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I. INTRODUCTION

What role does our state constitution play in appellate decision-making? Obviously, this topic is as open-ended as the words suggest. The most accurate answer to this question is the hackneyed and overused rejoinder "it all depends." However, the "what" upon which "it all depends" can be fleshed out a little further from one judge's viewpoint. What follows are largely the ruminations of this judge as he reflects on the ebb and flow with which state constitutional issues have been brought before him.

II. HIERARCHY OF LAWS

To begin with, when a state appellate judge raises her right hand to take the oath of office, she promises faithfully to execute and enforce the Constitution and laws of the United States as well as the constitution and laws of her own state. The United States of America is a single sovereign nation with a particular structure of government. As the pledge of allegiance proclaims, we are, indeed, "one nation, under God." Part of our governmental structure is the geographic division of the nation into separate states in a system we refer to as a federal republic. The states are not

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separate sovereign entities, but are in fact component parts of a single nation.

Why this lesson in grade school civics? Just as we regard a constitution as the basic charter and foundation of a government and the society it serves, we must remember a state judge must be ever cognizant of the basic principle that the Constitution and laws of the United States are at the top of the hierarchy of laws that control and guide the judge's resolution of legal issues brought to the court. The oath of office is not only a symbolic reflection of this hierarchy, it is the solid rock of the judge's assumption of her responsibilities as a judge, and a visible sign to the public of the judge's special pledge of allegiance. This pledge must be ever present in a judge's consciousness (and conscience).[1]

III. PRACTICAL IMPORTANCE OF STATE LAW

Just because the constitution and laws of the state occupy a space below the Federal Charter in this legal hierarchy, it does not mean that the state constitution does not play an important, if not the most important, role

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1. Many believe the activism of the Warren Court in enforcing the Federal Constitution on both substantive and procedural fronts was largely the result of the failure of state court judges to enforce the basic rights citizens enjoy under the Federal Constitution and, indeed, the failure to enforce many provisions of their own state constitutions. This lesson must not be forgotten.

Of course, many state courts did recognize the federal constitutional rights of their citizens. Consider, for instance, the Florida Supreme Court's 1907 reversal of a criminal conviction where the defendant challenged the racial composition of his jury:

> We think it sufficiently appears from the language of the challenge that there were colored men in Duval county competent to serve on the said jury. The challenge alleges "that there are, and were at the time of executing said venire, in Duval county, many thousand colored men of African descent of approved integrity, fair character, and sound judgment and intelligence, and fully qualified for jury duty; and this fact was well known to the sheriff of our said county."
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> These allegations of the challenge being admitted to be true by the demurrer thereto, and the defendant requesting the court to allow him to introduce witnesses to prove the truth thereof, the necessary conclusion is, therefore, that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States. The court erred in sustaining the demurrer. The court ought to have overruled the demurrer, and to have permitted the state to take issue thereon. The issues so raised is [sic] to be tried by the court on the proofs offered by the parties.

Montgomery v. State, 42 So. 894, 897 (Fla. 1907).

in a person's life as that life is affected by the law. Consider for a moment that currently there are 750 state judges, compared to some 29 federal judges, dispensing civil and criminal justice in Florida. These numbers provide a flavor of the comparative practical impact of state law compared to federal law on the average person. From a practical standpoint, it is state law and the state constitution which primarily determine the type of society and quality of life that a person will have in his home state. After all, under our Federal Constitution we have largely left it up to the states to determine the criminal, civil and administrative law that governs our relationships and activities. Only when state law collides with some important value recognized in our Federal Charter, or by our national Legislature, does state law give way.

IV. HISTORY

Someone once said (Justice Holmes, I believe) that the law is experience. In other words, the law is what has actually happened. The way certain things came to be strongly affects the way things are. While our present system of federalism—the relationship between the states and the central government—is essentially uniform throughout the country, it is worth noting at least one distinction among many in the origins of the state constitutions.

Many state constitutions were enacted and in place before the present Federal Constitution was drafted and adopted. Those states that declared their independence from England became small sovereign nations with their separate basic charters of government. The constitutions enacted by those states were, first and foremost, constitutions for separate nations. For example, they contained extensive protections for the personal rights of their citizens. Indeed, these constitutions and their provisions served as models and examples for the drafters of the Constitution of the United States.

