport baggage and passengers between hotels and passenger stations. The Florida Supreme Court held such trailers to be within the motor vehicle exemption because their function was to increase the capacity of a motor vehicle for carrying passengers and baggage. *Id.*

149. *Wood*, 196 So. at 843 ("It would not be logical to conclude that the people meant to relieve a car of ad valorem taxes but to leave subject to that burden a vehicle purely auxiliary to it and dependent upon it for useful operation."); see also *infra* notes 151-52 and accompanying text.

taxation for trailers used for housing accommodations.¹⁵⁰ However, in 1965, the Florida Supreme Court, relying upon the transportation-related purpose rationale of its previous decisions, held that the statutory exemption was unconstitutional to the extent that it applied to trailers which were not used primarily for transportation purposes.¹⁵¹ Thus, trailers used primarily for housing purposes would be subject to ad valorem taxation as tangible personal property for the first time in eighteen years.¹⁵² As a result, the mobile home lobby immediately went to work in Tallahassee.¹⁵³ Before

150. The law expressly limited its scope to “trailers and vehicles not self-propelled used for housing accommodations and known as trailer coaches.” Ch. 23969, § 1, 1947 Fla. Laws 741, 741 (codified at FLA. STAT. § 320.081(1) (1949)). It provided for a \$10 annual license fee “in lieu of all other taxes”. Ch. 23969, § 2, 1947 Fla. Laws 741, 741 (codified at FLA. STAT. § 320.081(2) (1949)). The fee was increased to \$15 in 1963. Ch. 63-528, § 2, 1963 Fla. Laws 1353, 1356 (codified at FLA. STAT. § 320.081 (1963)).

151. *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965). In *Palethorpe*, the tax assessor of St. Johns county made personal property assessments for 1963 against trailers used exclusively for housing purposes, even though the owners had paid their annual license tag tax on the trailers. The trailer owners challenged the assessment as a violation of Florida Statutes section 320.081, which provided an exemption for trailers used as housing accommodations. *Id.* at 528. In response, the tax assessor argued that by specifically exempting trailers used for housing, the Legislature created a tax exemption not expressly allowed by the constitution. *Id.* at 529. The resolution of the issue thus turned upon whether trailers used primarily for housing purposes were “motor vehicles” as contemplated by the constitutional exemption. In relying upon the rationale of *Wood*, 196 So. at 843, and placing substantial weight upon the use to which the trailers were put, the supreme court held that they were not motor vehicles.

[A] trailer, . . . when it is drawn or is capable of being drawn by an automobile or other motor vehicle primarily to carry persons or property over the public highways should be classified as a motor vehicle, even though it is incidentally and occasionally used to house persons over night while in transit or to house them for short periods on holidays or vacations. But where to all intents and purposes the actual primary use of such a trailer bears no reasonable relation to customary motor travel or carriage and the trailer is found to be used over longer periods than those above stated, for housing accommodations or for other non-transportation purposes, the exemption does not apply. The reason being that under such circumstances a trailer loses its primary character as a unit of motor vehicle transport and serves, for example, as an apartment or residence, and is no longer within the exempt class.

Palethorpe, 171 So. 2d at 531.

152. *Id.* (Classification as tangible personal property was to be made “regardless of whether or not a Florida license tag is purchased for [the mobile home]. . .”).

153. For example, as a part of its campaign to reverse the *Palethorpe* decision, the Florida Mobile Home and Recreational Vehicle Association opened a private restaurant in Tallahassee, which served free liquor and meals to legislators and their guests. Martin Dyckman, *The “Good Old Days” Weren’t*, ST. PETERSBURG (FLA.) TIMES, June 2, 1991, at

the end of the next session¹⁵⁴ the Legislature passed an emergency joint resolution to amend the constitutional motor vehicle exemption to specifically include mobile homes.¹⁵⁵ In a special off-year election the following November,¹⁵⁶ Florida voters approved the amendment by a narrow

5D.

154. The Florida Supreme Court decided *Palethorpe* on January 26, 1965, and denied a motion for rehearing on March 5, 1965. *Palethorpe*, 171 So. 2d at 526. On May 3, 1965, Senator Ryan of Martin county introduced Senate Joint Resolution 751, a proposed amendment to the constitution which would overrule *Palethorpe* by expressly exempting mobile homes from ad valorem taxation. FLA. S. JOUR. 254 (Reg. Sess. 1965); see *infra* note 155. The resolution passed the Florida Senate on May 25, 1965, FLA. S. JOUR. 634 (Reg. Sess. 1965), and the Florida House of Representatives on May 31, 1965, FLA. H.R. JOUR. 1298 (Reg. Sess. 1965). The Governor approved the resolution on June 24, 1965. Fla. S.J.R. 751, at 1826 (1965).

155. As originally offered, Senate Joint Resolution 751 (SJR 751) proposed that the motor vehicle exemption be amended to include the following language:

“Motor vehicles” as that term is used herein also includes mobile homes, trailer coaches, house trailers, camper type mobile homes mounted and transported wholly upon the body of a self-propelled vehicle, or any type of trailer or vehicle body without independent motive power drawn by or carried upon a self-propelled vehicle designed for and used either as a means of transporting persons or property over the public streets and highways of this state or for furnishing housing accommodations, or both

FLA. S. JOUR. 634 (Reg. Sess. 1965). By erasing the distinction between transportation and housing uses of mobile homes, this language was obviously intended to undo the damage of the Florida Supreme Court’s ruling in *Palethorpe*. The broad sweep of the original language was narrowed in committee by the appending of the following language to SJR 751:

provided, however, any included vehicle herein shall be subject to a license tax as an operable motor vehicle regardless of its actual use unless the included vehicle is permanently affixed to the land, in which case it shall be taxable as real property.

Id. This additional language seems to indicate a desire on the part of the Legislature to treat mobile homes as vehicles only until such time as they were no longer mobile, i.e. until a mobile home was “permanently affixed”. However, this limitation on the exemption was revised significantly only seven years later. See *infra* note 163 and accompanying text.

The Senate passed SJR 751 by a vote of 39-0, FLA. S. JOUR. 634 (Reg. Sess. 1965), and the House of Representatives by a vote of 100-3, FLA. H.R. JOUR. 1298 (Reg. Sess. 1965). In addition, both houses determined the existence of an emergency so as to allow a vote on the amendment at a special election on November 2, 1965. Fla. SJR 751, at 1826 (1965); see *infra* notes 156-57 and accompanying text.

156. The statewide ballot for the special election held on November 2, 1965, consisted only of five referendum questions. *Voters Face 5 Key Issues on Tuesday*, ST. PETERSBURG (FLA.) INDEPENDENT, Nov. 1, 1965, at 1 (other than the referendum on mobile home taxation, the questions involved a \$300 million highway bond issue, the creation of an additional district court of appeal, and creation of lower courts in Lake and Palm Beach counties).

margin.¹⁵⁷

The lesson of 1965 was not lost on those legislators who helped to draft the 1968 revision to the Florida Constitution. Article VII, section 1(b), of the Florida Constitution continued the express mobile home exemption¹⁵⁸ but gave the Legislature the power to define “mobile home.”¹⁵⁹ In addition, the 1968 Constitution failed to include a provision of the 1965 Amendment which classified as real property any mobile home which was permanently affixed to the ground.¹⁶⁰ This effectively granted the Legislature the power to determine when, and if, mobile homes would be considered real property for purposes of ad valorem taxation.¹⁶¹ Clearly, the intent of the drafters in adopting article VII, section 1(b), in 1968 was to provide the Legislature with unfettered discretion in the granting and application of the constitutionally granted exemption for mobile homes.¹⁶²

Since 1968, the Legislature has made almost constant adjustments to the statutory scheme which supports the mobile home exemption. On one hand, the Legislature expanded the scope of the exemption by requiring ownership of the ground upon which the mobile home is located before the mobile home can be taxed as real property.¹⁶³ This had the effect of precluding mobile homes located in rental parks from treatment as real

157. The final margin of approval was 347,349 to 330,493, or 51.2% to 48.8%. Telephone Interview with Joel Mynard, Records Administrator, Division of Elections, Florida Secretary of State's Office (Aug. 26, 1993).

158. FLA. CONST. art. VII, § 1(b).

159. *Id.* The exemption applies to “mobile homes, as defined by law”

160. Compare FLA. CONST. of 1885, art. IX, § 13 (1965) with FLA. CONST. art. VII, § 1(b).

161. The real property provision contained in article IX, section 13 of the 1885 Constitution, as amended in 1965, became a part of Florida's statutory law with the adoption of the 1968 Constitution. FLA. CONST. art. XII, § 10; see FLA. STAT. § 320.015(1) (1969). Subsequently, the Legislature has amended section 320.015 several times. See *infra* note 163.

162. The nominal reason for the changes to the constitution was to provide the Legislature “flexibility” in determining the scope of the exemption. See Commentary to article XII, section 1 of the Florida Constitution of 1968, 26A FLA. STAT. ANN. 3 (West 1970). Florida courts have acknowledged the Legislature's plenary power in this regard. See *Nordbeck v. Wilkinson*, 529 So. 2d 360 (Fla. 2d Dist. Ct. App. 1988).

163. Originally, mobile homes were considered real property so long as they were permanently affixed to the ground, without regard to ownership of the underlying property. FLA. CONST. of 1885, art. IX, § 13 (1965); FLA. STAT. § 320.015 (1969). However, since such a definition would likely subject mobile homes in rental parks to ad valorem taxation, see 1971 FLA. ATT'Y GEN. ANN. REP. 304 (owner of mobile home need not own underlying property for mobile home to be considered a fixture and subject to ad valorem taxation), the Legislature added the ownership requirement in 1972. Ch. 72-339, § 2, 1972 Fla. Laws 1225, 1226 (codified as FLA. STAT. § 320.01 (Supp. 1972)). See generally *supra* note 137.

property for purposes of ad valorem taxation. On the other hand, the Legislature also narrowed the reach of the exemption by numerous revisions of the statutory definition of "mobile home."¹⁶⁴ As a result, the mobile

164. Originally, the constitutional definition of mobile home, *see supra* note 155, was included within the statutory definition of "motor vehicle". FLA. STAT. § 320.01(1) (1965). Interestingly, Session Law chapter 65-446, which made this change, was adopted by the Legislature prior to its approval of the constitutional amendment. Ch. 65-446, 1965 Fla. Laws 1573. Since then, the Legislature has made sometimes fine distinctions between types of mobile housing units, usually based upon the purpose for which the unit was designed.

