First Principles for Constitution Revision

Daniel Webster* Donald L. Bell†
First Principles for Constitution Revision
The Honorable Daniel Webster*
Donald L. Bell**

TABLE OF CONTENTS

I. INTRODUCTION ...............................................................391
II. LESSONS FROM PREVIOUS REVISION COMMISSIONS .............393
III. INFLUENCES, ORIGINS, AND PRINCIPLES UNDERLYING Florida's Constitution .........................................................396
   A. Early Constitutional Theory and Practice ...........................396
   B. Constitutional Developments in the States .......................398
   C. The Development of Constitutional Law in Florida .............404
IV. FUNCTIONAL ANALYSIS OF THE FLORIDA CONSTITUTION ......408
   A. Protecting Against Tyranny: The Separation of Powers ........410
   B. The Legislative Branch .............................................413
   C. The Executive Branch ..............................................416
   D. The Judicial Branch ................................................420
   E. Local Government ..................................................424
   F. The Boundary Between State and National Government ......425
V. THE NATURE OF RIGHTS .................................................427
   A. The Right to Equal Protection of the Laws .....................431
   B. Rights in Property ................................................434
VI. OTHER PROVISIONS OF THE FLORIDA CONSTITUTION ..........435
VII. CONCLUSION .....................................................................436

I. INTRODUCTION

Alexis de Tocqueville, the great social observer and political scientist, arrived in the United States in 1831,1 only three years after Andrew Jackson, the populist, former military Governor of Florida, was elected President of

* Speaker, Florida House of Representatives, 1996-98; B.S., 1971 Georgia Tech., Electrical Engineering. Speaker Webster is also one of the public officers responsible for making appointments to the Constitution Revision Commission.

** General Counsel, Florida Department of State, Tallahassee, FL; B.S., 1975, Florida State University; M.S., 1979, Florida State University; J.D., 1989, Florida State University. Mr. Bell is also a former Florida State University College of Law faculty member.

1. I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Alfred A. Knopf 1945) at epilogue (1835).
the United States. Tocqueville found a nation of people "seeking with almost equal eagerness material wealth and moral satisfaction; heaven in the world beyond, and well-being and liberty in this one." This was the nature of the people who only a few years later adopted Florida's first constitution.

Floridians today still seek those things our predecessors pursued with such vigor: freedom of conscience, financial security, and liberty.

In an effort to assure the continued protection of these values, the framers of the 1838 Florida Constitution included a strong entreaty to those who read it a century and a half later. They noted that "frequent recurrence to fundamental principles, is absolutely necessary, to preserve the blessings of liberty." Like the framers of other state constitutions, the framers of Florida's original constitution understood that over time all human institutions, including constitutions, are subject to potentially harmful changes, misunderstandings, and misinterpretations. They believed that it was necessary to periodically revisit the reasons for creating a constitution in order to assure its continued vitality. As Florida pursues the task of

2. See ALLEN MORRIS, THE FLORIDA HANDBOOK 1995-1996, at 323 (1994). After he became President of the United States, Jackson continued to directly influence the philosophy of government in Florida through, among other things, the placement of his friends as state officers. Id. at 324-27. For example, Jackson played a prominent role in advancing the political careers of all five of the men who served as Territorial Governors of Florida. Id. William Pope DuVal, the first territorial Governor of Florida, was reappointed to that office by Jackson, and Florida's second Territorial Governor, John Henry Eaton, was a prominent member of Jackson's Cabinet. Id. at 324. Territorial Governor Richard Keith Call was a soldier under Jackson and was a close enough friend to have been married in Jackson's home. Id. at 325-26. Florida's fourth Territorial Governor, Robert Raymond Reid, who was serving as Territorial Governor when the Florida Constitution of 1838 was created, got his start in Florida politics when President Jackson appointed him United States Judge of East Florida. MORRIS, supra at 326. Even Florida's sixth Territorial Governor, John Branch, who did not take office until 1844, had previously served as Jackson's Secretary of the Navy. Id. at 327.

3. I TOCQUEVILLE, supra note 1, at 45.

4. Tocqueville's arrival in this country in 1831 preceded the drafting of Florida's first constitution by only seven years. Id. at epilogue. See generally FLA. CONST. of 1838.


6. With regard to a similar "frequent recurrence" provision in the North Carolina Constitution, Bilionis quotes William Hooper, a North Carolina delegate to the Continental
considering revisions to its constitution, this article is intended to discuss the fundamental principles that led to the creation of the Florida Constitution. It also discusses some of the major features of the Florida Constitution and suggests that its provisions should be examined from a functional perspective to determine whether they adequately serve appropriate constitutional purposes.

