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Smoking Laws, High-Speed Trains, and Fishing Nets a State Constitution Does Not Make: Florida's Desperate Need for a Statutory Citizens Initiative

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SMOKING LAWS, HIGH-SPEED TRAINS, AND FISHING NETS A STATE CONSTITUTION DOES NOT MAKE: FLORIDA'S DESPERATE NEED FOR A STATUTORY CITIZENS INITIATIVE*

*Ryan Maloney***

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* On November 5, 2002, subsequent to the completion of this Note, Florida voters approved Smoke-Free for Health's proposed state constitutional amendment banning smoking in restaurants and workplaces in Florida, entitled Protect People From the Hazards of Second Hand Tobacco Smoke by Prohibiting Workplace Smoking, by a margin of 71%. *See* Fla. Dep't of State, Div. of Elections, *November 5, 2002 General Elections*, *available at* http://enight.dos.state.fl.us/ (last visited Nov. 15, 2002). Florida voters also approved the proposed constitutional amendment banning the confinement of pregnant pigs in certain types of stalls on farms in Florida, entitled Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, by a margin of 54.8%. *See id.* In total Florida voters approved nine of the ten proposed amendments during the November 5, 2002 election. *See id.* The alternative smoking ban amendment proposed by the Committee for Responsible Solutions did not garner the required signatures in order to make it on the November 5, 2002 ballot. *See* Fla. Dep't of State, Div. of Elections, *Initiatives, Amendments, and Revisions*, *available at* http://election.dos.state.fl.us/initiatives/initiativelist.asp (last visited Nov. 15, 2002). The initiative committee, Derail the Bullet Train, which proposed the amendment to repeal the current high-speed rail amendment, also was not able to gather the required signatures to get its proposed amendment on the ballot for the November 5, 2002 election. *See id.*

** This Note is dedicated to Amy for her love and encouragement.

I. INTRODUCTION

On July 17, 2001, Smoke-Free for Health, a citizen initiative committee, unveiled its proposed amendment[1] to the Florida Constitution banning all smoking[2] in restaurants and workplaces in Florida.[3] By January 28, 2002, Smoke-Free for Health announced that its petition drive had succeeded in gathering 500,000 signatures[4] from registered Florida voters, and on March 28, 2002 the Florida Supreme Court ruled that the proposed amendment satisfied the technical requirements for ballot position.[5] The

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1. The ballot title and summary of the proposed amendment read:

> Ballot Title: PROTECT PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO SMOKE BY PROHIBITING WORKPLACE SMOKING.
> Ballot Summary: To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor workplaces. Allows exceptions for private residences except when they are being used to provide commercial child care, adult care or health care. Also allows exceptions for retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars. Provides definitions, and requires the legislature to promptly implement this amendment.

Protect People From the Health Hazards of Second-Hand Tobacco Smoke By Prohibiting Workplace Smoking, (proposed July 17, 2001) (to be codified at FLA. CONST. art. X, § 20), *available at* http://election.dos.state.fl.us/initiatives/fulltext/34548-1.htm. [hereinafter Proposed Smoking Ban Amendment].

2. The proposed amendment does make exceptions for private residences not being used for child or health care, retail tobacco shops, designated smoking rooms at hotels and other public lodging establishments, and stand-alone bars. *See id.*

3. *See* Jackie Hallifax, *Petition Drive Seeks to Ban Smoking in Workplaces*, NAPLES DAILY NEWS, July 18, 2001, *available at* http://www.naplesnews.com/01/07/florida/d656503a.htm (last visited Nov. 15, 2002).

4. *See* Jackie Hallifax, *Move to Ban Smoking in Restaurants, Workplace Goes to High Court*, NAPLES DAILY NEWS, Jan. 29, 2002, *available at* http://www.naplesnews.com/02/01/florida/d735494a.htm (last visited Nov. 15, 2002).

5. *See* Advisory Op. to Att'y Gen. re: Protect People From the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking, 2002 WL 464479 (Fla.). *See infra* Part III.C, and *infra* text accompanying notes 142-63 for a detailed discussion of the requirements of ballot position the Florida Supreme Court considers.

signatures were subsequently verified[6] and the amendment was placed on the November 5, 2002 election ballot.[7]

On February 5, 2002, in response to the smoking ban amendment put forth by Smoke-Free for Health, a rival group called the Committee for Responsible Solutions, which is backed by cigarette maker Philip Morris USA and the Florida Restaurant Association, presented a competing citizen initiative amendment[8] aimed at derailing Smoke-Free for Health's proposed amendment.[9] Although in April 2002 the Committee for Responsible Solutions did not yet have the signatures required to get its citizen initiative amendment on the ballot,[10] it would have been possible that Florida voters be forced to choose between two confusingly similar constitutional amendments dealing with smoking during the November 2002 election.

These two competing citizen initiative amendments are not the only ones that fought to be on the ballot in November 2002. There were thirty-three active citizen initiative amendments circulating in Florida trying to

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6. *See infra* text accompanying notes 127-30 for an explanation of the verification process. As of March 29, 2002, the number of signatures that have been verified is 362,293. *See* Brenda Farrington, *High Court Says Smoking Ban Amendment Can Go to Ballot*, NAPLES DAILY NEWS, Mar. 29, 2002, *available at* http://www.naplesnews.com/02/03/florida/d762177a.htm (last visited Nov. 15, 2002).

7. *See infra* text accompanying notes 124-26 for the required number and distribution of signatures to get a proposed amendment on the ballot.

8. The ballot title and summary of the proposed amendment reads:

> Ballot Title: SMOKING PROHIBITED IN CERTAIN INDOOR WORKPLACES AND RESTRICTED IN RESTAURANTS AND OTHER INDOOR WORKPLACES.
> Ballot Summary: This amendment prohibits smoking in certain enclosed indoor workplaces and restricts smoking in restaurants and other enclosed indoor workplaces. It gives business owners or persons in charge of certain enclosed indoor workplaces the ability to designate limited smoking areas, provided the smoking policy is clearly communicated. It exempts non-commercial private residences, retail tobacco shops, private offices, designated rooms in lodging establishments, and bars. It defines relevant terms.

Smoking Prohibited In Certain Indoor Workplaces and Restricted in Restaurants and Other Indoor Workplaces, (proposed Feb. 5, 2002) (to be codified at FLA. CONST. art. X, § 20), *available at* http://election.dos.state.fl.us/initiatives/fulltext/34830-1.htm (last visited Dec. 2, 2002).

9. *See* John Kennedy, *Tobacco Firms Fight Smoking Ban Plan*, S. FLA. SUN-SENTINEL, Feb. 6, 2002, at 5B.

10. Fla. Dep't of State, Div. of Elections, *Initiatives, Amendments, and Revisions, available at* http://election.dos.state.fl.us/initiatives/initiativelist.asp (last visited Dec. 2, 2002) [hereinafter *Initiatives, Amendments, and Revisions*]. *See infra* text accompanying notes 124-26 for the required number and distribution of signatures to get a proposed amendment on the ballot.

make it onto the November ballot.[11] While most of these did not make the cut, ten of the proposed amendments[12] met the threshold number of verified signatures[13] required for review by the Florida Supreme Court, and one of those that the Court approved[14] was an amendment to ban pig farmers from confining pregnant pigs in certain types of stalls on farms in Florida.[15]

The two competing smoking ban amendments, and the amendment banning the confinement of pregnant pigs, are just three of the more recent attempts by citizen initiative committees to graft very specific positive law provisions onto the Florida Constitution. In 2000, an initiative committee called Floridians for 21st Century Travel Connections and Choices was able to get a constitutional amendment on the ballot requiring the state government to begin construction of a high-speed train or monorail, linking the five most populous urban areas in Florida, by November 1,

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11. *See Initiatives, Amendments, and Revisions*, *supra* note 10. The most citizen initiatives that have ever been active and circulating at any one time was thirty-seven in 1996. Fla. Dep't of State, Div. of Elections, *Frequently Asked Questions*, *available at* http://election.dos.state.fl.us/initiatives/faq.shtml (last visited Dec. 2, 2002) [hereinafter *Frequently Asked Questions*].

12. Fla. Dep't of State, Div. of Elections, *Proposed Constitutional Amendments for 2002 Ballot*, *available at* http://election.dos.state.fl.us/initiatives/2002ballot.shtml (last visited Nov. 15, 2002).

13. The required number of signatures for review by the Florida Supreme Court is ten percent of the required number of voters statewide from at least one-fourth of the congressional districts in Florida, which for the 2002 election would be 48,869 signatures coming from at least three of the congressional districts. *See infra* text accompanying note 133.