The first of these changes occurred in 1970, with the division of motor vehicles into two distinct categories: those units "used as a means of transporting persons or property over the public streets and highways", and those "designed and equipped to provide living and sleeping facilities . . . and for operation over the streets and highways of the state . . ." Ch. 70-391, § 1, 1970 Fla. Laws 1209 (codified at FLA. STAT. § 320.01(1) (Supp. 1970)). The following year, the break between "motor vehicle" and "mobile home" was finalized when the latter was defined as follows:

"Mobile home" includes any type of trailer or vehicle body, regardless of any appurtenances, additions, or other modification thereto, without independent motive power, manufactured upon an integral chassis or undercarriage and designed either for travel over the highways or for housing accommodations or both.

Ch. 72-339, § 1, 1972 Fla. Laws 1225 (codified at FLA. STAT. § 320.01(1)(b) (Supp. 1972)).

The 1972 definition excluded a significant number of vehicle/housing accommodation combinations, which were instead defined as "recreational vehicle-type units" ("RV units"). These were treated strictly as motor vehicles and not as mobile homes. *Id.* Over the years, RV units have given the Legislature some difficulty because of the various kinds of such units, and because of their similarity to mobile homes. Since 1972, the Legislature has statutorily defined each of the following kinds of RV units: travel trailers, camping trailers, slide-in and chassis-mount truck campers, and motor homes, FLA. STAT. § 320.01(1)(b)1-4 (Supp. 1972); fifth wheel recreation trailers, FLA. STAT. § 320.01(1)(b)5 (1977); park trailers, FLA. STAT. § 320.01(1)(b)5 (Supp. 1984); van conversions, FLA. STAT. § 320.01(1)(b)5 (Supp. 1988); and private motor coaches, FLA. STAT. § 320.01(1)(b)5 (1989).

The next major change to the statutory definition of mobile home was made in 1978.

"Mobile home" means a structure, transportable in one or more sections, which is 8 body feet or more in width and which is built on an integral chassis, and designed to be used as a dwelling when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein.

Ch. 78-221, § 1, 1978 Fla. Laws 662 (codified at FLA. STAT. § 320.01(2) (Supp. 1978)).

The removal of the prior language regarding travel over the highways marked the abandonment by the Legislature of any pretense that a mobile home was anything more than "a structure . . . designed to be used as a dwelling." *Id.* In addition, the removal of the prior language including fixtures as a part of the mobile home provides a basis for the current practice of taxing such fixtures as carports and enclosed porches as tangible personal property. Interview with G. Prentice Dort, Director, Mobile Home Division, Pinellas County Property Appraiser's Office, Clearwater, Florida (June 2, 1993) [hereinafter Dort Interview].

home exemption now applies only to transportable residential structures on an integral chassis, and not to other types of structures or vehicles.¹⁶⁵ Requiring ownership of the underlying land, combined with the adjustments to the definition of mobile home, leaves little doubt that the ultimate intent of the Legislature since 1968 has been to limit the scope of the exemption to those existing mobile homes located in rental parks.

B. *Problems Caused by the Exemption*¹⁶⁶

The exemption from the ad valorem taxation enjoyed by mobile homes in rental parks has resulted in three major problems. First and foremost is the loss of revenue to local government inherent in the exemption itself.¹⁶⁷ Rather than taxing mobile homes in rental parks as tangible personal property,¹⁶⁸ local governments instead receive an annual license tax which is collected by the Division of Motor Vehicles.¹⁶⁹ Given the disparity

Since 1978, the definition of mobile home has not changed, although the Legislature has twice amended the statute to clarify certain license tax issues. See ch. 83-318, § 1, 1983 Fla. Laws 1951, 1954 (codified at FLA. STAT. § 320.01(2) (1983)) (defining mobile home length for license tax purposes); ch 85-155, § 5, 1985 Fla. Laws 1072, 1074 (codified at FLA. STAT. § 320.01(2) (1985)) (providing a rebuttable presumption as to mobile home length where drawbar has been removed). In addition, in 1992, the Legislature created a sub-category of mobile homes called "manufactured homes", which are defined as "mobile home[s] fabricated on or after June 15, 1976, in an off-site manufacturing facility for installation or assembly at the building site, with each section bearing a seal certifying that it is built in compliance with the Federal Manufactured Home Construction and Safety Standard Act." Ch. 92-148, § 5, 1992 Fla. Laws 1380, 1383 (codified at FLA. STAT. § 320.01(2)(b) (Supp. 1992)).

165. FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.01(2)(a) (Supp. 1992).

166. The problems outlined in this subdivision are based upon interviews with Pinellas County officials, and thus reflect those areas of difficulty in that jurisdiction. However, since the mobile home taxation scheme is statewide in scope, the problems discussed are likely to be widespread, although there are sure to be some differences between counties.

167. This loss is mitigated to some extent by the taxation as tangible personal property of fixtures attached to the mobile home. See *supra* note 164.

168. Tangible personal property is normally taxed at a rate slightly lower than is real property. For example, in Pinellas County, tangible personal property is taxed on average at roughly 19 mills, whereas real property is taxed at closer to 21 mills. Telephone Interview with G. Prentice Dort, Director, Mobile Home Division, Pinellas County Property Appraiser's Office (Sept. 9, 1993) [hereinafter Dort Telephone Interview].

169. FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.015(1) (1991). An annual license tax is collected when the owner of the mobile home first registers the mobile home and each year when the registration is renewed. FLA. STAT. § 320.081 (1991). The amount of the tax depends upon the length of the mobile home. FLA. STAT. § 320.08(11) (1991) (\$20 for the first 35 feet, and \$5 for each additional 5 foot increment, with a maximum of \$80 for mobile

between the license and personal property taxes for most mobile homes,¹⁷⁰ it is obvious that the exemption costs local governments significant amounts of money each year.¹⁷¹

A second problem related to the exemption is the misallocation of revenue between state and local governments due to the current sales tax distribution scheme for mobile homes. All mobile homes are currently subject to both state¹⁷² and county¹⁷³ sales taxes when purchased.¹⁷⁴ However, although sales tax proceeds are shared with local governments by the state,¹⁷⁵ the local government which receives such funds may not be

homes 65 feet in length or longer). Since each integral section of a mobile home is considered separately for purposes of taxation, *see* FLA. STAT. § 320.01(2) (a) (Supp. 1992), the owner of a mobile home which consists of two sections (commonly referred to as a "double wide") would pay twice the amount specified by section 320.08(11). *See also infra* notes 177-81 and accompanying text.

170. For example, for a 60 foot long "double wide" mobile home located in Pinellas County with an appraised value of \$30,000, the annual tangible personal property tax would be approximately \$570. *See supra* note 168. By comparison, the annual license tax paid on the same mobile home would be only \$90. *See supra* note 169.

171. Since mobile homes are exempt from assessment, and not just taxation, *see* FLA. STAT. § 192.001(11)(d) (1991), there are no estimates of lost revenue available. However, the discrepancy between potential property tax revenue and current license tax revenues speaks for itself. *See supra* note 170.

172. *See generally* FLA. STAT. ch. 212 (1991 & Supp. 1992) (sales tax). All mobile home sales are subject to the state-wide sales tax of six percent on the sales price of the mobile homes. FLA. STAT. § 212.06(1)(a) (Supp. 1992).

173. Florida allows counties to levy discretionary local option sales taxes for a variety of purposes, with a rate which varies between one-half of one percent and one percent, depending upon the purpose. FLA. STAT. § 212.055 (Supp. 1992) (valid purposes include charter county transit systems, local government infrastructure, operating expenses of counties with populations less than 50,000, indigent health care and county public hospitals). However, only the first \$5000 of the sales price of the mobile home is subject to these local sales taxes. *See* FLA. STAT. § 212.054(2)(b) (1991).

174. Both state and local sales taxes are collected on sales of mobile homes between dealers and non-dealers as well as sales between non-dealers. *See* FLA. STAT. § 212.06(10) (Supp. 1992) (title certificates may not be issued without proof of payment of sales tax); FLA. ADMIN. CODE ANN. r. 12A-1.037(1)(a), (b)(3) (1993).

175. Funds collected from the statewide sales tax are distributed mostly to the General Revenue Fund and various state trust funds, but approximately nine and one-half percent of proceeds collected from within qualified counties are returned to those counties to be shared between the county and any municipalities therein. FLA. STAT. § 212.20(6)(g) (Supp. 1992); *see* FLA. STAT. §§ 218.60-218.65 (1991) (proceeds disbursed to counties which qualify for revenue sharing pursuant to FLA. STAT. §§ 218.20-218.26 (1991)). Funds collected by the state from discretionary local option sales taxes are disbursed back to the county in which they were collected, minus an administrative fee not to exceed three percent. FLA. STAT. § 212.054(4) (1991).

the jurisdiction in which the mobile home will ultimately be situated.¹⁷⁶ As a result, local governments with significant concentrations of mobile homes often do not receive their intended share of the revenue produced by sales taxes on mobile home sales.

A third problem caused by the mobile home exemption is misallocation of license tax revenues between local governments.¹⁷⁷ Proceeds from the license tax are divided evenly between local school boards and either county or municipal governments.¹⁷⁸ Allocation of such proceeds often depend upon where the mobile home was originally registered, however, and not where the mobile home is located.¹⁷⁹ As with the misallocation of sales tax revenues,¹⁸⁰ local governments often do not receive a share of license tax proceeds commensurate with the number of mobile homes within their jurisdiction.¹⁸¹

The final problem with the mobile home exemption is the administrative contortions required of local officials to properly locate, classify, and tax mobile homes. Because mobile homes evolved from travel trailers which were pulled behind automobiles,¹⁸² the Division of Motor Vehicles (“DMV”) has traditionally had jurisdiction over issues regarding mobile

176. This is because the statewide sales tax funds are disbursed to the county in which the sales tax dealer, i.e., the mobile home dealer, is located. FLA. STAT. § 212.20(6)(g) (Supp. 1992). Furthermore, discretionary local option sales tax funds resulting from mobile home sales are disbursed to the county identified as the residence of the purchaser on the registration or title certificate. FLA. STAT. § 212.054(3)(a) (1991). Thus disbursement of both state and local sales tax revenues does not depend upon the ultimate location of the mobile home.

177. All mobile homes not categorized as real property are subject to an annual license tax. FLA. STAT. § 320.015(1) (1991).

178. FLA. STAT. § 320.081(5) (1991) (“one-half to the district school board and the remainder either to the board of county commissioners, for units which are located within the unincorporated areas of the county, or to any city within such county, for units which are located within its corporate limits”). The state retains \$1.50 of the license tax collected for each mobile home and places it in the General Revenue Fund. FLA. STAT. § 320.081(4) (1991).

179. The registration contains a “location code”, which, once entered, is unlikely to be changed because DMV personnel are not trained to modify it. Dort Telephone Interview, *supra* note 168.

180. *See supra* notes 171-76 and accompanying text.

181. Pinellas County officials estimate an annual shortfall of 15-45% of expected disbursements from license taxes. Dort Interview, *supra* note 164.