II. LESSONS FROM PREVIOUS REVISION COMMISSIONS

The only previous Constitution Revision Commission that has met pursuant to article XI of the Florida Constitution convened in 1978. While the 1978 Commission did not produce amendments acceptable to the public, its review of the constitution was still of some value. The 1978 Commission raised public consciousness with regard to the role of our constitution and its contents. By proposing certain amendments, it also brought particular issues to the forefront of the state's public policy agenda.
where they would remain for many years to come. If the current revision process produces similar results, it will have served a useful purpose.

The 1965 Constitution Revision Commission, which created our current constitution, the Constitution of 1968, was formed through a different process than either the 1978 Commission or the current 1997-98 Commission. The 1965 Commission also differed from the 1978 Commission in that it did not pursue changes in public policy as a primary objective. Perhaps for that reason, the 1965 Commission was the more successful of the two.

Those involved in the revision process of the mid-1960s had a general understanding that "the rightful place of the states in the federal system had been overwhelmed by central federal power." The Commission that produced the Florida Constitution of 1968 sought to address that concern. It also focused on eliminating extraneous provisions thereby returning the constitution to its fundamental purposes. The Commission succeeded in substantially reducing the size of the Florida Constitution and in eliminating "much of the obsolete and redundant language."

10. See id. (discussing a number of amendments originally proposed by the 1978 Commission that were rejected by the public, only to later be approved upon submission to the voters by the Legislature). Even so, the 1978 Commission might have been more successful if it had focused more on fundamentals and less on discussing sweeping changes in public policy.

11. See id. at 11-15. The 1965 Commission was created by the Legislature; the 1978 and 1997-98 Revision Commissions resulted from a recommendation made by the 1965 Commission that was adopted into the Florida Constitution of 1968. See id. at 15-16. While the proposed amendments produced by the 1978 Commission were submitted directly to the voters, the proposed amendments produced by the Commission of 1965 were submitted to the Legislature. The Legislature then substantially revised the proposals during four special sessions. The end product of those efforts was our current constitution, the Florida Constitution of 1968. MORRIS, supra note 2, at 680.

12. See generally D'ALEMBERT, supra note 7, at 14 (discussing the results achieved by the 1965 and 1978 revision commissions). During the late 1960s and early 1970s, many other factors contributed to a favorable climate for changes in public policy and in the state constitution. The public was grappling with the civil rights movement, political issues involving elections and voting rights, military matters relating to the Vietnam War, and criminal law issues such as search and seizure and the death penalty. Many of these issues rose to a level of federal constitutional significance and the public interest in constitutional law was considerably heightened. By 1978, public concern over many of these issues was less intense.

13. See id. at 11.
14. See id. at 13.
15. See id. at 12. Frequent statements to the effect that the 1968 revision reduced the size of the Florida Constitution by half are somewhat misleading. See D'ALEMBERT, supra
Perhaps the current Constitution Revision Commission would be wise to pursue these same objectives on a more modest scale. The Florida Constitution continues to serve as a vehicle for some "largely meaningless but politically popular verbiage." Accordingly, there are still opportunities for positive improvements to the constitution by pursuing the reductionist course that began with the creation of the 1968 Constitution.18

Because the Florida Constitution has a strong foundation and generally serves the people well, wholesale revision is probably not advisable.19 Nonetheless, the revision process offers us, as a society, an opportunity to review the reasons why we have a constitution and to consider whether specific provisions of our constitution are serving their intended purposes. That review may, after all, reveal ways in which the constitution can be improved. To the extent that revision is necessary at all, the objective in revising or amending the constitution should be to adjust the constitution's contents back to its basic purposes, thereby restoring its power to inspire the people and the government.

---

note 7, at 12. In fact, substantial portions of the Florida Constitution of 1885 were kept in force by including them in history notes and incorporating them by reference into the 1968 Constitution. See, e.g., FLA. CONST. art. VIII, § 6(e) (incorporating by reference the Dade County Home Rule provisions of the Constitution of 1885). The 1997-98 Revision Commission should consider advancing the reductionist intent of the 1968 Commission by proposing amendments that would eliminate the need for these extensive and unwieldy historical notes.

16. D’ALMBERTE, supra note 7, at 13:
17. Id. at 16.
19. The need for stability in the social order and in the law demands that a constitution be changed infrequently and no more than is necessary to accomplish particular purposes. It has been noted that "stability in constitutional law promotes the formation and maintenance of a social consensus on basic values. It does so by encouraging [legislators] and courts to articulate basic values and to provide moral leadership for society." Michael G. Colantuono, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change, 75 CAL. L. REV. 1473, 1509 (1987). Because it has the "potential to promote a consensus on social values[,]" stability in constitutional law "contributes to social cooperation and peace." Id. at 1510. Tocqueville noted with some dismay that "[a]lmost all the American constitutions have been amended within thirty years." I TOCQUEVILLE, supra note 1, at 267. He found that "the circumstances which contribute most powerfully to democratic instability, and which admit of the free application of caprice to the most important objects, are here in full operation." I TOCQUEVILLE, supra note 1, at 267.
III. INFLUENCES, ORIGINS, AND PRINCIPLES UNDERLYING FLORIDA’S CONSTITUTION

No revision of the Florida Constitution should be undertaken without first attempting to understand its nature and the purposes it serves. That understanding must come primarily from an examination of the history of constitutional government. Reviewing history will also provide some perspective with regard to the things that a constitution can and cannot accomplish.