14. *See* Advisory Op. to the Att'y Gen. re: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 27 Fla. L. Weekly S71 (Fla. Jan. 17, 2002) [hereinafter Limiting Confinement of Pigs].

15. The ballot and title summary of the proposed amendment read:

> Ballot Title: ANIMAL CRUELTY AMENDMENT: LIMITING CRUEL AND INHUMANE CONFINEMENT OF PIGS DURING PREGNANCY
> Ballot Summary: Inhumane treatment of animals is a concern of Florida citizens; to prevent cruelty to animals and as recommended by The Humane Society of the United States, no person shall confine a pig during pregnancy in a cage, crate or other enclosure, or tether a pregnant pig, on a farm so that the pig is prevented from turning around freely, except for veterinary purposes and during the prebirthing period; provides definitions, penalties, and an effective date.

Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, (proposed Oct. 27, 2000) (to be codified at FLA. CONST. art. X, § 20) *available at* http://election.dos.state.fl.us/initiatives/fulltext/34174-1.htm (last visited Dec. 4, 2002). As of Apr. 6, 2002, the proposed amendment has 165,941 verified signatures. *See Initiatives, Amendments, and Revisions*, *supra* note 10.

2003.[16] Florida voters approved the proposed amendment by a fifty-three percent to forty-seven percent margin during the November 2000 election.[17] The high-speed rail amendment is now enshrined in the Florida Constitution.[18]

In 1994, an initiative committee called Save Our Sealife, backed by the Florida Conservation Association (FCA),[19] was able to get a proposed amendment placed on the ballot to ban fisherman from using certain types of fishing nets in Florida's coastal waters.[20] Florida voters approved the

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16. *See* FLA. CONST. art. X, § 19.

17. *See* Larry Hannan, *Florida High-Speed Rail Plans Pick Up Steam*, NAPLES DAILY NEWS, June 25, 2001, *available at* http://www.naplesnews.com/01/07/marco/d602684a.htm (last visited Nov. 15, 2002).

18. FLA. CONST. art. X, § 19. The full text of the amendment reads:

> High speed ground transportation system. — To reduce traffic congestion and provide alternatives to the traveling public, it is hereby declared to be in the public interest that a high speed ground transportation system consisting of a monorail, fixed guideway or magnetic levitation system, capable of speeds in excess of 120 miles per hour, be developed and operated in the State of Florida to provide high speed ground transportation by innovative, efficient and effective technologies consisting of dedicated rails or guideways separated from motor vehicular traffic that will link the five largest urban areas of the State as determined by the Legislature and provide for access to existing air and ground transportation facilities and services. The Legislature, the Cabinet and the Governor are hereby directed to proceed with the development of such a system by the State and/or by a private entity pursuant to state approval and authorization, including the acquisition of right-of-way, the financing of design and construction of the system, and the operation of the system, as provided by specific appropriation and by law, with construction to begin on or before November 1, 2003.

Id.

19. William L. Martin, *Florida's Citizen Constitutional Ballot Initiatives: Fishing to Change the Process and Limit Subject Matter*, 25 FLA. ST. U. L. REV. 57, 60-62 (1997).

20. *See* FLA. CONST. art. X, § 16. The amendment reads in pertinent part:

> Limiting Marine Net Fishing. — (a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste. (b) For purposes of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:
> (1) No gill nets or other entangling nets shall be used in Florida waters; and
> (2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be

amendment by a two-to-one margin in the 1994 general election, and the amendment, popularly called the net ban amendment,[21] is also currently part of the Florida Constitution.[22]

All of the previously discussed amendments and potential amendments should not be a part of the Florida Constitution because they do not relate to the fundamental purposes of a constitution. A constitution is supposed to create, limit, and allocate the powers of government, as well as protect the fundamental rights of the people.[23] A constitution is not meant to be a vehicle for positive law.[24] Banning smoking in restaurants and workplaces, banning the confinement of pregnant pigs on farms, mandating the construction of a high-speed rail, and banning certain types of fishing nets are all goals that can and should be achieved through the legislative process by statute. Many commentators believe this proliferation of statutory law in the Florida Constitution through the citizen initiative process is a serious problem, although almost all also agree that the direct democracy provided by the citizen initiative is a vital aspect of Florida's democracy that should be preserved.[25]

Part II of this Article explores some of the problems caused by the recent proliferation, through the citizen initiative process, of constitutional amendments better suited for statutory law. Part III examines the citizen

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> connected, shall be used from any vessel, and no person not on vessel shall use more than one such net in nearshore and inshore Florida waters.

Id.

21. *See* William Yardley, *Fishermen, Law Entangled Over Net Ban*, ST. PETERSBURG TIMES, Jan. 14, 1999, *available at* 1999 WL 3299048.

22. *See* FLA. CONST. art. X, § 16.

23. *See* John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations For Change*, APR FLA. B. J. 71, 71 (1997); Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L. REV. 413, 420 (1995); P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 442-43 (1995); Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 408-09 (1995).

24. *See* Little, *supra* note 23, at 410. Positive law is "[a] system of law promulgated and implemented within a particular political community by political superiors . . . [p]ositive law typically consists of enacted law — the codes, statutes, and regulations that are applied and enforced in the courts." BLACK'S LAW DICTIONARY 1182 (7th ed. 1999).

25. *See* Anderson & Ciampa, *supra* note 23, at 73; Gordon, *supra* note 23, at 422; Jameson & Hosack, *supra* note 23, at 419; Little, *supra* note 23, at 415.

initiative process in Florida as it currently stands. Part IV considers some possible substantive and procedural solutions, and finally, Part V makes recommendations for changes that would preserve the sanctity of the Florida Constitution while still allowing the voices of the people of Florida to be heard through citizen initiatives.

II. PROBLEMS WITH CITIZEN INITIATIVE CONSTITUTIONAL AMENDMENTS

A. *Weakening the Primary Functions of the Constitution*

"I don't think there's anything more appropriate for the constitution of the state of Florida than the right of people to breathe clean air,"[26] said Martin Larsen, chairman of Smoke-Free for Health, on July 17, 2001, when his group first unveiled their proposed citizen initiative amendment[27] to the Florida Constitution banning all smoking in Florida restaurants and workplaces.[28] Although Martin Larsen and the 500,000 Florida voters[29] who later signed the Smoke-Free for Health petition may feel that the state constitution is an appropriate place for a smoking ban, many commentators,[30] including some justices of the Florida Supreme Court,[31] would heartily disagree. The general consensus among these commentators and jurists is that the primary purposes of the Florida Constitution are to limit, define, and allocate government functions among the various branches, and to protect the fundamental rights of the people with respect to government.[32] In other words, as one commentator stated, "[T]he constitution is not a vehicle for making positive law, but it is an instrument to limit and control what laws the government shall have the authority to make and what powers the government shall be permitted to exercise."[33]

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26. Hallifax, *supra* note 3.

27. *See* Proposed Smoking Ban Amendment, *supra* text accompanying note 1.

28. *See id.*

29. *See* Hallifax, *supra* note 4.

30. *See* Anderson & Ciampa, *supra* note 23, at 71; Gordon, *supra* note 23, at 420; Jameson & Hosack, *supra* note 23, at 442-43; Little, *supra* note 23, at 408-09.

31. *See* Limiting Confinement of Pigs, *supra* note 14, at 11 (Pariente, J., concurring); Advisory Op. to the Att'y Gen. — Limited Marine Net Fishing, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring); Advisory Op. to Att'y Gen. re: Stop Early Release of Prisoners, 642 So. 2d 724, 728 (Fla. 1994) (Grimes, J., dissenting).

32. *See supra* notes 23 and 31.

33. Little, *supra* note 23, at 410.

Constitutional amendments, like the proposed smoking ban and other recently proposed citizen initiative amendments such as the amendment to limit the confinement of pregnant pigs, do not define, limit, or allocate governmental power, or protect the fundamental rights of the people. Conversely, the amendments are exactly the type of positive law that should be statutory rather than enshrined in the Florida Constitution.[34] As Florida Supreme Court Justice Parker Lee McDonald stated in his concurrence in an advisory opinion approving the technical sufficiency of the wording of the net ban amendment,

> The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society . . . . Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments. . . . Some issues are better suited as legislatively enacted statutes than as constitutional amendments.[35]

Clearly, provisions such as the citizen initiative amendments previously discussed do not transcend time, change political mores, or represent general fundamental values. Rather, these provisions are specific and should be legislatively enacted as statutes so that they can be adaptable to the possible political, economic, and social changes in Florida.[36]

One of the major problems with allowing the Florida Constitution to become a vehicle for positive law is that it threatens to weaken the primary government defining and limiting functions of the constitution, changing it into a "vehicle for societal discourse instead of a protection from closely defined governmental and legal power."[37] As more and more special interest groups utilize the citizen initiative process to go over the heads of the legislature and put specific provisions in the state constitution that do

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34. *See supra* notes 23 and 31.