182. *See Wilma Norton, Crude Trailer Evolves into Museum Piece, ST. PETERSBURG (FLA.) TIMES*, Sept. 5, 1989, *Largo-Seminole Times*, at 1 (describing a home-made travel trailer dating from the 1930’s).

homes.¹⁸³ Unfortunately, although the DMV has jurisdiction over mobile homes, it has no vested interest in exercising that jurisdiction efficiently.¹⁸⁴ Several problems result. First, pinpointing the actual location of a newly purchased mobile home may be difficult because the address shown on the original registration is often not the actual location of the mobile home.¹⁸⁵ Second, determining whether a mobile home owner has failed to properly renew the mobile home's registration is hampered by the lack of formalized sharing of such data between the DMV and local property appraisers.¹⁸⁶ Finally, local officials end up bearing the burden of proper enforcement of the license tax laws because the DMV allocates only minimal resources to such enforcement.¹⁸⁷ In fact, only by forging relationships at the local level are local officials able to obtain needed data regarding mobile homes from the DMV.¹⁸⁸

183. See generally FLA. STAT. chs. 319-320 (1991 & Supp. 1992). The DMV's responsibilities include issuance of title certificates, see FLA. STAT. §§ 319.21-319.29 (1991), collection and disbursement of annual license taxes, see *supra* note 165, issuance of mobile home stickers, see FLA. STAT. § 320.0815(2) (1991) (mobile homes are issued stickers for placement in the window of the mobile home rather than license plates), enforcement of mobile home safety standards, see FLA. STAT. §§ 320.823-320.8325 (1991 & Supp. 1992), and regulation of mobile home manufacturers and dealers, see FLA. STAT. §§ 320.77, 320.8225 (1991).

184. The only benefit to the DMV for collecting the annual mobile home license tax is the indirect benefit derived from the \$1.50 allocation from each registration which goes to the General Revenue Fund. FLA. STAT. § 320.081 (1991); see *supra* note 178.

185. Interview with Robert J. Joplin, Property Appraiser, Mobile Home Division, Pinellas County Property Appraiser's Office, in Clearwater, Florida (July 19, 1993) [hereinafter Joplin Interview]. Locating mobile homes is made more difficult by the common practice of installing mobile homes without obtaining proper permits. *Id.*, see Bruce Vielmetti, *Illegally Set Up Mobile Homes May Cost County Millions*, ST. PETERSBURG (FLA.) TIMES, Nov. 29, 1987, Pasco Times, at 1.

186. Dort Interview, *supra* note 164.

187. For example, in 1988, the DMV had only one inspector allocated for collection of delinquent license taxes for the entire Tampa/St. Petersburg/Clearwater area. Amelia Davis, *City Seeking Late Fees for Mobile Homes*, ST. PETERSBURG (FLA.) TIMES, Sept. 2, 1988, Largo-Seminole Times, at 1. As a result, local officials are effectively required to conduct an annual park by park audit in order to ensure full compliance with the license tax laws. *Id.* (City of Largo); Amelia Davis, *Police to Cite Mobile Home Decal Violators*, ST. PETERSBURG (FLA.) TIMES, Apr. 18, 1991, City Times, at 1 (City of Largo); Amelia Davis, *Mobile Homes Targetted*, ST. PETERSBURG (FLA.) TIMES, Sept. 3, 1991, North Pinellas Times, at 1 (Pinellas County); Matthew Sauer, *Mobile Home Tag Money Rolls In*, ST. PETERSBURG (FLA.) TIMES, Aug. 12, 1992, Largo-Seminole Times, at 1 (Pinellas County).

188. Joplin Interview, *supra* note 185. For example, the Pinellas County Property Appraiser's Office is allowed limited access to the County Tax Collector's motor vehicle renewal system in order to allow verification of mobile home registrations. *Id.*

C. *Justifications for the Exemption*

Over the years, a number of justifications for the continued existence of the mobile home exemption have been advanced. The original justification was that mobile homes were just that, mobile, and therefore more akin to motor vehicles than to structures.¹⁸⁹ However, the decision of the Florida Supreme Court in *Palethorpe v. Thomson*,¹⁹⁰ which distinguished between the transportation and housing uses of “house trailers,”¹⁹¹ signalled the end of the mobility argument. Any such argument which survived *Palethorpe* has been further eroded by the treatment of some mobile homes as real property and thus not subject to the exemption.¹⁹² Indeed, the idea that modern mobile homes are mobile has been abandoned by the Legislature¹⁹³ as well as by some of the most ardent advocates of the exemption.¹⁹⁴ By now it is beyond dispute that mobile homes are structures designed for human habitation, and not mere trailers for general use on the roadways of the state.

A second argument advanced in support of the mobile home exemption is that owners of mobile homes in rental parks are already fully taxed because they pay sales taxes, license taxes, and property taxes on fixtures and on the rented ground as a part of their rent.¹⁹⁵ However, the argu-

189. The “mobility” of mobile homes was central to the argument of the mobile homes owners in *Palethorpe*.

It is clear in the case at bar, that the trailer coaches’ design was such that they were intended to be used in conjunction with a self-propelled motor vehicle. If not, then what is the purpose of the wheels, axles, brakes, running lights, and trailer hitches, not to mention the fact that the width was confined to that legally permissible to operate over the highways of the state. Obviously if the [trailer owners] did not desire mobility as well as living accommodations, they could have purchased identical living quarters without the mobile apparatus at a much cheaper cost and probably in much better locations.

Appellee’s Answer Brief at 11-12, *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965) (No. 33474).

190. 171 So. 2d 526 (Fla. 1965)

191. *See supra* notes 151-152 and accompanying text.

192. *See supra* note 137.

193. FLA. STAT. § 320.01(2)(a) (Supp. 1992) (mobile home defined as “a structure . . . designed to be used as a dwelling . . .”). *See generally supra* note 164.

194. Fred Youn-teck, former president of the Federation of Mobile Home Owners of Florida, a mobile home owners’ advocacy group, has estimated that 95% of the mobile homes in Florida are never moved. *Mobile They Aren’t*, *supra* note 134.

195. Typical is the following reaction to a letter to the editor taking the position that mobile home owners do not pay their share of taxes:

I am sick and tired of being put down for living in a mobile home by

ment fails because the mobile home exemption allows owners of mobile homes in rental parks to avoid paying ad valorem taxes on the value of the structure in which they live. Instead, such mobile home owners pay an annual license tax, which, on average, is much lower than the property tax levy would be.¹⁹⁶ While the license tax has not been increased once since voters adopted the exemption in 1965,¹⁹⁷ the personal property levy has reflected the inflation of property values and increased cost of government generally since then. The fact is that of all types of housing structures, only mobile homes in rental parks are totally exempt from ad valorem taxation.¹⁹⁸ It cannot be said that such a discrepancy was intended by Florida voters.¹⁹⁹

A third justification for the continued existence of the mobile home exemption is that it is analogous to the homestead exemption available for owners of real property in Florida.²⁰⁰ However, such reasoning ignores

people who don't know what they are talking about. First of all, let me tell you the taxes we pay.

1. Sales tax when we purchase our mobile home.
2. License tag fees each year.
3. Intangible tax.
4. Real property tax.

The people who live in rental parks receive no tax exemptions. All in all, a mobile home in a rental park pays taxes comparable to a home valued at \$39,500.17. As I see it, we are paying more than our fair share of taxes. I hope this explains to the man from Hudson that we are not freeloaders. We pay our share and then some.

Mobile Home Owners Pay Taxes, ST. PETERSBURG (FLA.) TIMES, Jan. 6, 1988, Pasco Times, at 2.

196. See *supra* note 170.

197. Compare ch. 65-466, § 2, 1965 Fla. Laws 1574 with FLA. STAT. § 320.08(11) (1991).

198. All permanent housing structures, whether rented or owner occupied, are subject to ad valorem taxation as real property. FLA. CONST. of 1968, art. VII, § 9(b) (1976) (authorizing levy of ad valorem taxes on real property by local governments); FLA. STAT. § 192.001(12) (1991) (defining "real property" for purposes of ad valorem taxation as "land, buildings, fixtures, and all other improvements to land."). Furthermore, mobile homes permanently affixed to land owned by the owner of the mobile home are also subject to ad valorem taxation as real property. FLA. STAT. § 193.075(1) (1991).

199. In fact, at the time, the expectation was that the exemption would save the owner of a typical mobile home approximately \$36.25 per year in personal property taxes, compared to an estimated average license tax of \$25.00. *Trailer Tax Probably Valid for This Year*, ST. PETERSBURG (FLA.) TIMES, Nov. 4, 1965, at B1.

200. The 1968 Constitution, as amended, provides a \$25,000 exemption to every person who owns real estate and maintains thereon their permanent residence. FLA. CONST. art. VII, § 6 (1980).

the fact that the mobile home exemption applies to all mobile homes in rental parks, and not just those used as a permanent residence.²⁰¹ In addition, other types of renters do not enjoy any benefit from the homestead exemption, even where those renting are permanent residents of Florida.²⁰² Finally, the mobile home exemption extends to the entire value of the mobile home, and not just to the first \$25,000 of assessed value covered by the homestead exemption.²⁰³ Thus, the mobile home exemption is not analogous to the homestead exemption, because it applies whether or not the mobile home owner is a permanent resident of Florida, and because it exempts the full value of mobile homes in rental parks.

D. *Recommendation*

By now it is apparent that the exemption from ad valorem taxation currently enjoyed by owners of mobile homes located in rental parks is not defensible on any rational ground outside of the obvious concern legislators have for well organized special interest groups.²⁰⁴ The exemption costs local governments significant revenue each year,²⁰⁵ and the current statutory scheme for the collection and disbursement of sales and license taxes on mobile homes leaves much to be desired.²⁰⁶ In addition, administration of mobile home taxation is left mainly to the ingenuity of local officials who rely on mobile home taxation, but have no jurisdiction over it.²⁰⁷ Therefore, we recommend that the Revision Commission amend article VII, section 1(b), to revoke the ad valorem tax exemption for mobile homes.²⁰⁸ Furthermore, in order to maintain a consistent approach between taxation of mobile homes and other types of housing structures, we also recommend that the Revision Commission expressly exempt mobile

201. Compare FLA. CONST. art. VII, § 1(b) and FLA. STAT. § 320.015(1) (1991) with FLA. CONST. art. VII, § 6(a).

202. The 1968 Constitution, as amended, allows the Legislature to provide by general law a homestead exemption for renters who are permanent residents of the state. FLA. CONST. art. VII, § 6(e) (1980). To date, the Legislature has made no such provision.