In reviewing our history, it is not difficult to see the effects of constitutional law. As Tocqueville said: “America is the only country in which it has been possible to witness the natural and tranquil growth of society, and where the influence exercised on the future condition of states by their origin is clearly distinguishable.” Having achieved a reasonable level of success at self-government, Floridians should not ignore the principles that contributed to that success.

A. Early Constitional Theory and Practice

The seeds of modern constitutions can be found in documents as old as the Magna Carta. However, it was in the latter part of the eighteenth

20. See, e.g., Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 OR. L. REV. 1279, 1282 (1995) (noting that “principled debate over a constitutional provision’s application to contemporary circumstances can begin only after grappling with its historical antecedents”). This does not imply that we are forever bound by “original intent” or to the current contents of the constitution. The people are free to amend the constitution at any time. See discussion infra note 78 (discussing the different methods by which the Florida Constitution can be amended).


22. T OCQUEVILLE, supra note 1, at 28. While he admired the system of government and the people of this country, Tocqueville did not always like what he found here. He abhorred the institution of slavery and his thoughts about slavery caused him to express his admiration for our social system with some reservations. For example, he commented: “I am far from supposing that the American laws are pre-eminently good in themselves: I do not hold them to be applicable to all democratic nations; and several of them seem to me to be dangerous, even in the United States.” Id. at 322.

23. Indeed, the origin of at least one provision of the Florida Constitution, the guarantee of “access to courts” contained in article I, § 21, has been traced directly to a similar provision in the Magna Carta. See D’ALEMBERTE, supra note 7, at 32. As Professor Robert Williams
century that Europeans began to fully articulate the key elements of constitutional theory, such that they could be harmonized into a body of law. A common understanding developed that when individuals came together to form governments, they had certain inherent rights that must survive the creation of government. These rights could be apprehended through an understanding of morality, reason, and logic, and they could not be divested. Indeed, governmental infringements of fundamental individual liberties were seen as the potential source for a multitude of threatening conditions. Government had come to be seen as a consensual creation of those who sought to be governed. It was considered that


While the United States Constitution has no “access to courts” provision, a provision similar to the one in the Florida Constitution can be found in the constitutions of 39 states. See Hoffman, supra note 20, at 1279 (citing David Schuman, The Right to a Remedy, 65 TEMP. L. REV. 1197, 1201 & n.25 (1992)).


26. Tocqueville simultaneously explained the moral foundation of American law and distinguished it from the recently demised French aristocracy: “To the European, a public officer represents a superior force; to an American, he represents a right. In America, then, it may be said that no one renders obedience to man, but to justice and to law.” I TOCQUEVILLE, supra note 1, at 98.

27. See id. at 81-82; see also VA. CONST. art. I, § 1 (stating that “all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity”).

28. Interference with any one individual’s inherent right to freedom of conscience, for example, poses a threat to the rights of all individuals in the society. This in turn poses a threat to the society itself. Carried to the extreme, deprivation of liberty can threaten a government’s continued existence. See, e.g., DANIEL WEBSTER, The Reply to Hayne, in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 227, 256 (Edwin P. Whipple ed., Fred B. Rothman & Co. 1993) (1870) (explaining that “the people may . . . throw off any government when it becomes oppressive and intolerable . . .”).

29. See LOCKE, supra note 25, at 54 (“men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent”). See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just [P]owers from the [C]onsent of the [G]overned . . . .”).
people, as the creators of government, held all political power. They could bestow power on political figures, or withhold power and reserve it for individuals in society as the people deemed appropriate.

Notwithstanding the significance of revolutionary thinking, the translation of constitutional theory into practice did not result from the peaceful contemplation of scholars. Government is believed to have arisen from the desire to fully exploit freedom and the necessity of securing self-protection against others. "Constitutional government," however, arose much more recently to provide people with protection against other forms of government. As we approach the revision process, we must remember that constitutions resulted from governmental oppression. Oppressive government turned the public mind away from obedience to the laws of kings and toward the laws of reason. Our first responsibility is to assure that our constitution continues to protect against tyranny.