Again, in taking the liberty to generalize, the origins and purpose of the constitutions of the original thirteen colonies (and some other states) should be distinguished from the constitutions of those states which came into the union much later, after the nature of the country as a single federal union had been well established in both its identity and authority. These later constitutions, though similar in content to their older siblings, were drafted and adopted in a context that somewhat anticipated their role as charters for states becoming a geographical and administrative part of an established sovereign nation. At the same time, however, the basic provisions of the constitutions of the earlier states were usually incorporated in these

constitutions.

While this particular difference in the origins of the various state constitutions may have little practical significance in a present day analysis of constitutional law, it is an important "experience" factor that should be in our consciousness when we discuss "states' rights" or debate other issues concerning the authority and role of the states in the federal union.

The substantial role of state government in our lives is a product of our unique history in becoming a nation. In other countries, administrative divisions of the central government based on geographical lines are just that: Administrative divisions typically utilized to more efficiently carry out government functions. At the risk of oversimplification, I cite the small nation of Ireland as an example. There the country government, while based on historic geographic lines, is more or less simply a subdivision of the national government. There is no constitution for County Court.

Florida was a federally owned territory before becoming a state in the federal union. Its first constitution was drafted by a group of settlers in 1838 at St. Joseph, Florida, some eight years before Florida was admitted as a state. The Federal Constitution and many state constitutions were then in existence, and these likely served as models and examples for the drafters of Florida's charter, including the provisions protecting the personal rights of its citizens.[2] The modern version of our constitution was adopted in 1968 after substantial redrafting was done by a statewide commission.

V. DIVISION OF FUNCTIONS

A constitution performs many functions. It serves as a basic blueprint for people who live in a particular geographic area to come together, assess their values (especially in relation to how they will live together) and give expression to those important values in an agreement controlling their relationships. Many times the details are left to be worked out by the Legislature, the courts or the Executive Branch. However, the idea is to set aside certain fundamental and important values and give expression to them in a charter that will be enduring. While there is a means of amending this basic charter, the idea is not to rely on amendment as values may change (although that is certainly done), but rather to work hard to correctly identify fundamental values, articulate them in a written document, and

2. For an extremely valuable insight into the origins and purposes of the provisions of Florida's Declaration of Rights, see Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549 (1993).

stand by them. The values articulated in a constitution often identify those things that set apart one society or group of people from another. Similarly, the willingness to stand by these values, once properly identified, is one measure of the maturity and success of such a society.

The 1968 revision of the Florida Constitution represented a unique opportunity for citizens of both "old" and "new" Florida to discover or rediscover these important values and affirm them in their basic charter.[3] For that reason alone, the 1968 action must be counted as a tremendous success.

VI. FLORIDA'S COURTS

There are four levels of courts in Florida: county courts, with limited civil and criminal jurisdiction; circuit courts, with general civil and criminal jurisdiction; district courts of appeal, with general appellate jurisdiction; and the supreme court, with broad, but well-defined, appellate and supervisory jurisdiction over the state court system.[4] Issues involving the state constitution may be raised in any of these courts. Review by the district courts, although somewhat technically broader, usually involves review of the circuit courts' decisions. This review is set out in the constitution and in the rules of appellate procedure.[5]

Under our adversarial system of justice, which relies heavily on procedural fairness to accomplish its goal of a just result, an enormous amount of control is placed in the hands of the litigants, and, in turn, in the hands of the lawyers representing them. By and large, this means that only issues raised by the parties are addressed by the courts.

At the appellate level, this ordinarily means that issues involving the state constitution will not be treated unless they were raised and considered in the trial court. Of course, there are exceptions involving fundamental error or the patent unconstitutionality of a statute or action that may cause an appellate court to act even though the issue was not raised in the trial court.[6] This is a very narrow exception, however, and appellate judges are

3. Such activity has continued. In 1980, a unique "right of privacy" for Florida residents was added to the constitution. *See* FLA. CONST. art. I, § 23. Two years later, in a move in the "other direction," an amendment was added to limit the scope of Florida's version of the Federal Fourth Amendment to United States Supreme Court decisions construing the Fourth Amendment. *See infra* note 10.

4. *See* FLA. CONST. art. V, §§ 1, 3-6.

5. *See id.* § 4; FLA. R. APP. P. 9.030.

6. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE §§ 5.7-5.8 (1988).

extremely reluctant to consider issues that a trial court has not had an opportunity to deal with, especially since a trial court is a more appropriate forum to develop the facts that must be established to determine the constitutional issue.