203. Compare FLA. CONST. art. VII, § 1(b) with FLA. CONST. art. VII, § 6(a) (1980).

204. See *supra* note 153; *infra* note 230.

205. See *supra* notes 167-71 and accompanying text.

206. See *supra* notes 172-81 and accompanying text.

207. See *supra* notes 182-188 and accompanying text.

208. As revised, article VII, section 1(b) would read: "Motor vehicles, boats, airplanes, trailers, and trailer coaches ~~and mobile homes, as defined by law~~, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes."

homes from sales taxation.²⁰⁹

As a result of this amendment, mobile homes would generally be subject only to ad valorem taxation,²¹⁰ either as tangible personal property or as real property, depending on the circumstances.²¹¹ This reflects the undeniable fact that today's mobile homes are used for housing, not for transportation.²¹² Such a shift in emphasis would be consistent with both the policy underlying the original motor vehicle exemption granted in 1930²¹³ and with the rationale of the *Palethorpe* decision.²¹⁴

E. *Anticipated Impact of Recommendation*

The proposed amendments would have a differing impact on each of the various groups which have an interest in mobile homes located in rental parks. First, county and municipal governments would clearly benefit both as to administration of mobile home taxation²¹⁵ and as to receipt of funds derived from such taxation.²¹⁶ On the other hand, the state government would lose its sales tax revenue,²¹⁷ but would likely be able to mitigate such losses by reducing expenditures required under the current system,

209. The revision would read: "The Legislature shall impose no sales or use tax upon tangible personal property which is designed and used primarily for housing accommodations."

210. The proposed amendment should not preclude the levying of appropriate license taxes when a mobile home is transported on public street and highways.

211. Mobile homes located in rental parks should be treated as tangible personal property, since the mobile home owner does not own the land underlying the mobile home. However, if the mobile home is owned by the owner of the land, then it should continue to be taxed as real property. See FLA. STAT. § 193.075(1) (1991); Ch. 93-132, § 6, 1993 Fla. Laws 565 (exempting mobile homes used by mobile home dealers exclusively for display purposes).

212. See *supra* notes 189-94 and accompanying text. The change in the physical appearance of mobile homes over the years supports this contention. Older homes were truly "trailers", measuring roughly 10 x 60 feet. More typical today is a "double wide," measuring 24 x 50 feet. The newest mobile homes measure 28 x 56 feet, and even have pitched roofs, a far cry from their flat-topped trailer ancestors. Telephone Interview with Dort, *supra* note 168.

213. See *supra* note 145.

214. *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965); See *supra* note 151.

215. See *supra* notes 182-88 and accompanying text.

216. See *supra* notes 167-81 and accompanying text.

217. See *supra* notes 174-75.

which would no longer be needed under the amendment.²¹⁸

Mobile home dealers would be impacted positively, if at all, by the proposed amendment. They would no longer be required to collect sales taxes on mobile home sales,²¹⁹ nor, hopefully, would they be required to perform other mobile home related administrative functions.²²⁰ Furthermore, so long as the dealer actually owns a particular mobile home for the purpose of selling it, the mobile home would not be subject to ad valorem taxation.²²¹

Two other groups which would be impacted by enactment of the proposed amendment are lien holders and holders of security interests against mobile homes. The dual nature of mobile homes as both vehicles and fixtures under the current system often forces lien and interest holders to resort to duplicative filings of their interest in order to be fully protected.²²² Under the proposed amendment, the need for separate filing would no longer exist.²²³ Thus, both lien holders and holders of security interests would only be required to record their interest once, providing a level of certainty to an area of the law which is currently quite confused.²²⁴

Clearly, the group which would be most heavily impacted by the proposed amendment are the current owners of mobile homes located in

218. For example, expenditures related to mobile home registration and license tax collection and disbursement. See FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.01(2)(a) (Supp. 1992). In addition, since mobile homes are not mobile, the current treatment of mobile homes as motor vehicles regarding title certification should be removed. See FLA. STAT. § 319.21 (1991 & Supp. 1992).

219. See FLA. STAT. § 212.06 (Supp. 1992).

220. For example, handling title certification of new mobile homes. See *supra* note 218.

221. FLA. CONST. art. VII, § 4(b) ("Pursuant to general law tangible personal property held for sale as stock in trade . . . may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation."); FLA. STAT. § 196.185 (1989) (exempting inventory from ad valorem taxation).

222. Encumbrances and liens against mobile homes currently should be filed with both the Division of Motor Vehicles, see FLA. STAT. §§ 319.24-319.27 (1991) (title certificates), and the Florida Secretary of State, see FLA. STAT. § 679.301-679.318 (1991) (UCC financing statements).

223. See *supra* note 218.

224. Compare FLA. STAT. § 320.015(2) (1991) (providing that a mobile home remains personal property for purposes relating to a security interest so long as the interest was created while the mobile home was considered personal, and not real, property) with *General Elec. Capital Corp. v. Sohn*, 566 So. 2d 841 (Fla. 1st Dist. Ct. App. 1990) (tax deed forecloses security interest in mobile home permanently affixed to the land covered by the deed).

rental parks.²²⁵ The extent of the impact would depend upon the value of the mobile home,²²⁶ but on average, the amendment would result in significantly higher tax payments.²²⁷ However, higher payments could have the positive benefit of accelerating the current trend toward conversion of rental mobile home parks to ownership parks.²²⁸

In conclusion, it is clear that revocation of the mobile home exemption provided by article VII, section 1(b), of the Florida Constitution would have a sweeping impact upon the way mobile homes are taxed in Florida. It is equally clear that the group with the greatest stake in the amendment are the current owners of mobile homes in rental parks, since they would be asked to shoulder a greater tax burden than they do today.²²⁹ This higher tax burden would be the single greatest barrier to enactment of the amendment.²³⁰ However, the increased burden of the amendment could be

225. An argument can be made that the trade-off between sales taxes paid up-front and personal property taxes paid over time is essentially a wash. If this is the case, then future buyers of mobile homes to be located in rental parks will not be effected by the proposed amendment.

226. See *supra* note 168. For example, assuming a tangible personal property tax rate of 19 mills, older single-wide mobile homes assessed at less than \$3000 would likely break even or benefit from annual ad valorem tax payments of \$57.

227. See *supra* note 170.

228. Significant numbers of mobile home owners within rental parks are purchasing the rental parks and converting them into condominiums or cooperatives. See FLA. STAT. § 718 (1991 & Supp. 1992) (condominiums); FLA. STAT. § 719 (1991 & Supp. 1992) (cooperatives); Betty Jean Miller, *Home Sweet Home Mobile Home Park Is Theirs*, ST. PETERSBURG (FLA.) TIMES, Mar. 24, 1992, City Times, at 1. Some rental parks are also subdivided, and individual lots sold to the mobile home owner. Dort Interview, *supra* note 164. Ownership of the underlying land, regardless of form, allows the mobile home owners to exercise more control over the services provided in the park, and, more importantly, allows many owners to take advantage of the homestead exemption. See *supra* note 200. This, of course, raises the potential for lost revenue due to the homestead exemption. Dort Interview, *supra* note 164 (one conversion resulted in the exemption of 60% of assessed value). However, such is the nature of the homestead exemption generally, and as such is beyond the scope of this discussion.

229. See *supra* notes 225-27 and accompanying text.

230. Not only are mobile home manufacturers well represented in Tallahassee, but 240,000 mobile home owners are represented by the Federation of Mobile Home Owners of Florida (FMO). See *supra* note 153; see also *Federation Can Help Keep Owners Informed*, ST. PETERSBURG (FLA.) TIMES, Nov. 10, 1991, at 3H. The FMO is an aggressive advocate for mobile home owners generally, and for those in rental parks in particular. Kendra Brown, ST. PETERSBURG (FLA.) TIMES, Jan. 12, 1990 (as of the end of 1989, FMO was involved in 65 court cases, most involving rent increases). Its activities go beyond applying pressure on the Legislature, and have included opposing judges who rule against mobile home owners, Bruce Vielmetti, *Mobile-Home Owners Group Campaigns Against Judge*, ST. PETERSBURG

lessened either by some kind of phased tax credit scheme,²³¹ or by conversion of the mobile home from personal property to real property.²³² Regardless, we believe that our proposal is fair to all parties involved. We strongly urge the Revision Commission to seriously consider action in this area.

VI. ARTICLE VII, SECTION 10C: CHANGES IN THE PLEDGING OF PUBLIC CREDIT

Article VII, section 10(c) of the Florida Constitution has been so thoroughly changed by judicial decision that it should be modified to reflect those changes. In order to understand the scope of the change, it is useful to look at the pertinent part of the forerunner provision in the 1885 Constitution.

The credit of the State shall not be pledged or loaned to any individual, company, corporation, or association. . . . The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.²³³

(FLA.) TIMES, Aug. 27, 1990, Brandon Times, at 1, and flooding the United States Department of Housing and Urban Development with letters opposing increased safety standards in the face of Hurricane Andrew, Laurie McGinley, *Storm Rages Over Mobile-Home Safety*, WALL ST. J., Aug. 23, 1993, at B1.

231. For example, by allowing a credit against ad valorem taxation for sales taxes previously paid by the mobile home owner, the impact of the amendment on current owners would be lessened. Of course, no such credit has ever been offered for owners of mobile homes who also own the underlying land, even though they also pay ad valorem taxes.

232. See *supra* note 228.

233. FLA. CONST. of 1868, art. IX, § 10 (1875) (quoting *State v. Jacksonville Port Auth.*, 204 So. 2d 881, 882 (Fla. 1967)). The rationale for this provision in the 1885 Constitution was found to be two-fold. First:

This section was first adopted in 1875 as an amendment to the Constitution of 1868. Its purpose was to stop the practice of public bodies becoming stockholders or bond holders and in other ways loaning their credit to and becoming interest[ed] in the organization and operation of railroads, banks and other commercial institutions. Many of these enterprises were poorly managed and failed, resulting in such government entities as were interested therein in becoming responsible for their debts and other obligations, which obligations fell ultimately on the taxpayers.

Jacksonville Port Auth., 204 So. 2d at 882.

The modern view of the effect of this provision of the 1885 Constitution has been set out in *Linscott v. Orange County Industrial Development Authority*.²³⁴

The Constitution of 1885, article IX, section 10, prohibited government bodies from obtaining money for, or pledging the public credit to, any private entity. Under case law, revenue bonds payable solely from capital project revenues (non-recourse bonds) were held to be pledges of public credit and were prohibited unless it could be shown that the capital project served a predominately or paramount public purpose [For example in *State v. Town of North Miami*, the trial court ruled that the non-recourse bonds for the construction of a private plant were valid because they did not involve a pledge of the public credit. Implicit in our decision overruling the circuit court was a determination that the bonds involved either obtaining money for, or pledging the public credit to, a private entity.