35. *Limited Marine Net Fishing*, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring).

36. *See id.*

37. *See* Gordon *supra* note 23, at 427.

not relate to the primary purpose of the constitution, there is a danger that the Florida Constitution could be converted into "an unintelligible babble reflecting clashing localized and special interest values."[38] In other words, by using the Florida Constitution as a "weapon in the war over public policy"[39] rather than as a tool to protect citizens' rights by defining and limiting government, these special interest groups threaten to "lard the constitution with non-constitutional substance,"[40] reducing the inherently higher status constitutional provisions command, and weakening the Florida Constitution's primary functions.[41]

B. *Problems of Implementation and Interpretation*

A potential weakening of the primary functions of the Florida Constitution is not the only problem caused by the proliferation of non-constitutional content in the Florida Constitution. Cloaking more and more non-constitutional content in the garb of constitutional supremacy through the citizen initiative process creates serious problems of implementation for the legislative and executive branches of government, and of interpretation for the Florida courts.

1. Problems of Implementation

The recently passed citizen initiative amendment requiring the state to construct a high-speed train or monorail[42] is a prime example of a citizen initiative constitutional provision causing major problems of implementation because of its dubious constitutional status. The amendment mandates that the state begin construction by November 1, 2003, that the train or monorail connect Florida's five largest urban areas, and that the train be capable of speeds in excess of 120 miles per hour.[43] However, the amendment does not specify the source of the money to pay for the construction,[44] nor does it define exactly where the train will go

38. *See id.*
39. *Id.*
40. *See* Little, *supra* note 23, at 408.
41. *See supra* notes 23 and 31.
42. *See* FLA. CONST. art. X, § 19. *See supra* text accompanying note 18 for the full text of the amendment.
43. *See id.*
44. *See id.*

because it does not name the five largest urban areas in Florida. It leaves that decision to the state legislature.[45]

Fifty-three percent of Florida voters approved the high-speed rail amendment during the general election in November 2000,[46] when the economy of Florida was still relatively strong.[47] However, the economy of Florida, along with the economy of the rest of the country, soured somewhat during 2001, and in 2002 the state's budget shortfall required cuts of approximately $1.8 billion dollars.[48] Cost estimates for construction of the high-speed rail range from a low of $6 billion to a high of $26 billion.[49] Regardless of the current economic situation in Florida, or the need for the state to spend money on other unanticipated costs, the high-speed rail amendment mandates that the state begin construction by November 1, 2003.[50] In fact, the Florida Legislature has already spent $4.5 million to study the best way to comply with the amendment.[51]

Since this mandate to begin construction of a high-speed rail is a part of the Florida Constitution, there is very little wiggle room for the governor and the legislature. The amendment cannot be changed or delayed because of current budgetary concerns, except through the adoption of another constitutional amendment by the people.[52] In fact, an initiative committee called Derail the Bullet Train attempted to circulate a petition to do just that.[53] The amendment was designed to repeal the

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45. *See id.* The five most populous areas in Florida are South Florida, Orlando, Tampa/St. Petersburg, Jacksonville, and Daytona Beach. *See Vote Against Bullet Train Plan*, FT. LAUDERDALE SUN-SENTINEL, Oct. 9, 2000, at 14A [hereinafter *Vote Against Plan*].

46. Hannan, *supra* note 17.

47. *See* Doreen Hemlock, *Leaders Cautiously Optimistic Slower Growth Said To Be Likely In 2001*, S. FLA. SUN-SENTINEL, Dec. 9, 2000, at 33A.

48. Editorial, *Derail Huge Boondoggle*, S. FLA. SUN-SENTINEL, Jan. 11, 2002, at 24A.

49. Vernon Peeples, *High-Speed Rail In Constitution, But No Funding Source*, SARASOTA HERALD-TRIB., Jan. 14, 2001, at BCE4.

50. FLA. CONST. art. X, § 19.

51. *See* Hannan, *supra* note 17.

52. "Constitutional amendments . . . become fairly rigid and difficult to change even if a mistake is made. The same initiative processes that created an errant initiative provision must be used to correct the mistake." Jameson & Hosack, *supra* note 23, at 458. Although another constitutional amendment would be required to change the High-Speed Rail amendment, the new amendment would not necessarily have to be done through the citizen initiative process. The legislature can also propose amendments for the ballot by joint resolution agreed to by three-fifths of the membership of each house of the legislature. FLA. CONST. art. XI, § 1.

53. The ballot title and summary of the proposed amendment reads:

> Ballot Title: FLORIDA'S AMENDMENT TO REPEAL THE PROVISION THAT REQUIRES HIGH-SPEED GROUND TRANSPORTATION

current high-speed rail amendment in order to enable the legislature to "decide whether this [high-speed rail amendment] makes sense for Florida after consideration of relevant data concerning costs, revenue, and fiscal status."[54] However, without the passage of such an amendment, the legislature's hands are tied, and it could be forced to divert money from more critical state programs in order to pay for the high-speed rail.[55]

Although permanence and inflexibility are valuable assets for amendments dealing with important fundamental limitations on government, the issues of implementation with the high-speed rail amendment clearly illustrate how the permanence and inflexibility of a constitutional amendment can be a serious problem when the amendment addresses subject matter better suited for the statute books. Obviously, as evidenced by the passage of the amendment in 2000, a majority of Florida citizens supported construction of a high-speed rail. However, if the high-speed rail amendment had been a statutory provision, then it could have been altered or phased in more slowly, based on the current economic circumstances of Florida.[56] Unfortunately, because Florida does not currently have a way for citizens to propose statutes by initiative, when the legislature and the governor were unwilling to go forward with previous attempts to bring high-speed rail to Florida,[57] the only available avenue for advocates of high-speed rail was through the constitutional citizen initiative process. Now, a mandate to begin construction on the high-speed rail is locked into the Florida Constitution, and unless it is amended or repealed by another constitutional amendment, the state is locked into paying for it, whether it can afford to or not.

> Ballot Summary: Proposes an amendment to the State Constitution to repeal the provision that requires the development and operation of a high-speed ground transportation system in the state. This repeal will enable the State Legislature to decide whether this makes sense for Florida after consideration of relevant data concerning costs, revenue, and fiscal status of the State.

Florida's Amendment to Repeal the Provision That Requires High-Speed Ground Transportation, (proposed Feb. 25, 2002) (to repeal FLA. CONST. art. X, § 19), *available at* http://election.dos.state.fl.us/initiatives/fulltext/34876-1.htm (last visited May 15, 2002).

54. *Id.*

55. *See* Peeples, *supra* note 49.

56. FLA. CONST. art. III, § 1 grants the power to legislate, in other words to make new laws and change existing laws, exclusively to the state legislature. The state legislature has one regular session each year, and in addition special sessions can be called by the governor, or by the legislature itself. *Id.* §§ 3(b)-(c).

57. In January 1999, Governor Jeb Bush canceled plans for a $6.3 billion high-speed bullet train linking Miami, Tampa and Orlando. *See Vote Against Plan*, *supra* note 45.

2. Problems of Interpretation

Another problem caused by the placement of positive law amendments in the Florida Constitution through the citizen initiative process is the inherent difficulty in the judicial interpretation of provisions that read like statutes, but have the weight of constitutional law. *Department of Environmental Protection v. Millender*,[58] a recent Florida Supreme Court decision interpreting the net ban amendment,[59] is a good example of these difficulties.

Millender dealt with the controversy over how to measure trawl nets used for shrimp fishing in the coastal waters of Florida under the net ban amendment of 1994.[60] The amendment banned any type of net "containing more than 500 square feet of mesh area" from use in "nearshore and inshore Florida waters."[61] A fisherman named Ronald Crum hired Buford Golden, an experienced net maker, to construct a shrimp trawl (Golden-Crum net),[62] which would meet net ban specifications.[63]

A group of commercial fishermen brought an action for declaratory judgment that the Golden-Crum net was in compliance with the net ban amendment.[64] The trial court found that subsection (c)(2)[65] of the net ban amendment was ambiguous, but interpreted it to require that nets contain no more than 500 square feet of mesh area, measured using the formula for

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58. 666 So. 2d 882 (Fla. 1996).

59. FLA. CONST. art. X, § 16.

60. *Millender*, 666 So. 2d at 883.