Appellate courts basically exist to review decisions made by the trial courts. When there is no "decision" on an issue, there is nothing to "review" in the ordinary sense. There is a wide disparity, usually depending on the nature of the constitutional provision involved, in the practice of the parties and their lawyers in the utilization of the state constitution to support their legal positions.

VII. MEAT AND POTATOES

This disparity can be illustrated by comparing the routine use of state constitutional provisions concerning homestead, a subject untreated by the Federal Constitution, to the utilization of the provisions of the Declaration of Rights section of the Florida Constitution.[7] In many instances, these later provisions mirror the protection of rights afforded by the Federal Constitution. The "meat and potatoes" of the state constitution are those provisions meant to give structure to state government and control to the ordinary social, economic, and political intercourse between us. Because there are no duplicate or parallel provisions in the Federal Constitution, these provisions have always been relied upon in state courts as primary authority.

This is so simply as a matter of definition. Where the state constitution deals with issues of state concern, such as the structure of state government and the court system or the provisions concerning homestead, those provisions, just like the statutes enacted by the state legislature, will provide the ordinary grist for the state courts' mills. Not much has changed on that front. The "meat and potatoes" of the Florida Constitution has always been, and will for the foreseeable future be, a constant subject for Florida's appellate courts.

VIII. DECLARATION OF RIGHTS

Until recently, however, in this judge's tenure,[8] it was rare that a

7. Article I of the Florida Constitution is entitled "Declaration of Rights." FLA. CONST. art. I.

8. Judge Anstead has been an appellate judge since 1977.

personal right would be asserted on the basis of a provision in the Florida Constitution. Even today, the Declaration of Rights is seldom cited in appellate briefs. Perhaps this is due to the lack of education or emphasis on our state constitution in the state law schools, and in the various means of continuing legal education.

Another reason may be the visual prominence of the cases decided, especially by the United States Supreme Court, involving the protections afforded by the Federal Constitution. This is especially true concerning the Bill of Rights and other amendments to that document. In recent history, the national debate over the decisions of the *Warren* Court, and later the *Burger* and *Rhenquist* Courts, on issues of federal constitutional rights, has occupied center stage in the national and local media.[9] Yes, lawyers and their clients watch television and read newspapers, too. In contrast, state court decisions based upon the Declaration of Rights have, until recently, been not only rare, but even more rarely publicized.

IX. TRENDS

Undoubtedly, personal rights are usually asserted by persons, and those persons are ordinarily under criminal prosecution by the government. Government agents are usually alleged to have violated the defendant's rights while investigating him for criminal conduct. The government has no personal rights to be asserted. As a matter of fact, the *Warren* Court was perceived to have been more apt to recognize and enforce a personal right under the Federal Constitution than the succeeding *Burger* and *Rhenquist* Courts. As a trend has developed in United States Supreme Court decisions favoring the government and limiting personal rights under the Federal Constitution, parties, their lawyers, and judges have "suddenly" discovered the Florida Constitution has a Declaration of Rights.

Of course, under the federal constitutional scheme and especially the Fourteenth Amendment, states are only prohibited from denying those protections afforded by the Federal Constitution. States are not prohibited from affording *greater* rights and protections to their citizens than the constitutional minimum afforded by the Federal Charter.[10] Recently, there

9. The Warren Court refers to Chief Justice Earl Warren's tenure; the Burger Court refers to Chief Justice Warren E. Burger's tenure; and the Rhenquist Court refers to Chief Justice William H. Rhenquist's tenure.

10. Significantly though, in 1981, article I, section 12 of the Florida Constitution was amended to mandate that Florida courts construe its provisions in accord with United States

has been a sharp increase around the nation in state court decisions predicated upon state constitutions; a trend that has been true in Florida as well. In fact, Florida has become something of a national trend-setter on this subject.

But, to get back to basics, we must remember it is the parties and their lawyers who raise the issues. With respect to personal rights, it has been the parties and their lawyers who, finding themselves being turned away by the federal courts, have started raising issues predicated upon rights protected by their state constitutions. These litigants, who have increased in numbers, have brought about the court opinions expounding upon those state constitutional rights, and in many instances, have found those rights to be more expansive than many federal opinions have found in similar provisions in the Federal Charter. The interesting development in state constitutional law, still emerging and forming, involves cases where both the federal and state constitutions are implicated, usually with the assertion and protection of personal rights. As noted, Florida is free to extend greater personal rights to its residents than are provided in the Federal Charter.