Town of North Miami, and its progeny, began to have a significant effect on Florida's economic development in the 1960's because of a ruling by the Internal Revenue Service, later codified, which made the interest on industrial revenue bonds exempt from federal income tax. As a result of this ruling, Florida was placed at a competitive disadvantage with other states which could offer tax exempt, non-recourse revenue bonds to private entities for capital projects.²³⁵

As pointed out in *Linscott*,²³⁶ the reaction of the drafters of article VII of the 1968 Florida Constitution to *North Miami* and *Jacksonville Port Authority* was to write exceptions to the rule carried over from the 1885 Constitution against pledging credit. The exceptions were directed at the

Second, such government involvement with business and commerce was seen as an interference with the free enterprise system. "Perhaps the modern trend of government encroachment on the free enterprise system is the wise road to follow. So long however, as the Constitution reads as it does now, it seems clear that we have no choice in the matter." *Id.* at 883. "[I]n 1966 this state added 397 new plants and 156 major plant expansions yielding 33,223 new jobs. These facts establish that Florida has prospered and continues to grow and prosper under the free enterprise system. It confirms the wisdom of our forefathers nearly a hundred years ago in writing into the Constitution one provision which to this date remains unchanged." *Id.* at 886 (footnote omitted).

234. 443 So. 2d 97 (Fla. 1983).

235. *Id.* at 98-100 (citing *Jacksonville Port Auth.*, 204 So. 2d at 881 wherein non recourse bonds for a major port expansion were held invalid).

236. *Id.* at 97.

North Miami and Jacksonville Port Authority situations.²³⁷

The basic limitation remained in article VII, section 10:

Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership, or person²³⁸

The reader will note that the ban on “*obtaining money for*” a “corporation, association, partnership or person”²³⁹ found in the 1885 Constitution has been deleted. More on this anon. As alluded to above,²⁴⁰ the 1968 version contained an exception aimed directly at the *North Miami and Jacksonville Port Authority* problems:

But this [the ban on pledging public credit] shall not prohibit laws authorizing:

(c)[²⁴¹] the issuance and sale by any county, municipality, special district or any other local governmental body of (1) revenue bonds to

237. The *Linscott* court stated:

Concurrently, in August 1967, each house [of the Florida legislature] adopted joint resolutions proposing revisions to the constitutional provisions prohibiting the pledge of the public credit to private entities. In pertinent part, the thrust of the Senate version was to overturn *Jacksonville Port Authority* [(disapproval of use of revenue bonds to improve port facilities for a private entity)]; that of the house version to overturn *Town of North Miami* [(disapproval of the use of revenue bonds to build a warehouse for the private sector)].

Id. at 100 (footnotes omitted).

As the reader can easily see, when approved by the electorate, these become the “airport and port facilities” and “industrial and manufacturing plant” exceptions in article VII, section 10(c) of the 1968 Florida Constitution.

238. FLA. CONST. art. VII, § 10.

239. *See supra* text accompanying note 233.

240. *See supra* note 237 and accompanying text.

241. Also excluded from the ban on pledging credit are:

- 1) “the investment of public trust funds,” FLA. CONST. art. VII, § 10(a);
- 2) “the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities,” FLA. CONST. art. VII, § 10 (b); and
- 3) “a municipality, county, special district, or agency of any of them, being a joint owner of, giving, lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person,”

FLA. CONST. art. VII, § 10(d). The author has no difficulty with these and suggest they remain unchanged with the following possible exception; that there be added to section 10(d) those projects found in FLA. CONST. art. VII, §§ 14-17.

finance or refinance the cost of capital projects for *airport or port facilities*²⁴² or (2) revenue bonds to finance or refinance the cost of capital projects for *industrial or manufacturing plants* to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived solely from revenue derived from the sale, operation or leasing of the projects²⁴³

Read literally, except for the four exceptions²⁴⁴ contained in this provision, the rigid restrictions on revenue bond financing of projects for the private sector would apparently still apply. The first major case to interpret this constitutional section may or may not have so held. The court stated:

All other proposed public revenue bond projects not falling into the exempted class described in section 10(c) of article VII would, of course, have to run the gauntlet of prior case decisions to test whether the lending or use of public credit for any of them was contemplated It will be noted that under similar language in the 1885 Constitution . . . the cases hold that the validity of each proposed public revenue bond financing project depends upon the circumstances, e.g., whether the purpose serves a *paramount public purpose*, although there might be an incidental private benefit, and other criteria.²⁴⁵

At this point in the supreme court's opinion, it appeared to be on the verge of a glaring oversight. The applicable provision regarding revenue bonds in the 1885 Constitution had included the words "obtaining money for"²⁴⁶ as a means of pledging the public credit. Those words are conspicuously left out of the 1968 Constitution. Thus, since a change in language from an earlier to a later constitution is to be accorded meaning,²⁴⁷ it could clearly be argued, as was ultimately done in *Nohrr*, that revenue

242. See *supra* note 237 and accompanying text (emphasis added).

243. FLA. CONST. art. VII, § 10(c) (emphasis added).

244. The exceptions are "airports and port facilities" and "industrial and manufacturing plants." *Id.*

245. *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 308-09 (Fla. 1971) (emphasis added); see, e.g., *State v. Jacksonville Port Auth.*, 204 So. 2d 881 (Fla. 1967) (presenting an index to decisions of the supreme court of both sides of the subject), and referenced in that regard in *Nohrr*, 247 So. 2d at 309.

246. See *supra* text accompanying note 239.

247. See *State v. City of St. Augustine*, 235 So. 2d 1 (Fla. 1970); *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960).

bonds, frequently called “non recourse revenue bonds,”²⁴⁸ are simply not pledges of the public credit at all since the bondholder can look for payment from the revenues generated by the project and not to any other revenue sources belonging to the government entity involved.²⁴⁹

In this opinion, even after saying that the rigid strictures of the 1885 Constitution (*paramount public purpose*) would apply, the court then found that the non recourse revenue bonds involved in this case, did not pledge the public credit:

Under the foregoing construction of Section 10(c), Article VII, the dormitory-cafeteria projects involved here are not revenue projects that contemplate the lending or use of the credit of the county or its commissioners. The word ‘credit’ as used in Fla. Const., art. VII, section 10 (1968), implies the imposition of some new financial liability on the part of the State or political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.

In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody. Neither the full faith and credit nor the taxing power of the State of Florida or any political subdivision thereof is pledged to the payment of the principal of, or interest on, these revenue bonds. The purchasers of the revenue bonds may not look to any legal or moral obligation on the part of the state, county, or authority to pay any portion of the bonds.²⁵⁰

Thus, the Florida Supreme Court appeared to be saying that since non recourse revenue bonds are involved,²⁵¹ there is no pledge of public credit and the no pledging of public credit provision in article VII, section 10 of the 1968 Constitution should not even apply. Such a conclusion would be bolstered by the deletion of the “obtaining money for” language that had appeared in the 1885 Constitution.²⁵²

However, the court then appeared to return in part to its original view, that except for “airports and port facilities” and “industrial and manufactur-

248. *Linscott*, 443 So. 2d at 101.

249. *See infra* text accompanying note 250.

250. *Nohr*, 247 So. 2d at 309.

251. *See supra* text accompanying note 246.

252. *See supra* text accompanying notes 239, 246.

ing plants,” the rule under the cases interpreting the 1885 Constitution which required a paramount public purpose would still apply. The supreme court found that even though the school was private, a *public purpose* was served by aiding it to acquire a dormitory-cafeteria. The court stated that “[c]ertainly, the financing of college dormitories and dining facilities as an aid in providing for the education of the youth of this State is a public purpose.”²⁵³

It would thus appear that the *Nohrr* court had, albeit in a roundabout way, created an interpretation of the pledging credit provision of the 1968 Florida Constitution which required only a “public purpose” and not a “paramount public purpose” if no pledge of the public credit was involved, even if the project involved was not an “airport or port facility” or “industrial or manufacturing plant.”

This interpretation was not immediately followed and, indeed, it can be argued that *Nohrr* was misread. In *Orange County Industrial Development Authority v. State*,²⁵⁴ the supreme court found that *Nohrr*:

establish[ed] a two-prong test for determining whether revenue bonds for . . . projects [other than for “airport and port facilities” and “industrial and manufacturing plants”] would be validly authorized pursuant to the constitution. The two criteria are (1) whether the revenue bonds contemplate a pledge of the credit of the state or political subdivision and (2) whether the funded project serves a paramount public purpose, although there might be an incidental private benefit.²⁵⁵

This reading of *Nohrr*, of course, ignores the fact that in the end, the *Nohrr* court found the necessity for only a public benefit, not a paramount one.²⁵⁶ This difference will at once become significant. This significance

253. *Nohrr*, 247 So. 2d at 309. The reader will note that the court gave great deference to the legislative determination that a public purpose was served by the project. The court stated Florida Statute, “section 243.19 . . . contains a finding by the legislature that projects financed under the Educational Facilities Law [as was the project in *Nohrr*] are, in effect, for a public purpose. . . . The finding of legislature is determinative” *Id.* (citations omitted).

254. 427 So. 2d 174 (Fla. 1983). Involved were industrial development revenue bonds. *Id.* at 176. They were clearly non recourse bonds. *Id.* at 179.

255. *Id.* at 178. The court, thus, emphasized the need for a paramount public purpose rather than merely a public purpose as *Nohrr* had suggested would be the case when non recourse revenue bonds were involved.

256. *See supra* text accompanying note 253.

occurs in *Linscott v. Orange County Industrial Development Authority*.²⁵⁷

With the adoption of the Constitution of 1968, the “*paramount public purpose*” test developed by case law under the Constitution of 1885 lost much of its viability. The test is still applicable when a pledge of public credit is involved, but where such pledge is not involved, . . . it is enough to show that a public purpose is served.²⁵⁸

This, of course, is the other reading of *Nohrr*²⁵⁹ and apparently supersedes the interpretation of *Nohrr* found in *Orange County Industrial Development Authority v. State*.²⁶⁰

Based on the foregoing, it is suggested that article VII, section 10(c) of the 1968 Florida Constitution be amended to read:

(c) the issuance and sale by any county, municipality, special district or other local governmental body of non recourse revenue bonds for any project if any public purpose is served thereby. The term “non recourse revenue bond” means revenue bonds that are payable solely from revenue derived from the sale, operation or leasing of the projects. If any projects so financed, or any part thereof, are occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract shall be subject to taxation to the same extent as other privately owned property.

The reader will note three major changes from the present 10(c). First, the special status of “airport and port facilities” and “industrial and manufacturing plants” is removed. It is assumed that (1) that such projects could easily pass the “any public purpose” test in the proposed change, and (2) that it was never the intent of the drafters of the current 10(c) that such projects

257. 443 So. 2d 97 (Fla. 1983).

258. *Id.* at 101 (emphasis added).

259. *See supra* text accompanying note 253.