61. FLA. CONST. art. X, § 16(b)(2).

62. "A shrimp trawl is a conical shaped bag type net that is dragged along the ocean bottom with the shrimp being funneled through the open mouth of the net and captured in the closed end or bag of the net." *Millender*, 666 So. 2d at 884 n.1.

63. *Id.* at 884.

64. *Id.*

65. Subsection (c)(2) of FLA. CONST. art X, § 16 reads:

> "[M]esh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height. Calculations for any other nets of combination type nets shall be based on the shape of the individual components.

Id.

the area of a cone (circumference of the mouth of the net times the slant height length divided by two).[66] Based on this method, the trial court concluded that the Golden-Crum net had less than 500 square feet of mesh area, and thus complied with the net ban amendment.[67]

The basis of the appeal to the Florida Supreme Court was not a disagreement over the basic measurement formula,[68] but was over the method used to measure slant height, one of the components of the formula.[69] The FCA, an intervening party in the appeal on behalf of the state, argued that the slant height of the net should be measured when fully stretched out because the general language of the first sentence of subsection (c)(2), "'[M]esh area' of a net means the total area of netting with the meshes open to comprise the maximum square footage," was governed by the more specific language of the fourth sentence of subsection (c)(2), "Trawls and other bag type nets shall be calculated as a cone using . . . the maximum length from the net mouth to the tail end of the net to derive the slant height."[70] The FCA also argued that the fourth sentence of subsection (c)(2) should govern over the first sentence because of the theory of statutory construction which holds that the last expression of legislative will is the one that prevails.[71] Using the FCA's method, the total mesh area of the Golden-Crum net was 953.3 square feet,[72] in violation of the net ban amendment.[73]

The Florida Department of Environmental Protection (DEP) had a different method for determining slant height under the net ban amendment.[74] The DEP argued that the "meshes open" language of the first sentence of subsection (c)(2) could be harmonized with the "maximum length" language of the fourth sentence by using an "open mesh diagonal method" to calculate slant height.[75] The DEP argued this was the correct method because net mesh is oriented and hung on a

66. *Millender*, 666 So. 2d at 884-85.

67. *Id.* at 884.

68. All the parties agreed that the appropriate formula for calculating the mesh area of the net was C (circumference) × SH (slant height)/2 and that the circumference of the Golden-Crum net was equal to 65.75 feet. *Id.* at 885 n.3.

69. *Id.* at 885.

70. *Id.*

71. *Id.* at 886.

72. *Millender*, 666 So. 2d at 885 n.4.

73. *See* FLA. CONST. art. X, § 16.

74. *Millender*, 666 So. 2d at 885.

75. *Id.*

diagonal.[76] Under this method, the total mesh area was 673.6 square feet,[77] and still in violation of the net ban amendment's requirement that the total mesh area be 500 square feet or less.[78]

Finally, the appellee, Millender, argued that the "open mesh" language must be harmonized with the "maximum length" language by measuring across the bar of the mesh,[79] which Millender claimed was the accepted industry method of measuring open mesh.[80] Using Millender's method, the total mesh area of the Golden-Crum net was 476.6 square feet,[81] which was within the parameters set by the net ban amendment.[82]

Although the Florida Supreme Court found that the first and fourth sentences within subsection (c)(2) were subject to varying interpretations, the Court stated that the "amendment should also be construed as a whole . . . [and that] each subsection, . . . must be read in light of the others to form a congruous whole so as not to render any language superfluous."[83] The Court also noted that, "[l]ess latitude is permitted when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes."[84]

In light of these principles of interpretation, the Court found that if the drafters of the amendment intended that the total mesh area be measured using the methods of the FCA or DEP, this intention would have been clearly spelled out in the amendment.[85] The Court also concluded that the voters could not have understood the language on the ballot summary as implying the complicated method proposed by the DEP.[86] Furthermore, the Court noted that the proposed methods of measurement by the DEP and the FCA would reach an absurd result that would defy common sense.[87] Finally, the Court found that in the context of the stated purpose of the amendment, which was to limit rather than prohibit shrimp trawl fishing, evidence that the DEP and FCA methods would result in shrimp trawl nets

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76. *Id.*

77. *Id.* at 885 n.5.

78. FLA. CONST. art. X, § 16(b)(2).

79. *Millender*, 666 So. 2d at 885. "'Bar measurement' means the mesh size of a net as measured by the distance from the center of a knot to the center of an adjacent knot." *Id.* at 886 n.7.

80. *Id.* at 885.

81. *Id.* at 885 n.6.

82. FLA. CONST. art. X, § 16(b)(2).

83. *See Millender*, 666 So. 2d at 886 (quoting Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979)) (citation omitted).

84. *Id.* (citing City of Jacksonville v. Continental Can Co., 113 Fla. 168, 172, (1933)).

85. *Id.*

86. *Id.*

87. *Id.*

that were not commercially viable was relevant to the interpretation of the amendment.[88]

Accordingly, the Florida Supreme Court affirmed the judgment of the trial and circuit courts.[89] Thus, as a commentator pointed out,[90] as a result of the *Millender* decision, Florida Constitutional jurisprudence now oddly includes the following holding by the Florida Supreme Court: "[T]hat for purposes of measuring trawl nets under article X, section 16, slant height equals one half the stretched mesh length from the mid-point of the net mouth to the tail end of the net, and that the Golden-Crum net complies with the amendment's specifications."[91]

In addition to the initial problem that holdings like the one in *Millender* may serve to weaken state constitutional jurisprudence by inundating it with non-constitutional content,[92] *Millender* also illustrates some of the problematic issues inherent in interpreting citizen initiative constitutional provisions having non-constitutional content. For example, in its analysis of the net ban amendment, the Florida Supreme Court noted that constitutional amendments have to be construed as a whole so as not to render any language superfluous, and that courts have less latitude when construing constitutional amendments because amendments are presumed to have been more carefully framed than statutes.[93] However, in stating this rule of construction, the Florida Supreme Court cites to *City of Jacksonville v. Continental Can Co.*,[94] a case that the Florida Supreme Court decided in 1933, thirty-five years before the Florida Constitution granted the power to the people to propose constitutional amendments by initiative.[95] At that time, amendments to the Florida Constitution could only be proposed by the state legislature.[96]

Thus, a valid presumption, from an era when state constitutional amendments were exclusively framed in a presumably deliberate and careful manner by the legislature,[97] may not have as much validity when applied to state constitutional amendments enacted through the citizen initiative process. These constitutional amendments may or may not be as

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88. *Millender*, 666 So. 2d at 887.

89. *Id.* at 887.

90. *See* Martin, *supra* note 19, at 82-83.

91. *Millender*, 666 So. 2d at 887.

92. *See supra* text accompanying notes 37-41.

93. *Millender*, 666 So. 2d at 886.

94. 113 Fla. 168, 172 (1933).

95. *See infra* text accompanying note 96.

96. The 1885 Florida Constitution allowed only for the legislature to propose amendments or call a constitutional convention. FLA. CONST. of 1885, art. XVII.

97. *See supra* text accompanying notes 84, 93.

carefully and deliberately framed by the special interest initiative committees that propose the new laws. The presumption of deliberation and carefulness is likely weakened even more when the constitutional amendment at issue is not one that is designed by its framers to provide "society's consensus on general, fundamental values,"[98] but is instead a positive law provision framed by a special interest committee, and designed to benefit certain specific groups or prohibit certain specific conduct, as well as garner votes.

Application of this presumption by the Florida Supreme Court in *Millender* arguably caused the Florida Supreme Court to construe the net ban amendment against the intent of the FCA, one of the original instigators and proponents of the net ban amendment. If the net ban amendment had been enacted as a statute, then the Florida Supreme Court may have been able to apply the FCA's argument that the fourth sentence of subsection (c)(2) should trump the previous conflicting provision in the first sentence because of the general rules of statutory construction, namely that specific provisions govern over general provisions,[99] and that generally the last expression of legislative will prevails.[100]

However, because the net ban was a constitutional amendment, the Florida Supreme Court had to construe the amendment as a whole in order to not render any language superfluous.[101] Furthermore, because of the presumption that constitutional provisions have been more carefully and deliberately framed than statutes,[102] the Florida Supreme Court had even less leeway to read the fourth sentence of subsection (c)(2) as the FCA proposed.[103] Thus, the FCA's interpretation of the amendment that it originally helped instigate and support[104] was defeated in part because the net ban was enacted as a constitutional amendment rather than as statutory law.[105]

As the preceding discussion indicates, the proliferation of positive law provisions dealing with non-constitutional content in the Florida Constitution threatens to weaken the primary functions of the constitution, and at the same time causes serious problems with the implementation and interpretation of these amendments by the legislature and the Florida

98. *See supra* text accompanying note 35.
99. *See Millender*, 666 So. 2d at 886.
100. *Id.*
101. *Id.* (citing City of Jacksonville v. Continental Can Co., 113 Fla. 168, 172 (1933)).
102. *Id.*
103. *Id.*
104. *See Martin, supra* text accompanying note 19.
105. *Millender*, 666 So. 2d at 886.

courts. Clearly some changes in the constitutional citizen initiative process are needed to alleviate these problems. However, before proposing changes to the citizen initiative process, one must first examine the process as it currently stands.