X. FLORIDA'S DECLARATION OF INDEPENDENCE

Among others, retired Justice William Brennan of the United States Supreme Court, noting the trend of the *Rehnquist* Court, has been active in calling upon lawyers and state court judges to utilize their state constitutions to protect the rights of their citizens. There have been many articles written on the issue, as well as state court decisions around the country, proclaiming the independence of the state courts to invoke their own constitutions to protect individual rights.[11]

Perhaps the most significant and comprehensive opinion of the Florida Supreme Court on the independent force of our state constitution was

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Supreme Court's decisions construing the Fourth Amendment. FLA. CONST. art. I, § 12. The effect of this amendment has been a topic of sharp debate on the Florida Supreme Court, where a tenuous 4-3 majority has ruled that Florida courts are bound by future decisions of the United States Supreme Court. *See* Perez v. State, 620 So. 2d 1256 (Fla. 1993). I characterize the majority as "tenuous" because one of its members has declared that he believes this ruling is wrong, but that he is bound to follow it by stare decisis. *Id.* at 1258-61 (Overton, J., concurring).

11. *See* PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM: REPORT OF THE 1992 FORUM FOR STATE COURT JUDGES (Barbara Wolfson ed. 1993) (co-sponsored by The Roscoe Pound Foundation and Yale Law School).

handed down recently in *Traylor v. State*,[12] where the court declared:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits. Federalist principles recognize that although some government intrusion into the life of the individual is inevitable, such intrusion is to be minimized. Government encroachment is thus restricted by both the federal and state constitution.
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> . . . .
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> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.
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> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.[13]

No Justice in *Traylor* took issue with these statements.

The "primacy principle" announced in *Traylor* is now routinely applied by the Florida Supreme Court. For example, in *Allred v. State*,[14] the court took a case that had largely been decided on federal constitutional grounds in the trial and appellate courts, and boldly declared at the outset: "We begin our analysis with the Florida Constitution's Declaration of Rights,

12. 596 So. 2d 957 (Fla. 1992).
13. *Id.* at 961-63 (citations omitted) (footnotes omitted).
14. 622 So. 2d 984 (Fla. 1993).

consonant with the primacy principle explained in *Traylor v. State*. Only if allegedly self-incriminating statements pass muster under our state constitution need we examine them under federal law."[15] This is a clear charge to the legal community and to all levels of Florida courts to pay more attention to our state constitution.[16]

XI. CONCLUSION

Because of the broad function served by the Florida Constitution in many areas of the law, it has long occupied a central role as the primary authority in the resolution of legal disputes in Florida courts. Furthermore, since the Florida Constitution remains the primary authority in those areas, that active role will continue.

A major change in the use of the constitution has occurred recently. This change involves the rights set out in the Declaration of Rights that somewhat parallel the guarantee of personal rights set out in the United States Constitution. While these state constitutional rights have been in place for some time, their invocation has been limited for a variety of reasons. Since personal rights must be invoked by persons, they may have been used infrequently by persons who perceived that state courts would construe such rights in a narrow fashion. When the federal courts began to strongly enforce similar provisions in the Federal Constitution, it made more sense to invoke those provisions. As the trend changed in the federal courts to one favoring the government, litigants have again turned to state constitutions and the state courts.

In Florida, the state's high court has responded with a firm signal that the Florida Constitution is a resource available to Florida residents to protect their personal rights. As the word gets out, we can expect litigants, lawyers, and judges, to increasingly rely on the Declaration of Rights in the Florida Constitution as the primary protection for personal rights in Florida. Now that the trend has started, it is doubtful that it will be easily stopped or stalled, even if the trend in the United States Supreme Court should change. This move presents an immediate challenge to Florida's law schools and continuing legal education programs to do a better job of emphasizing the

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15. *Id.* at 986.

16. Ironically though, this bold call to arms may at times amount to nothing more than a paper tiger. For instance, as discussed in note 10, Florida courts are bound to interpret article I, section 12 of the Florida Constitution (our version of the Fourth Amendment) consistent with the United States Supreme Court's interpretation of the Fourth Amendment.

importance of the Florida Constitution in our lives.

As a state court judge, I view this trend favorably because I see it as simply part of an overall scheme of government that was intended to operate this way all along. Under our federal system, the states must tip their caps and acknowledge that the central government is supreme, but the states have been left to run the show. Let's do it right, whether we are on the bottom or the top, or indeed, in the middle.