260. *See supra* text accompanying notes 254-55. It should be noted, however, that Justices Overton and Ehrlich concurred in the result in *Linscott*, but not in the opinion of the majority. They did not write an opinion, so one is left to guess what they intended. *Linscott*, 443 So. 2d at 101. (Overton, J. & Ehrlich, J., concurring in decision only). It is, however, possible to conclude that they continued to believe that a paramount public purpose is required, even in *non recourse revenue* bond situations, but that such a purpose existed in *Linscott*. If this supposition is correct, then counting Justice Boyd’s dissent in *Linscott*, its major shift in emphasis was supported by a bare majority of the court. However, it has subsequently been followed. *See Northern Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992).

be supported by anything other than non resource revenue bonds and the present 10(c) says exactly that.²⁶¹

Second, any hint of a limitation of the use of revenue bonds to capital projects was removed along with the removal of the “airports and port facilities” and “industrial and manufacturing plants language.” That should also make it easier for the proposed change in 10(c) to support the issuance of arbitrage bonds by municipal corporations as discussed below.

Third, the limitation regarding the interest on such bonds being exempt from federal income taxation, which my proposal leaves out, seems to be more of a recognition of a then existing²⁶² and very malleable practice²⁶³ which serves little practical purpose except that such bonds would be desirable at lower interest rates because no federal income tax would have to be paid on such interest. The author claims no expertise in bond finance, but can see no other purpose for this provision which he proposes to delete. Indeed, it appears that this practice now may be the case anyway. The bonds in *State v. City of Orlando*, below, were not limited to tax exempt obligations. While the supreme court refused to affirm the circuit courts validation of the bond issue, no comment was made by the court on the fact that some of the bonds were not tax exempt. Perhaps this was because the bond issue was seemingly held to be invalid on grounds other than a violation of article VII, section 10. It is impossible to say for sure.

In any event, as changed, section 10(c) seems to otherwise state the existing law as indicated in *Nohrr*²⁶⁴ and *Linscott*.²⁶⁵

The purposed change to section 10(c) might, if a legislative history of such a change so indicates, also overturn the pernicious effect of the supreme court decision in *State v. City of Orlando*,²⁶⁶ which is both meddlesome and poorly reasoned.²⁶⁷ There, the court held, in effect, that

261. “The revenue bonds . . . [must be] payable *solely* from revenue derived from the sale, operation or leasing of the projects.” FLA. CONST. art VII, § 10(c) (emphasis added).

262. See *supra* text accompanying note 235.

263. See *State v. Broward County*, 468 So. 2d 965 (Fla. 1985) (discussing the cap and other limitations on tax exempt bonds issued by a state caused by the Federal Deficit Reduction Act of 1984).

264. See *supra* text accompanying note 253.

265. See *supra* text accompanying notes 257-58.

266. 576 So. 2d 1315 (Fla. 1991). Orlando proposed to sell revenue bonds and use the proceeds to invest at a profit with other local government entities. *Id.* at 1316. The city might also borrow some of the money itself. *Id.*

267. The bonds involved were clearly non recourse revenue bonds. “[T]he bonds would be payable only from the funds derived from repayment of the loans by the local agencies.” *City of Orlando*, 576 So. 2d at 1316. Nevertheless, the court mentioned the “paramount

a municipal corporation could not issue a type of non recourse revenue bond known as an arbitrage bond, that is, where the revenue raised from the bond issue is invested at an interest rate greater than that attached to the bond issue, thus raising money for the municipal corporation.²⁶⁸

After thorough review and discussion, the court approved the sale and issuance of arbitrage bonds by a municipal corporation in *State v. City of Panama City Beach*.²⁶⁹ Then in *City of Orlando*, when faced with an arbitrage scheme more complex than the one in *City of Panama City Beach*,²⁷⁰ the court retreated from its holding in the latter case.²⁷¹ It did so without significant reference to article VII, section 10. Rather, it found that “borrowing money for [the] primary purpose of reinvestment is not a valid municipal purpose as contemplated by article VIII, section 2(b) [of the Florida Constitution].”²⁷² This provision requires that municipal power be

public purpose” test. *Id.* at 1317. This is incorrect unless the court intended to *sub silentio* overrule *Linscott v. Orange County Industrial Development Authority*. See *supra* text accompanying notes 257-58. Yet this can hardly be the case since that test was reaffirmed in *North Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992), decided subsequent to *Orlando*. Justice Grimes, the author of the *Orlando* opinion, joined the majority opinion in the latter case. *Id.* at 443. In any event, the case did not apparently turn on the issue of article VII, section 10 of the Florida Constitution.

268. See *State v. City of Panama City Beach*, 529 So. 2d 250, 250-51 (Fla. 1988).

269. *Id.*

270. The difference in investment schemes is discussed *supra* note 266 and *infra* note 271.

271. The bond issue in *City of Panama City Beach* was relatively simple compared to the one in *Orlando*. The proceeds from the sale of what were clearly non recourse revenue bonds, or at least the “bulk” of such proceeds, was to be invested at a higher interest rate than the bonds paid. The profit was to be used for such municipal purposes as parks and recreational facilities. *City of Panama City Beach*, 529 So. 2d at 250. Therefore, it was not entirely clear whether the *Orlando* court actually overruled *City of Panama City Beach* or limited it to its facts, i.e. straight forward investment of the proceeds from the bond issue as opposed to the complicated *Orlando* scheme. The court stated “[a]ccordingly we recede from *State v. City of Panama City Beach* to the extent that it conflicts with this opinion.” *City of Orlando*, 576 So. 2d at 1318. Subsequently, it has become clear that *City of Panama City Beach* was totally receded from, and effectively overruled. “*State v. City of Orlando* . . . held ‘that borrowing money for the primary purpose of investment is not a valid municipal purpose’” *Washington Shores Homeowners’ Ass’n v. City of Orlando*, 602 So. 2d 1300, 1302 n.3 (Fla. 1992). This conclusion is not surprising since the *Orlando* court relied almost entirely on Justice McDonald’s dissent in *City of Panama Beach*, which argued that borrowing money in order to invest it at a higher interest rate in order to make money is not a valid municipal purpose.

272. Article VII, section 10 issue was thoroughly discussed in *City of Panama City Beach*, 529 So. 2d at 253-54. The only reference to it in *Orlando* is the statement that, “[b]y allowing the city council to later decide how to spend the profits, the city has deprived this

exercised for municipal purposes.

To explain why the investing of non recourse revenue bond money in order to use the profit is not a municipal purpose, the court relied on the following reasoning of Justice McDonald²⁷³ in his dissent in *City of Panama City Beach*. Justice McDonald saw “no valid public [municipal?] purpose in investing for investing’s sake. Making a profit on an investment is an aspect of commerce more properly left to commercial and business entities.”²⁷⁴ What was ignored by the court, of course, is the fact that the profit from the investment would have to be used for a municipal purpose because of article VIII, section 2(b) of the Florida Constitution. To city governments already struggling to find additional sources of revenue to meet ever increasing demands for services and to a tax weary public, the court’s reasoning must seem, relatively speaking, to have come from out of the middle ages.²⁷⁵

This line of reasoning also undermines the Legislature’s attempt to restore broad municipal home rule power subsequent to the supreme court’s disastrous decision in *City of Miami Beach v. Fleetwood Hotel, Inc.*²⁷⁶ As

Court of the ability to determine whether the expenditures will meet a paramount [sic] public purpose.” *City of Orlando*, 576 So. 2d at 1317. This did not however turn out to be the issue on which the case was decided. *Id.*

273. *City of Orlando*, 576 So. 2d at 1315. Justice McDonald was Chief Justice at the time.

274. *City of Panama City Beach*, 529 So. 2d at 257. (McDonald, C.J., dissenting, and Overton & Ehrlich, J.J., concurring with dissent). Justice McDonald also argued that the arbitrage bonds served no public purpose. *Id.* at 252-58.

275. Sometimes words or phrases I have read in books or heard in movies come to mind and find themselves used in my writings because the movie or book context and the article context in which they are used seem somehow related. I recall this phrase from the Twentieth Century Fox movie on the life of the World War II German Field Marshal, Erwin Rommel, *The Desert Fox*. The phrase occurs when Rommel and General Fritz Bayerlein are discussing Hitler’s no retreat order during the Battle of El Alamein, when the Afrika Korps and its Italian allies were faced with the overwhelming quantitative and, in some instances, qualitative, superiority of the British Eighth Army. Bayerlein, speaking to Rommel: “It’s [Hitler’s order] out of the Middle Ages. This is an order to throw away an entire army. Nobody has said ‘victory or death’ since people fought with bows and arrows.” Justice McDonald’s argument is not an order “to throw away an entire army” and certainly there is absolutely no intent on my part to equate Justice McDonald or any other justice, with Hitler, *but* the argument *is* an argument to throw away a unique, valuable source of non tax municipal revenue at a time when new sources of that type are almost impossible to find.

276. 261 So. 2d 801 (Fla. 1972). This case gutted article VIII, section 2(b) of the then new 1968 Constitution by placing an artificially narrow interpretation on the term “municipal purpose” This caused the Legislature to undo *Fleetwood* by enacting chapter 73-129 of the Laws of Florida 1973, which restored the term “municipal purpose” to its intended meaning.

was previously stated, the question of whether or not the issuance of non recourse revenue bonds for arbitrage purposes was a valid municipal purpose was thoroughly discussed in *City of Panama City Beach* and arbitrage bonds were found to constitute both a public and a municipal purpose.²⁷⁷

Hopefully, the proposed change in 10(c) would restore the law as it was before *Orlando*. Should any doubt exist on this score, the author recommends that another section be added to article VII specifically stating that non recourse revenue arbitrage bonds serve both a public and municipal purpose.

This discussion has caused the author to also make the following suggestions when changes to the bond provisions of article VII of the 1968 Florida Constitution are being considered. As far as I can determine, there does not exist any consistent definition of the types of bonds based on their funding. I suggest that the constitution define three basic type of bonds.

- 1) *Non recourse revenue bonds* as defined above.²⁷⁸
- 2) *Special obligation bonds*²⁷⁹ which pledge some²⁸⁰ but not all²⁸¹

See generally the discussion of this subject in 1973 Fla. Att'y Gen. Ann. Rep. 450 (1973); see also *City of Panama City Beach*, which ignored *Fleetwood* and appears to adopt the original view of "municipal purpose." 529 So. 2d at 250. Alarming, the dissent of Justice McDonald in *City of Panama City Beach* relied almost entirely on *Fleetwood* for its municipal purpose argument, *id.* at 257 (McDonald, C.J. dissenting and Overton & Ehrlich, J.J., concurring with dissent.) Even more alarming, it is this argument upon which the court's opinion in *Orlando* is based. See *supra* text accompanying note 272.

277. *City of Panama City Beach*, 529 So. 2d at 254-56.

278. See *supra* text accompanying note 250.

279. This term was directly used in *State v. Alachua County*, 335 So. 2d 554, 555 (Fla. 1976) and indirectly in *Town of Medley v. State*, 162 So. 2d 257, 258-259 (Fla. 1964).