III. THE CURRENT INITIATIVE PROCESS IN FLORIDA

A. *Short History of the Citizen Initiative in Florida*

The citizen initiative method of amending the Florida Constitution came about as a part of the last wholesale revision of the Florida Constitution in 1968.[106] The revised Florida Constitution of 1968 specifically reserved to the people of Florida "[t]he power to propose the revision or amendment of any portion or portions of this constitution."[107] In 1972, Florida voters approved a legislatively proposed amendment that required citizen initiative proposals to be limited to "one subject and matter directly connected therewith."[108] Finally in 1994, the Florida electorate adopted an amendment proposed by citizen initiative which exempted any future initiative "limiting the power of government to raise revenue" from the single-subject requirement.[109] Currently, Article XI, section 3 of the Florida Constitution, which is the provision that gives the people the power to propose constitutional amendments by initiative, provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a

106. FLA. CONST. art. XI, § 3 (amended 1972). The 1968 revised constitution also created four other ways to amend the Florida Constitution. One is by the Constitution Revision Commission, to meet ten years after the revision, and then every twenty years thereafter, that can also recommend proposed constitutional amendments and revisions to be placed on the ballot in the next general election. *Id.* at § 2. Another is by a joint resolution agreed to by three fifths of both houses of the legislature. *Id.* at § 1. Yet another way is by the calling of a constitutional convention by the people. *Id.* at § 4. Finally, the Taxation and Budget Reform Commission can also propose amendments. *Id.* at § 6.

107. *Id.* § 3 (amended 1972).

108. *Id.*

109. *Id.* § 3 (amended 1994).

copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts, respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.[110]

B. *Putting a Citizen Initiative on the Ballot*

The procedure for actually getting a citizen initiative on the ballot is a fairly arduous process that can be extremely time consuming and expensive. Although some initiatives have made ballot position in less than two years, Jim Smith, a former Florida Secretary of State, has recommended that initiative committees who want to get a constitutional initiative on the ballot begin working at least four years before the targeted election in order to have sufficient time to gather the necessary signatures and fight any legal challenges to the proposed amendment.[111] Furthermore, while no studies have been conducted on the proposal costs in Florida, in California, which also has a constitutional citizen initiative process, the average cost of getting a citizen initiative on the ballot skyrocketed from $45,000 in 1976 to over $1 million in 1990.[112] With some initiative committees in Florida garnering millions of dollars in contributions,[113] it is likely that Florida's proposal costs are similar to those in California.

The first step in the process is to meet a statutory requirement that the sponsor of an initiative amendment register as a political committee with the Secretary of State. This must occur prior to the taking or initiating of any action with respect to the proposed amendment, including the gathering of petition signatures.[114] Once the sponsor is registered as a

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110. *Id.*

111. Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509, 1511-12 (1994).

112. Jameson & Hosack, *supra* note 23, at 439-40.

113. Smoke Free for Health, the committee supporting the ban on smoking in restaurants and workplaces in Florida reports contributions of $1,988,244, and as of March 2002 has spent $1,610,899; Floridians For Humane Farms, which is supporting the ban on the confinement of pregnant pigs reports contributions of $732,570. *Initiatives, Amendments, and Revisions*, *supra* note 10. Floridians for 21st Century Travel Connections and Choices spent $3,029,751 getting the high-speed rail amendment passed in 1994. *Id.*

114. FLA. STAT. § 106.03 (2001). Committees must file a statement of organization with the Division of Elections which must include: the name and address of the committee; the names, addresses, and relationships of affiliated or connected organizations; the area, scope, or jurisdiction of the committee; the name, address, and position of the custodian of books and accounts; the name, address, and position of other principal officers; any issues such organization is supporting or

committee, it must submit the text of the proposed amendment and petition to the Secretary of State for approval.[115] The Secretary of State does not judge the legal sufficiency of the proposed amendment,[116] but rather reviews it to make sure it complies with various format requirements. This includes ensuring that the ballot title is fifteen or fewer words,[117] that the ballot summary is seventy-five or fewer words,[118] and that the correct size and format of the petition is used.[119] The Secretary of State must render a decision regarding the proposed amendment and petition within seven days of its submission.[120] Once the secretary approves the proposed amendment and petition, the committee may begin circulating the petition in order to obtain the necessary number of registered voter signatures.[121]

The number of signatures the committee is required to gather is eight percent of the number of voters who voted in the most recent presidential election.[122] This means that in 2002, based on the number of people who voted in the 2000 presidential election, a committee must gather 488,722 verified signatures.[123] These signatures must come from at least half, meaning twelve, of the twenty-three congressional districts in Florida.[124]

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opposing; a statement as to whether the committee is a continuing one; a plan for the disposition of residual funds in the event of dissolution of the committee; and a listing of all banks, safe-deposit boxes, or other depositories used for committee funds. *Id.*

115. FLA. STAT. § 100.371(3) (2001).

116. FLA. ADMIN. CODE ANN. r. 1S-2.009(1) (2001).

117. FLA. STAT. § 101.161 (1) (2001). "The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." *Id.*

118. *Id.* "[T]he substance of the amendment or other public measure shall be an explanatory statement, not exceeding [seventy-five] words in length, of the chief purpose of the measure." *Id.*

119. FLA. ADMIN. CODE ANN. r. 1S-2.009(2) (2001).

> To be sufficient the petition form must be printed on separate cards or individual sheets of paper. The minimum size of such forms shall be 3 inches by 5 inches and the maximum size shall be 8 ½ inches by 11 inches. Additional material which does not conform to the size requirements above may be attached. Each form shall contain space for only one elector's signature. The Division will not approve forms providing for multiple signatures per page.

Id.

120. *Id.* at (1).

121. *Id.* at (2).

122. FLA. CONST. art. XI, § 3.

123. *Frequently Asked Questions*, *supra* note 11.

124. FLA. CONST. art. XI, § 3; *see also Frequently Asked Questions*, *supra* note 11.

Then the committee must submit the signatures to the appropriate supervisor of elections for verification.[125] The committee must pay for the verifying of the collected signatures in advance.[126] The cost is the lesser of ten cents per signature or the actual cost of checking the signatures.[127] If the committee is unable to pay the cost of verification without imposing an undue burden on its otherwise available resources, then upon written certification of such inability, given under oath to the supervisor of elections, the committee can have the signatures verified at no charge.[128]

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125. FLA. STAT. § 99.097(1) (2001).The Supervisor of Elections for each county in which the petition was circulated is responsible for verifying those signatures. FLA. ADMIN. CODE ANN. r. 1S-2.0091(1) (2001).

> [T]he Supervisor [of elections] shall verify the signatures on each petition to ensure that each person signing said petition is a registered elector in that county and that the date the elector signed the petition was not more than four years prior to the date the Supervisor verified the petition. Initiative petitions must contain all of the following or they will be deemed invalid and the Supervisor shall not verify the signature: (a) the Signee's name, (b) the Signee's street address (including city and county), (c) the Signee's voter registration number or date of birth, (d) the Signee's signature, (e) the date the elector signed the petition.

FLA. ADMIN. CODE ANN. r. 1S-2.0091(2) (2001). The Supervisor of Elections has the discretion to use

> the most inexpensive and administratively feasible of either of the following methods of verification: a) A name-by-name, signature-by-signature check of the number of authorized signatures on the petitions; or (b) A check of a random sample, as provided by the Department of State, of names and signatures on the petitions. The sample must be such that a determination can be made with a reliability of at least 99.5 percent. . . . If the petitions do not meet such criteria, then the use of the [random sampling] verification method described in this paragraph shall not be available to supervisors.

FLA. STAT. § 99.097(1)(a)-(b) (2001). However, if a committee submits petitions that "contain at least fifteen percent more than the required number of signatures, the petitioner may require that the supervisor of elections use the random sampling verification method in certifying the petition." *Id.* § 99.097(2).

126. *Id.* § 99.097(4).