280. See *Town of Medley*, 162 So. 2d at 257; *Alachua County*, 335 So. 2d at 554. In the former, the Town of Medley pledged the following toward the payment of "Public Improvement Revenue Bonds": "the revenues from a proposed water system, [p]roceeds of the cigarette tax, franchise tax on electric power, utility taxes and occupational license taxes." *Town of Medley*, 162 So. 2d at 257. "No ad valorem taxes were pledged and the form of the proposed bond and the ordinance authorizing the issue specifically provides that the Town is not 'directly or indirectly or contingently' obligated to levy ad valorem taxes for the payment thereof." *Id.* at 257-58. In spite of the fact that

[i]n any instance in which a municipality has been using funds from special non-ad valorem sources of revenue to meet its operating costs and then diverts those funds by pledging them to payment of a specific indebtedness as done here, the result will probably be that ad valorem taxes will have to be increased to make up the deficiency in funds available for operating expenses,

the bonds were held not to be a pledge of ad valorem taxes so as to trigger the constitutional requirement for a referendum. *Id.* at 258. The Alachua County case is to the same effect.

local government sources of revenue but exclude the direct or indirect²⁸² pledge of ad valorem taxes on ad valorem tax increments.²⁸³

3) *General obligation bonds* which pledge the full taxing power of the taxing entity including ad valorem taxes on real property and tangible personal property at the local government level. These would continue to require referendum approval²⁸⁴ with the exceptions now found in the constitution.²⁸⁵

VII. ARTICLE XI, SECTION 3: THE REHABILITATION OF THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO PROPOSE CHANGES TO THE FLORIDA CONSTITUTION—UNDOING THE MALIGNANT EFFECT OF *FINE V. FIRESTONE*²⁸⁶

In the 1968 Florida Constitution, the people of this state for the first time, were given the right to propose amendments to the constitution

281. In *Volusia County v. State*, 417 So. 2d 968 (Fla. 1982), the Florida Supreme Court distinguished *Medley* and *Alachua* and held that where a local government pledged “all legally available, unencumbered sources of county revenue including all money derived from regulatory fees and user charges assessed by the county.” *Id.* at 969. This amounted to a pledge of ad valorem tax revenues which would obviously be required to take up the slack, thus triggering the referendum requirement of article VII, section 12 of the Florida Constitution. *Id.* at 972. The fact that the county had also “covenant[ed] to do all things necessary to continue receiving the various revenues pledged . . . to fully maintain the programs and services which generate the service fees and user charges.” *Id.* at 969, 971.

282. *Volusia County*, 417 So. 2d at 968.

283. *See State v. City of Daytona Beach*, 484 So. 2d 1214 (Fla. 1986).

284. *See* FLA. CONST. art. VII, §§ 11, 12.

285. *See id.* §§ 14, 17.

286. 448 So. 2d 984 (Fla. 1984). Regrettably, the author of this section has deemed it necessary to levy very harsh criticism at the *Fine* opinion. This will undoubtedly be read by some to reflect poorly on the author of this opinion, Justice Overton and all of the remaining justices, since there were no dissents. However, the author has a very high regard for the court, Justice Overton and each of the other justices who participated in the *Fine* decision. Nevertheless, he believes that they fell into the common judicial trap of legislating in this case by misapplying the clear meaning of the constitution to avoid a result which may be seen as harmful or even disastrous to the body politic. This is certainly not the first time a court has done this or something like it nor will it be the last. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). Many other state and federal cases could be cited. I also respectfully confess that it is far easier to play “Monday morning quarterback” as I am doing than to have to reach a decision in a factual situation where an unusually hard case may very well make, as here, what I believe to be bad law. I do hope, however, that from the perspective of the time that has passed since *Fine v. Firestone* was decided that my criticisms will be seen as having a respectable validity.

through a process called “initiative”²⁸⁷. At first, the scope of changes proposed through this process²⁸⁸ was very narrow, and limited to changing only sections of the constitution at a time.²⁸⁹ The first case to interpret this provision, *Adams v. Gunter*,²⁹⁰ held that an amendment proposed by initiative could not remain on the ballot because its effect would be to change more than one section of the constitution.

Obviously being dissatisfied with the narrow interpretation of the peoples’ right to propose changes through the initiative process,²⁹¹ the Legislature placed on the ballot a change in this process that would give the people “the power to propose the revision or amendment of any portion or portions of this constitution” so long as it “embraces but one subject and matter directly connected therewith.”²⁹² Early cases interpreted this provision broadly. The majority opinion in the first case to interpret the changed initiative provision, *Weber v. Smathers*,²⁹³ is exceedingly short on explanation²⁹⁴ and is much better described in a subsequent case, *Floridians Against Casino Takeover v. Let’s Help Florida*.²⁹⁵

287. See FLA. CONST. art. XI, § 3 (amended 1972).

288. There are four other ways by which proposed changes to the constitution can be placed on the ballot. See *id.* § 1 (proposal by Legislature); *id.* § 2 (revision commission); *id.* § 4 (constitutional convention); *id.* § 6 (taxation and budget reform commission).

289. As pointed out in *Fine v. Firestone*, the original initiative provision provided in pertinent part that “[t]he power to propose amendments to any section of this constitution by initiative is reserved to the people.” *Fine*, 448 So. 2d at 989 n.2 (emphasis added).

290. 238 So. 2d 824 (Fla. 1970).

291. “As I construe the 1972 change in light of what was present in the Constitution before, what was retained in other sections, and *Adams*, it seems to me obvious that the 1972 change was designed to enlarge the right to amend the Constitution by initiative petition.” *Weber v. Smathers*, 338 So. 2d 819, 823 (1976) (England, J., concurring).

See also the following:

In response to [*Adams v. Gunter*] which narrowly interpreted the original “single section” initiative provision, the people adopted a legislatively-proposed amendment to article XI, section 3, to provide for revision or amendment of “any portion or portions” of the constitution by initiative, upon the condition that the proposal embrace a single subject and matter directly connected therewith H.J.R. no. 2835, pp. 1665, Laws of Florida (1972).

Floridians Against Casino Takeover v. Lets Help Fla., 363 So. 2d 337, 340 (Fla. 1978), receded from by *Fine*, 448 So. 2d at 984.

292. FLA. CONST. art. XI, § 3.

293. 338 So. 2d at 819.

294. *Id.* The case is however greatly enhanced by Justice England’s concurring opinion which is here drawn upon rather heavily. See *Weber*, 338 So. 2d at 822-24, (England J., concurring).

295. 363 So. 2d 337 (Fla. 1978).

In this first decision to deal with the initiative process subsequent to the 1972 amendment several principles evolved which, to our mind, settled the standard of review by the judiciary when confronted by an assault upon a particular initiative proposal. First, “the 1972 change was designed to enlarge the right to amend the Constitution by initiative provision.” [Weber v. Smathers, 338 So. 2d at 823 (England, J., concurring).] Second, the burden upon the opponent is to establish that the initiative proposal “is clearly and conclusively defective.” [Id. at 822.] Third, “the ‘one subject’ limitation was selected to place a functional, as opposed to a locational, restraint on the range of authorized amendments.” [Id. at 823 (England, J., concurring).] Last, in applying the foregoing principles to the amendment there under consideration, which arguably embraced at least five “subjects” ranging from financial disclosure by public officials to limitations on lobbyists and civil penalties on nongovernmental employees, the philosophy emerged that the one subject limitation should be viewed broadly rather than narrowly. The narrow view would have compelled a finding that at least five “subjects” were embraced within the proposal. The broad view accepted, in fact, by the Court led to the upholding of the proposal as a single subject—“ethics in government.”²⁹⁶

The Florida Supreme Court in *Floridians Against Casino Takeover* was perhaps even more generous in applying the approach it had gleaned from *Weber* to the facts before it, an approach it described as possessing a “pragmatic and common sense judicial philosophy.”²⁹⁷

The present proposal [at issue] (1) authorizes state regulated, privately operated casino gambling in a specific geographical area and (2) directs the anticipated tax revenues from that source to education and local law enforcement. . . . [T]he generation and collection of taxes, and the distribution thereof [are] part and parcel of the single subject of legalized casino gambling. In both instances [*Weber* and the present case] the various elements serve to flesh out and implement the initiative proposal, thereby forging an integrated and unified whole.²⁹⁸

The court in *Floridians Against Casino Takeover* also relied on a suggestion Justice England had made in his concurring opinion in *Weber*.

Furthermore, as perceived by Justice England in *Weber*, it seems

296. *Id.* at 340 (footnotes omitted).

297. *Id.*

298. *Id.*

appropriate to draw a parallel between Article XI, Section 3, and Article III, Section 6, Florida Constitution, because each utilizes the restraining phrase "shall embrace but one subject." The former applies to the constitutional initiative process while the latter deals with enactment of laws by the legislature. However, the need for germanity is common to both. Noting that there "is gloss aplenty on the 'one subject' limitation for legislation" [Justice England] concluded "that widely divergent rights and requirements can be included without challenge in statutes covering a single subject *area*."²⁹⁹

Thus, the 1972 amendment overturning the narrow "one section" limitation was to be given broad effect, fulfilling what had been said much earlier by Justice Terrell: "[W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution."³⁰⁰

Subsequently, the Florida Supreme Court was faced with the "Citizens' Choice Amendment on Government Revenue" which was placed on the ballot by initiative.³⁰¹ It proposed to place a cap on most government sources of revenue.³⁰² The First District Court of Appeal upheld the validity of the proposed amendment.³⁰³

[T]he proposed amendment in this case contains various elements within the ambit of the single subject of revenue limitation, and the petitioner [*Fine*] has not established that the proposal is 'clearly and conclusively defective' within the purview of article XI, section 3, Florida Constitution.³⁰⁴

It is beyond cavil that the adoption of this revenue limiting proposal would have had a profound effect on government at all levels in the State of Florida. It is certainly arguable that the supreme court decided that the proposed amendment would be bad for the state and thus set out to find that it violated the single subject rule. In this it succeeded. However, it also

299. *Id.* at 340-41.

300. *Weber*, 338 So. 2d at 821 (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)); *see also infra* note 339.

301. *Fine*, 448 So. 2d at 986.

302. *Id.* at 986-87.

303. *Id.* at 985.

304. *Id.* at 987 (quoting *Fine v. Firestone*, 443 So. 2d 253, 257 (Fla. 1st Dist. Ct. App. 1983)).

succeeded in inflicting exceedingly severe injury on the right of the people, themselves, to effectively place an amendment on the ballot because the liberality of *Weber v. Smathers*³⁰⁵ and *Floridians Against Casino Takeover v. Let's Help Florida*³⁰⁶ was substantially impaired if not destroyed. The *Fine* opinion is arguably thinly veiled judicial legislation.

The court began its attack on the revenue cap proposal, and thus on the interpretational structure erected by *Weber*³⁰⁷ and *Floridians Against Casino Takeover*,³⁰⁸ by placing great emphasis on the fact that a proposal placed on the ballot by initiative did not, of necessity, go through a process of hearings and debate which it described as "filtration."³⁰⁹ The other means³¹⁰ by which amendments may be placed on the ballot do have such processes.³¹¹ In reading the court's discussion of the initiative method of placing a proposal on the ballot as compared to the other methods, the reader could be led to believe that this subject had never been addressed by the court before. Quite the contrary is true.

The issue of "filtration" was thoroughly discussed in Justice England's concurring opinion in *Weber*.³¹²

[B]ut surely in light of 1968 concerns over populist overhauls by non-deliberative petitions [referring to Justice Robert's dissent] we can deduce an intention to restrain initiative in a manner comparable to restraints on the legislature. The same term, of course, appears in Article III, Section 6, which states that laws developed in the legislature "shall embrace but one subject."³¹³ It makes a great deal of sense to me to view the same phraseology in the Constitution, operating in both cases as a functional limitation on our written laws (one statutory, the other organic), as having the same meaning. At least no justification for a differentiation is here made to appear.³¹⁴

305. 338 So. 2d at 819; *see supra* text accompanying notes 293-96.

306. 363 So. 2d at 337; *see supra* text accompanying notes 297-99.

307. *See supra* note 305.

308. *See supra* note 306.

309. *Fine*, 448 So. 2d at 988.

310. *See supra* note 288. The *Fine* court did not include the Taxation and Budget Reform Commission (art. XI, section 6) which was added later, but without doubt would have considered that it provided "filtration."

311. *Fine*, 448 So. 2d at 988.

312. 338 So. 2d at 819.

313. *See infra* text accompanying note 320.

314. *Weber*, 338 So. 2d at 823 (England, J., concurring) (footnotes omitted); *see infra* text accompanying note 318.

As was pointed out earlier,³¹⁵ Justice England's equation of the two single subject limitations³¹⁶ was accepted by the court in *Floridians Against Casino Gambling*.³¹⁷ The *Fine* court receded from this equation between the two.

We find it is proper to distinguish between the two. First, we find the language "shall embrace but one subject and matter *properly connected* therewith" in article III, section 6, regarding statutory change by the legislature is broader than the language "shall embrace but one subject and matter *directly connected* therewith," in article XI, section 3, regarding constitutional change by initiative. . . . [W]e find that we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. [This is sophistry because the "change" could as easily add additional subjects as delete them. This observation makes the next sentence in this quote from the court's opinion nonsensical and contrived if one is talking about the single subject requirement.] This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative. . . . [M]ost important, we find that we should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.³¹⁸

The *Fine* court's distinction between "properly" and "directly," had already been demolished by Justice England in *Weber*.³¹⁹ He stated that "[t]his distinction is not critical here, however, since the debate between the parties involves the number of 'subjects' in the proposal before us and not its peripheral 'matters.'"³²⁰ It would seem that as in *Weber*, at issue in *Fine* was the number of subjects, not "peripheral matters."

The court in *Fine* set-up a strawman only to knock it down.

315. See *supra* text accompanying note 299.

316. *Weber*, 338 So. 2d at 823.

317. 363 So. 2d at 340-41.

318. *Fine*, 448 So. 2d at 988-89 (emphasis added). It is uncertain how one should take the implication in the last sentence that perhaps the single subject limitation on the Legislature does not "require strict compliance."

319. See *supra* text accompanying notes 315-17.

320. *Weber*, 338 So. 2d at 823 n.4 (England, J., concurring).

The problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict. We recede from *Floridians* [*Against Casino Takeover*] to the extent that it conflicts with this view.³²¹

The court in *Fine* then went on to bemoan the fact that this problem would place upon its shoulders the burden of harmonizing conflicting provisions without its having the benefit of any legislative history or similar indicia of meaning or intent of the drafters of the proposal.³²² Furthermore, the court offered no clear explanation, or arguably no explanation at all, how its narrow interpretation of the words "directly connected" would solve the problem of conflicting provisions.³²³

Then, perhaps most damaging of all to the ability of the people of Florida to change their constitution,³²⁴ the *Fine* court receded from its holding in *Floridians Against Casino Takeover*³²⁵

that the question of whether an initiative proposal conflicted with other articles or sections of the constitution had "no place in assessing the legitimacy of an initiative proposal." We recede from that language and find that how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal.³²⁶

There can be little doubt that lurking in that one sentence is the spectre of the court's drifting back to the "one section" limitation on initiative proposals. The 1972 change that was intended to excise that limit.³²⁷ If

321. *Fine*, 448 So. 2d at 989.

322. *Id.*

323. It should not be all that difficult to determine how the new proposal would have affected the existing constitution. Certainly it would not appear to have been that difficult under the facts of *Fine*.

324. See *supra* text accompanying note 300.

325. 363 So. 2d at 337.

326. *Fine*, 448 So. 2d at 990 (citation omitted).

327. See *supra* note 291; see also Justice Kogan's concurring and dissenting opinion, in Advisory Opinion to the Attorney General, 592 So. 2d 225 (Fla. 1991). There, Justice Kogan suggested that the single subject rule is violated "[i]f the proposed initiative contains more than one separate issue about which the voters might differ." *Id.* at 231. (Kogan, J., concurring in part and dissenting in part.) He explained further in a footnote.

the court can now measure the number of subjects in an initiative proposal by its effect on “other articles or sections”³²⁸ of the constitution there is little or nothing to stop the court from finding such “effect” creates additional subjects and thence travel back down the road to the discredited and changed “one section” rule.

The court, not surprisingly, found that rather than one subject, “government revenue,”³²⁹ the initiative proposal actually contained three: 1) “restrict[ions on] all types of taxation utilized for general governmental operations;”³³⁰ 2) “restriction on the operation and expansion of all user-fee services;”³³¹ and 3) “the substantial effect it [would have] on the constitutional scheme for the funding of capital improvements with revenue bonds.”³³² There can be little, if indeed any, doubt that these three “subjects,” as the court found them to be, would, under the prior case law³³³ which the court “trashed,”³³⁴ have been found to be matters “directly connected” to the single subject of limitations on government revenue.

There can be little, indeed no, doubt that the court’s probable objective in preventing the people from voting on a proposal it deemed harmful to the State of Florida had been achieved. However, it was achieved at a terrible cost to the right of the people to control their constitutional destiny³³⁵ without recourse to the Legislature, revision commission, constitutional

I do not suggest that an initiative contains multiple subjects if reasonable voters might disagree with some integral component by which the initiative achieves its purposes. Rather, such disagreement must be about matters that, if severed, would leave at least two complete and workable proposals. If so, the component is discrete and not integral. If the disagreement is about a matter that cannot be severed without rendering the remainder absurd, then the initiative must stand or fall as a unit when put to the voters.

Id. at 231 n.5 (Kogan, J., concurring in part and dissenting in part).

In *Advisory Opinion to the Attorney General*, the court found a single subject, even when applying the *Fine* test. “The sole subject of the proposed amendment is limiting the number of consecutive terms that certain elected public officers may serve.” *Id.* at 227. The question of how proposed change would “affect other articles or sections of the constitution,” *Fine*, 448 So. 2d at 990, was given little weight. *Advisory Opinion*, 592 So. 2d at 225. Indeed, *Weber* rather than *Fine* was cited. *Id.* The reader can reach whatever conclusions he or she wishes from this.

328. *Fine*, 448 So. 2d at 990.

329. *Id.*

330. *Id.*

331. *Id.* at 991.

332. *Id.*

333. *See supra* text accompanying notes 293-99.

334. The reader will forgive the slang. Somehow its use seemed appropriate.

335. *See supra* note 291.

convention or taxation and budget reform commission.³³⁶ Once again the reader needs to be reminded of the words of Justice Terrell as quoted by Justice Overton in one of the latter's earlier opinions. "[W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution."³³⁷ And, "neither the wisdom of the provision nor the quality of its draftsmanship is a matter for our review."³³⁸

In light of this earlier disclaimer by Justice Overton, the following language from *Fine* reads like overdone protest.³³⁹

We are mindful that it is not our responsibility to address the wisdom or merit of this proposed initiative amendment and we have not done so. Solely on the basis of the legal issue presented to this court, we find that the Citizens' Choice proposal is clearly and conclusively defective because it fails to meet the intent and purpose of the single-subject requirement of article XI, section 3 of the Florida Constitution.³⁴⁰

To remedy this judicial dismantling of the initiative provision, we propose that the word "directly" in article XI, section 3 be changed to "properly" to bring it in line with the single subject limitation on legislation found in article III, section 6 of the Florida Constitution. Then, in the words of Justice England: "There is gloss aplenty on the 'one subject'

336. *Id.*

337. *Weber*, 338 So. 2d at 821 (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). The reader should note that although Justice Terrell was talking about a legislatively proposed amendment to the constitution, Justice Overton used the quote in the context of an amendment proposed by initiative in *Weber*.

338. *Id.* at 822 (citing *Gray v. Childs*, 156 So. 274 (1934)).

339. "[He] doth protest too much, me thinks." Shakespeare, *Hamlet*, act III, scene 2, Line 242. John Bartlett, *Familiar Quotations*, 94 (Christopher Morely & Lovella D. Everett eds., 12th ed. 1951) (1948).

340. *Fine*, 448 So. 2d at 992-93. It is disingenuous at best for the court to include the following words from Justice Thornal's concurring opinion in *Adams v. Gunter* when they were directed at the earlier discredited constitutional provision which limited change by initiative to one section of the Constitution. *See supra* text accompanying notes 289, 290. "The single subject rule of restraint is a provision 'which the people themselves have incorporated in our Constitution to protect it against precipitous and spasmodic changes in organic law.' *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (Thornal, J., concurring);" *Fine*, 448 So. 2d at 993.

To remedy this judicial dismantling of the initiative provision, we propose that the word “directly” in article XI, section 3 be changed to “properly” to bring it in line with the single subject limitation on legislation found in article III, section 6 of the Florida Constitution. Then, in the words of Justice England: “There is gloss aplenty on the ‘one subject’ limitation for legislation, and we know that widely divergent rights and requirements can be included without challenge in statutes covering a single subject area.”³⁴¹

To deal with an issue that *could cause* a real problem, we also propose that the following sentence be added to the end of article XI, section 3, the initiative provision: Such revision or amendment shall not contain proposed changes in the Constitution that conflict with each other.

341. *Weber*, 338 So. 2d at 823 (England, J., concurring) (footnotes omitted). *See also supra* text accompanying note 299.

PART VII
BIBLIOGRAPHY
ON THE
FLORIDA CONSTITUTION