127. *Id.*

128. *Id.*

> In the event a candidate, person, or organization submitting a petition to have an issue placed upon the ballot is entitled to have the signatures verified at no charge, the supervisor of elections of each county in which the signatures are verified at no charge shall submit the total number of such signatures checked in the county to the Comptroller no later than December 1 of the general election year, and the

Article IV, section 10 of the Florida Constitution authorizes the Attorney General to petition the Florida Supreme Court for an advisory opinion as to "the validity of any initiative petition circulated pursuant to Section 3 of Article XI."[129] Under the legislation[130] enacted to execute this constitutional provision, once the supervisors of elections have verified that the initiative committee has gathered at least ten percent of the required number of voters statewide from at least one-fourth of the congressional districts,[131] the supervisors notify the Secretary of State, who immediately submits an initiative petition to the state Attorney General.[132]

When the Attorney General receives the initiative petition, then he or she must petition the Florida Supreme Court within thirty days, requesting an advisory opinion regarding the compliance of the text of the proposed amendment with Article XI, section 3 of the Florida Constitution and with Florida Statutes § 101.161.[133] Article XI, section 3 contains the single-subject requirement that mandates that the proposed amendment "embrace but one subject and matter directly connected therewith,"[134] while Florida Statutes § 101.161 requires that the proposed amendment's ballot title and summary be written in clear and unambiguous language.[135]

> Comptroller shall cause such supervisor of elections to be reimbursed from the General Revenue Fund in an amount equal to ten cents for each name checked or the actual cost of checking such signatures, whichever is less.

Id.

129. FLA. CONST. art. IV, § 10. This constitutional provision also requires the Florida Supreme Court to permit interested persons to be heard on the questions presented. *Id.* Jurisdiction to accept the petitions for advisory review is provided to the Florida Supreme Court by FLA. CONST. art. V, § 3(10). Before these two amendments were added to the Florida Constitution in 1986, single-subject challenges to proposed amendments, and challenges to the sufficiency of the ballot statements, were ordinarily made by petitioning a court to issue a writ of mandamus to the Secretary of State to strike initiatives from the ballot after they had been assigned ballot position. Little, *supra* note 23, at 396-97. The purpose of the amendments was to allow for an early test of the technical compliance of the substance and ballot language of an initiative before the effort and expense of gathering all the required signatures had been made. *Id.* at 397. This served to open the initiative process for greater use by reducing the risk of costly and irretrievable mistakes after all the work had been done. *Id.*

130. FLA. STAT. §§ 15.21, 16.061(1) (2001).

131. FLA. STAT. § 15.21(3) (2001). This would be 48,869 signatures coming from at least three congressional districts for the 2002 election. *Frequently Asked Questions*, *supra* note 11.

132. FLA. STAT. § 15.21 (2001).

133. FLA. CONST. art. IV, § 10; FLA. STAT. § 16.061(1) (2001). The Attorney General can also enumerate in the petition any specific factual issues which the Attorney General believes would require a judicial determination. *Id.*

134. FLA. CONST. art. XI, § 3.

135. FLA. STAT. § 101.161(1) (2001). The full text reads:

After the Florida Supreme Court approves the proposed amendment, and the supervisors of elections verify that the necessary number and distribution of registered voter signatures has been obtained,[136] then the Secretary of State must certify the proposed amendment for ballot position and place the proposed amendment on the ballot for the next general election occurring over ninety days from the certification.[137] Once the signatures are verified they are good for four years from the date the signatures were made. Therefore, if a committee misses the deadline for the closest general election, it may be able to get the proposed amendment on the ballot for the next general election two years later.[138]

The Florida Constitution requires the committee to publish the full text of the proposed amendment, with notice of the date of the election, in one newspaper of general circulation in each county in Florida once during the tenth week before the election and again during the sixth week before the election.[139] Finally, if a majority of voters[140] approve the proposed amendment at the general election, the amendment will become effective

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> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. Except for amendments and Ballot language proposed by Joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

Id.

136. FLA. STAT. § 100.371(2) (2001). Again, the total number and distribution of signatures needed to put a proposed amendment on the ballot is eight percent of the number of people who voted in the last presidential election, coming from at least half of Florida's twenty-three congressional districts. *See* FLA. CONST. art. XI, § 3.

137. FLA. CONST. art. XI, § 5(a). *See also* FLA. STAT. ch. 100.371(1) (2001). The legislature may with a three-fourths vote of each house move the amendment to an earlier special election held more than ninety days after such filing. FLA. CONST. art. XI, § 5(a).

138. *See* FLA. STAT. § 100.371(2) (2001).

139. FLA. CONST. art. XI, § 5(b).

140. FLA. CONST. art. XI, § 5(c).

on the first Tuesday after the first Monday in January following the election.[141]

C. *Judicial Review of Initiatives*

As noted above, once an initiative committee obtains verified signatures equaling at least ten percent of the required number of signatures from at least one-fourth of the congressional districts in Florida, the Secretary of State submits a petition to the Attorney General, who then requests an advisory opinion regarding the validity of the proposed amendment from the Florida Supreme Court.[142] In determining the validity of the proposed amendment, the Florida Supreme Court's inquiry is limited to whether the proposed amendment comports with the single-subject requirement of Article XI, section 3 of the Florida Constitution, and whether the ballot title and summary are clear and unambiguous pursuant to Florida Statutes § 101.161.[143] The Florida Supreme Court strictly limits its review to these two issues and does not evaluate the merits or wisdom of the proposed amendment.[144]

The Florida Supreme Court has held that there are two major purposes of the single-subject requirement of Article XI, section 3 of the Florida Constitution.[145] The first is to prevent logrolling, or the "practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed."[146] The second purpose of the single-subject requirement is to protect "against multiple 'precipitous' and 'cataclysmic'

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141. *Id.* This is the default date for effectiveness of the amendment. The amendment itself may also specify a different date for the amendment to become effective. *Id.*

142. *See supra* text accompanying notes 129-32.

143. *See* Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998).

144. *See* Advisory Op. to the Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 368 (Fla. 2000) (High-Speed Monorail); *see also* Advisory Op. to the Att'y Gen. — Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991).

145. *High Speed Monorail*, 769 So. 2d at 369 (Fla. 2000).

146. *Id.; see* Advisory Op. to the Att'y Gen. re Ltd. Casinos, 644 So. 2d 71, 73 (Fla. 1994) (citing Advisory Op. to the Att'y Gen. — Ltd. Marine Net Fishing, 620 So. 2d 997 (Fla. 1993)); *see also* In re Advisory Op. to the Att'y Gen. — Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994).

changes in the constitution by limiting to a single subject what may be included in any one amendment proposal."[147]

In *Fine v. Firestone,*[148] the Florida Supreme Court held that in order for a citizen initiative amendment to comply with the single-subject requirement, the proposed amendment must manifest a "logical and natural oneness of purpose."[149] Making this determination requires the Court to consider whether the proposed amendment affects separate functions of government, and whether it affects other provisions of the state constitution.[150] However, a proposal will not automatically be invalidated just because it could potentially interact with other parts of the state constitution,[151] or because it affects several branches of state government.[152] It is only "when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test."[153]

The Florida Supreme Court has found that the main purpose of the ballot title and summary requirements in Florida Statutes § 101.161[154] is to ensure that the "electorate is advised of the true meaning and ramifications of an amendment,"[155] and to "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot."[156] In order to meet the statutory requirements, the ballot title and summary must be accurate and informative,[157] and "state 'in clear and unambiguous language the chief purpose of the measure.'"[158] As noted above,[159] if the Court

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147. Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n, 705 So. 2d 1351, 1353 (Fla. 1998) (citing *In re* Advisory Op. to the Att'y Gen. — Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994)).

148. 448 So. 2d 984 (Fla. 1984).

149. *Id.* at 990.

150. *In re* Advisory Op. to the Att'y. Gen. — Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994).

151. Advisory Op. to the Att'y Gen. — Fee on the Everglades Sugar Prod., 681 So. 2d 1124, 1128 (Fla. 1996).

152. *Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1353-54.

153. *Id.* at 1354.

154. *See supra* text accompanying note 135.

155. Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 486, 490 (Fla. 1994) (quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)).

156. *See* Advisory Op. to the Att'y Gen. re Term Limits Pledge, 718 So. 2d 803 (Fla. 1998) (quoting *Fee on the Everglades Sugar Prod.*, 681 So. 2d at 1127).

157. Advisory Op. to the Att'y Gen. re: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 27 Fla. L. Weekly S71, 3 (Fla. Jan 17, 2002) (citing *Term Limits Pledge*, 718 So. 2d at 803).

158. *See* Advisory Op. to the Att'y Gen. — Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991) (quoting *Askew*, 421 So. 2d at 154-55); *accord* Advisory Op. to

approves the ballot title and summary, then the initiative committee must still gather the required number and distribution of signatures and have them verified more than ninety days[160] before the election in order to have the proposed amendment appear on the ballot.[161]

IV. PROPOSALS FOR CHANGE

Many of the same commentators who have analyzed problems caused by the proliferation of constitutional amendments dealing with non-constitutional content in the Florida Constitution have also proposed changes designed to alleviate these problems.[162] These proposed changes can be broken down into roughly four categories: changes making it harder to amend the Florida Constitution, changes restricting the content of proposed amendments, changes giving the state government more control over the citizen initiative process, and changes to the process that would allow citizens to propose statutes by initiative.[163]

A. *Making the Florida Constitution Harder to Amend*

One obvious way of slowing down the proliferation of constitutional amendments dealing with non-constitutional content is to make the Florida Constitution more difficult to amend, by either making it harder to get proposed amendments on the ballot, or by making it harder to get those amendments on the ballot passed.[164] One idea may be to require more signatures to get a proposed amendment on the ballot.[165] Currently, the signature requirement is eight percent of the number of eligible voters who voted in the most recent presidential election.[166] The number of signatures

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the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998).

159. *See supra* text accompanying notes 136-37.

160. The deadline to have the signatures in and verified so that the proposed amendment will appear on the ballot for the November 5, 2002 election is Aug. 6, 2002. *Frequently Asked Questions*, *supra* note 11.

161. *See supra* text accompanying notes 136-41.

162. *See generally* Anderson & Ciampa, *supra* note 23, at 72-74 (discussing proposed changes to the citizen initiative process); *see generally* Gordon, *supra* note 23, at 428-34 (discussing proposed changes to the citizen initiative process); *see generally* Jameson & Hosack, *supra* note 23, at 442-60 (discussing proposed changes to the citizen initiative process); *see generally* Little, *supra* note 23, at 410-15 (discussing proposed changes to the citizen initiative process).

163. *See supra* text accompanying note 162.

164. *See* Jameson & Hosack, *supra* note 23, at 444-45.

165. *Id.* at 444.

166. *See supra* text accompanying note 122.

required could be raised by simply increasing the percentage required, to ten or twelve percent for example. Alternatively, since only about seventy percent of registered voters actually voted in the last presidential election,[167] the signature requirement could be made tougher by requiring eight percent of the total number of all registered voters in Florida, rather than just the number of voters who voted in the last presidential election.[168]

Another way to make it more difficult to get a proposed citizen initiative amendment on the ballot would be to shorten the period of time initiative committees have to gather the signatures.[169] Florida currently allows initiative committees four years to gather signatures,[170] which is more time than any other state with a constitutional citizen initiative allows.[171] Florida could keep the signature requirement the same, but shorten the time allowed to collect the signatures to the two years between each general election.

Florida could also make it harder for Florida voters to approve the amendments that actually appear on the ballot.[172] Currently, amendments become part of the constitution as long as they are passed by a simply majority of the voters.[173] Florida could change the citizen initiative process by requiring a super-majority of the voters to approve amendments before they become a part of the constitution.[174] Whether done in conjunction with making it harder to get an amendment on the ballot or alone, requiring a super-majority approval would likely decrease the number of constitutional amendments dealing with non-constitutional content if for no other reason than a super-majority requirement would decrease the total number of all amendments passed.

However, the main problem with making it harder to amend the Florida Constitution through the citizen initiative process is that the process is already quite difficult.[175] Although the number of proposed amendments circulating before each election can be quite high,[176] the number that actually obtain the requisite signatures and survive judicial review to make

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167. Fla. Dept. of State, Div. of Elections, *Elections Results*, *available at* http://election.dos.state.fl.us/elections/resultsarchive/Index.asp (last visited Dec. 4, 2002).

168. *See* Jameson & Hosack, *supra* note 23, at 436-37.

169. *See id.* at 444.

170. *See supra* text accompanying note 138.

171. *See* Jameson & Hosack, *supra* note 23, at 440.

172. *See* Gordon, *supra* note 23, at 429; *see also* Jameson & Hosack, *supra* note 23, at 445.

173. *See supra* text accompanying note 140.

174. Jameson & Hosack, *supra* note 23, at 445.

175. *See* Little, *supra* note 23, at 413.

176. *See supra* text accompanying note 11.

it on the ballot is normally quite lower,[177] and the number that are actually approved by Florida voters and become part of the constitution is even less.[178] Since the citizen initiative process began in 1968 until the general election in 2000, only fifteen amendments have made it onto the ballot through the citizen initiative process,[179] and of those, the Florida voters approved only ten.[180] With only fifteen amendments passed in the thirty-four years since 1968,[181] the problem with the citizen initiative process is not so much with the number of amendments passed, but with the content of those successful amendments.[182]

B. *Restricting the Content of Proposed Amendments*

Some commentators have proposed changes to the citizen initiative process that would restrict the content of amendments allowed on the ballot.[183] One idea is to make certain portions of the Florida Constitution unavailable for amendment by the citizen initiative process.[184] For example, one commentator, Professor Daniel R. Gordon, has proposed that the content of citizen initiative amendments be restricted so that no right contained in Article I of the Florida Constitution could be directly diminished by an initiative amendment, and so that no change may be made by initiative when that change would involve only a limited economic or social interest.[185] Gordon suggests that the Florida Supreme Court be given jurisdiction to decide these issues before a proposed amendment is allowed on the ballot.[186]

Another commentator, Professor Joseph W. Little,[187] has suggested that all amendments to the Florida Constitution, including those proposed by the citizen initiative process, be restricted by a rule that "[n]o amendment to the constitution may be placed upon the ballot to accomplish a purpose

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177. *See Initiatives, Amendments, and Revisions*, *supra* note 10.

178. *See id.*

179. *Id.*

180. *See id.*

181. *See id.*

182. *See* Little, *supra* note 23, at 410.

183. *See* Jameson & Hosack, *supra* note 23, at 444-45; *see also* Gordon, *supra* note 23, at 429; *see also* Little, *supra* note 23, at 410.

184. *See* Jameson & Hosack, *supra* note 23, at 444-45; *see also* Gordon, *supra* note 23, at 429.

185. Gordon, *supra* note 23, at 429. Professor Gordon also proposes that initiative proposals that would make any changes to FLA. CONST. art. I, or FLA. CONST. art. X, § 4, must be approved by sixty percent of the electors voting the general election. *Id.*

186. *Id.*

187. Professor of Law, University of Florida College of Law; B.S., Duke University, 1957; M.S. Worcester Polytechnical Institute, 1961; J.D., University of Michigan, 1963.

that is within the power of the Florida Legislature to accomplish by law."[188] Professor Little suggests that by testing every proposed constitutional amendment against this standard, only amendments that "would either change the definition of the constitutional structure of government or change the limits on governmental power" would be allowed in the constitution, thus preserving the primary government defining and limiting functions of the constitution.[189]

The major problem with restricting the content of proposed constitutional amendments in either of these ways is that there would likely be a significant increase in litigation, placing much more discretionary authority in the hands of the Florida Supreme Court. Although the Florida Supreme Court currently reviews amendments proposed by the citizen initiative process,[190] that review is limited to the substantive single-subject requirement,[191] and to the more technical ballot title and summary language requirements.[192] Further substantive restrictions on the content of proposed amendments would likely result in more contentious litigation by both sides, and give the Florida Supreme Court more discretionary authority to make substantive evaluations of potential amendments.[193] This could lead the Florida Supreme Court to consciously, or even unconsciously, use the content restrictions as a pretext for reviewing the merits or wisdom of proposed amendments.

C. *Giving State Government More Control*

Another way of possibly slowing down the proliferation of amendments dealing with non-constitutional content is by giving the state government more control over the citizen initiative process. For example, a few states that allow for constitutional citizen initiatives, including Mississippi,[194] use an indirect constitutional initiative process.[195] Indirect initiative processes generally require that the proposal be submitted to the

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188. Little, *supra* note 23, at 410.

189. *Id.*

190. *See supra* text accompanying notes 133-35.

191. *See supra* text accompanying notes 143-53.

192. *See supra* text accompanying notes 154-58.

193. There has already been criticism by one commentator that the Florida Supreme Court has been inconsistent in applying the single-subject review, suggesting somewhat result driven jurisprudence. *See* Thomas C. Marks, Jr., *Constitutional Change Initiated By the People: One State's Unhappy Experience*, 68 TEMP. L. REV. 1241, 1289 (1995).

194. MISS. CONST. art. 15, § 273(1).

195. Massachusetts also has an indirect constitutional citizen initiative process. MASS. CONST. art. 48, pt. 4, § 2; *see also* Jameson & Hosack, *supra* note 23, at 433-34.

legislature before it is placed on the ballot.[196] In Mississippi, the legislature can adopt, amend, or reject the proposed amendment.[197] The legislature cannot keep the proposed amendment from going on the ballot entirely,[198] but if the legislature amends the original amendment or passes an alternative amendment, then the amended or alternative amendment goes on the ballot along with the original amendment. The voters can then decide which they prefer.[199] Enactment of an indirect initiative method in Florida like the one in Mississippi,[200] or even one that would allow the legislature to keep a proposed amendment off the ballot entirely,[201] would give the state government more control over the initiative process by allowing the legislature to voice concerns with proposed amendments more effectively, and to create alternative proposals that might derail some of the blatantly non-constitutional amendments proposed through the citizen initiative process.

One problem with giving the state government more control over the citizen initiative process by changing to an indirect constitutional initiative process is that the change would have to be accomplished through a constitutional amendment, which has to be approved by Florida voters.[202] As some commentators have pointed out, Florida voters would be unlikely to favor any amendment that would take away or restrict any of their power to propose amendments to their constitution.[203] This is evinced by the fact that, in 1994, the people of Florida voted to enlarge their power to propose constitutional amendments, approving a citizen initiative amendment which exempted any future initiative "limiting the power of government to raise revenue" from the single-subject requirement.[204]

D. *Creating a Statutory Initiative*

One change that many commentators have suggested is the creation of a statutory citizen initiative process to go along with the current

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196. *See* MISS. CONST. art. 15, § 273(2); MASS. CONST. art. 48, pt. 4, § 2; *see also* Jameson & Hosack, *supra* note 23, at 433-34.

197. MISS. CONST. art. 15, § 273(2).

198. The Massachusetts legislature can keep the initiative from reaching the ballot at all with a twenty-five percent vote of both legislative houses in two consecutive sessions. MASS. CONST. art. 48, pt. 4, § 2; *see also* Jameson & Hosack, *supra* note 23, at 433-34.

199. MISS. CONST. art. 15, § 273(7)-(8); *see also* Jameson & Hosack, *supra* note 23, at 433-34.

200. *See* MISS. CONST. art. 15, § 273.

201. *See* MASS. CONST. art. 48, pt. 4, § 2.

202. *See* Jameson & Hosack, *supra* note 23, at 445.

203. *See id.*

204. *Supra* text accompanying note 109; *see also* Jameson & Hosack, *supra* note 23, at 444.

constitutional initiative.[205] These commentators generally argue that development of a statutory initiative process would help protect the sanctity of the Florida Constitution by keeping out non-constitutional content,[206] while still providing "the people with recourse against the legislature when it declines to enact desired legislation."[207]

Professor Little proposed a model for a statutory initiative process that is very similar to the current constitutional initiative. The model includes similar ballot title and single-subject requirements.[208] However, Professor Little's proposal is somewhat different because it requires substantially fewer signatures to get a proposed statute on the ballot,[209] and it includes a partial limitation on the state legislature against the subsequent repeal or modification of any statute enacted by statutory initiative.[210]

One of the problems inherent in having a statutory initiative in combination with a constitutional initiative is deciding which proposals to allow as potential constitutional amendments, and which proposals to allow as potential statutes. Although a less daunting signature requirement would likely encourage many special interest groups to propose their initiatives as statutes only, some groups would still attempt to propose amendments with non-constitutional content. The Florida Supreme Court would then be called upon to decide which proposals could appear on the ballot as amendments and which proposals would have to go on the ballot as statutes.[211] Having the Florida Supreme Court decide this potentially contentious issue would likely raise the same issues as those noted above regarding content restrictions on citizen initiative amendments, namely the threat of increased litigation and the danger of placing too much substantive discretion in the hands of the Court.[212]

Furthermore, the creation of any kind of statutory initiative would require a constitutional amendment since the existing constitution gives

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205. *See* Anderson & Ciampa, *supra* note 23, at 74; *see* Jameson & Hosack, *supra* note 23, at 458-60; Little, *supra* note 23, at 411-12.

206. *See* Anderson & Ciampa, *supra* note 23, at 74; Jameson & Hosack, *supra* note 23, 458; Little, *supra* note 23, at 410.

207. Little, *supra* note 23, at 411-412. *See also* Anderson & Ciampa, *supra* note 23, at 74; Jameson & Hosack, *supra* note 23, at 458-60.

208. Little, *supra* note 23, at 412.

209. *Id.*

210. *Id.* at 411-12.

211. *See* Jameson & Hosack, *supra* note 23, at 455. These commentators suggest that the constitution could be amended to provide the Florida Supreme Court jurisdiction to decide, in its advisory opinion, whether a proposed amendment is more appropriate as statutory law than as a constitutional amendment. *Id.*

212. *See supra* text accompanying notes 191-93.

the exclusive lawmaking power to the state legislature.[213] Approval of a statutory initiative may be somewhat difficult if the voters see it as a restriction on their power to propose constitutional amendments by initiative.[214] However, if voters can be persuaded to view the creation of a statutory initiative process as providing them more of a voice in the day-to-day operations of the state, approval of a statutory initiative may be more likely.[215] Either way, the creation of a statutory initiative, in tandem with the current constitutional initiative, would probably have a better chance at voter approval than a bald restriction on the constitutional citizen initiative alone.[216]

VI. CONCLUSION

The insertion into the Florida Constitution of constitutional amendments dealing with non-constitutional content by means of the citizen initiative process has caused some serious problems in Florida. This is evinced by the difficulties encountered by the Florida legislature in implementing the recently passed amendment mandating construction of a high-speed rail,[217] and by the problems encountered by the Florida Supreme Court in interpreting the net ban amendment[218] in *Millender*.[219] Further proliferation of non-constitutional content in the Florida Constitution threatens to weaken the primary government defining and limiting function of the constitution, and to reduce the inherently higher status constitutional provisions command.[220]

The current initiative process must be changed to restrict the presence of non-constitutional content in the Florida Constitution. As Justice Parker Lee McDonald wrote, "The [current] technical requirements, such as the single-subject rule and [the ballot title and summary requirements] appear insufficient to prevent abuse of the amendment process."[221]

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213. FLA. CONST. art. III, § 1; *see also* Little, supra note 23, at 412; *see also supra* text accompanying note 202.

214. *Cf.* Jameson & Hosack, *supra* note 23, at 445 (stating that electors may not favor an amendment limiting citizen access); *see also supra* text accompanying notes 203-04.

215. *See* Jameson & Hosack, *supra* note 23, at 445.

216. *See id.*

217. *See infra* Part II.B.1.

218. *See infra* Part II.B.2.

219. Dep't of Envtl. Prot. v. Millender, 666 So. 2d 882 (Fla. 1996).

220. *See infra* Part II.A.

221. *Limited Marine Net Fishing*, 620 So. 2d 997, 999-1000 (Fla. 1993) (McDonald, J., concurring).

Although changing the initiative process to make it harder to amend the Florida Constitution would likely prevent some of the amendments dealing with non-constitutional content from making it into the constitution, such changes would also likely stifle other legitimate and important initiative amendments proposed by the people.[222] The process of amending the constitution through initiative is hard enough, as the numbers show.[223] The real problem is with the non-constitutional content of proposed amendments, not with the overall number of amendments. However, bald content restrictions on amendments would likely be very unpopular with the Florida voters who would have to approve any such restrictions.[224] Also, any change giving the state government too much control over the process, such as implementation of an indirect initiative process, would likely be very unpopular with Florida voters.[225]

The best way to ensure that all future constitutional initiative amendments are constitutional in nature is to give the people the alternative of a statutory initiative. A statutory initiative would give the people of Florida an alternative avenue to propose desired programs in spite of legislative resistance, while reserving the constitutional initiative process for issues truly constitutional in nature.[226] Furthermore, if citizens were given an alternative avenue of direct democracy, they would be more likely to approve restrictions limiting the content of proposed constitutional amendments.[227] In addition, a limit on the legislature's power to repeal or amend statutes enacted through citizen initiative[228] would give more permanence to proposals enacted by the people without needlessly enshrining them in the Florida Constitution.[229]

222. *See infra* Part IV.A.
223. *See supra* text accompanying notes 175-82.
224. *See* Jameson & Hosack, *supra* note 23, at 445.
225. *See supra* text accompanying notes 202-04.
226. *See supra* text accompanying notes 206-07.
227. *See supra* text accompanying notes 215-16.
228. *See* Little, *supra* note 23, at 411-12.
229. *See id.*