B. Constitutional Developments in the States

For practical reasons, constitutional theory could not immediately be put into full practice in Europe. Perhaps because there was a less existing government to supplant, and the tyrannical monarchies were more remote,

---

30. See Fla. Const. art. I, § 1. While the principle espoused in article I, section 1, predates any constitution, the language of this provision was undoubtedly adopted from one of the earlier constitutions of the other states where similar provisions abounded. See, e.g., Va. Const. art. I, § 2.

31. See Holland, supra note 24, at 993 (noting that "[t]he people possessing this plenary bundle of specific powers were free to confer them on different governments and different branches of the same government as they deemed best."). Europeans had this discovery thrust upon them by the French and American revolutions.

32. As previously noted, constitutional law is predicated upon belief that all individuals possess certain rights which cannot be divested by government. See I Tocqueville, supra note 1, at 56. People join together under the umbrella of government so that they may better enjoy those rights. See Locke, supra note 25, at 54-55.

33. Locke speculated that primitive cultures had no need of constitutional law until someone among them rose to a position of tyranny. Locke, supra note 25, at 124. Mill proposed that the only justifications for government interference with individual freedom were "self-protection" and to "prevent harm to others." John Stuart Mill, On Liberty 13 (Carrin V. Shields ed., The Liberal Arts Press, Inc. 1956) (1859).

34. It was the imposition of government against their will that caused people to develop systems of self-governance for their own protection. Locke, supra note 25, at 114.

35. See id.

36. See Robert N. Clinton, A Brief History of the Adoption of the United States Constitution, 75 Iowa L. Rev. 891, 892 (1990) (noting that the colonists were "[p]olitically... far removed from England"... and "used to a significant measure of self-
the principles of free self-governance found more fertile soil on this continent.

As Tocqueville noted:

The general principles which are the groundwork of modern constitutions, principles which, in the seventeenth century, were imperfectly known in Europe, and not completely triumphant even in Great Britain, were all recognized and established by the laws of New England: the intervention of the people in public affairs, the free voting of taxes, the responsibility of the agents of power, personal liberty, and trial by jury were all positively established without discussion.37

Because of continued oppression, the founders of our national government ultimately declared and sustained independence for the thirteen individual colonies that then existed.38 However, it was eleven years later, in 1787, before the states joined together under the common bond of a single national constitution.39 Before the Federal Constitution was adopted, all of government”). Notwithstanding ultimate English oversight, “colonial Legislatures substantially enacted most laws and adopted policies for the colonies.” See id.

37. I TOCQUEVILLE, supra note 1, at 41.

38. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This document begins:

We hold these [T]ruths to be self-evident, that all [M]en are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these [R]ights, Governments are instituted among Men, deriving their just [P]owers from the [C]onsent of the [G]overned.

Id.

39. See Clinton, supra note 36, at 891. For the first five years of independence, there was no national document to bind the colonies together. Id. In 1781, the original colonies agreed to adopt the Articles of Confederation which, in reality, operated more like a treaty between the states than a constitution. Id. at 891 n.1. However, many of the states specifically conditioned their ratification of the Constitution on the ultimate adoption of a bill of rights by Congress. See id. at 911-12. Because of the inadequacies in the Articles of Confederation, the states reconvened in a second constitutional congress in 1787 which ultimately led to the adoption of the current United States Constitution in 1789. See generally id. at 891. Others feared that enumerating certain rights would lead to the conclusion that others did not exist. To allay those fears, Congress also adopted the Ninth Amendment which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Clinton, supra note 36, at 911-12 (quoting U.S. CONST. amend. IX). Still others feared that an enumeration of rights in a Federal Constitution might somehow be construed to supplant the states as the primary guarantors of individual liberties. See THE FEDERALIST NO. 84 at 510-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961)
the thirteen states had adopted state constitutions. Tocqueville noted that "[t]he form of the Federal government of the United States was the last to be adopted; and it is in fact nothing more than a summary of those republican principles which were current in the whole community before it existed, and independently of its existence." The state constitutions were entirely unique in the history of government. In addition to the fundamental proposition that all political power is derived from the people, the state constitutions recognized, and for the first time resolved, certain problems inherent in the very idea of government—problems that could threaten the continued existence of self-government if left uncontrolled. First, the states recognized that consolidations of power are dangerous to the public interest. Having escaped one king, the people of the thirteen

40. See Holland, supra note 24, at 990. In response to a resolution passed by the Continental Congress in May of 1776, and the signing of the Declaration of Independence, all of the former colonies established new constitutional governments, and eight had drafted new constitutions before the end of that year. See id. at 989-90.

41. I TOCQUEVILLE, supra note 1, at 61; see also Holland, supra note 24, at 991-92 (noting that the framers of the United States Constitution had participated in writing and had lived under 18 state constitutions before they began their work on the Federal Constitution); James G. Exum, Jr., Rediscovering State Constitutions, 70 N.C. L. Rev. 1741, 1741-42 (1992) (noting that the framers of the Federal Constitution "drew heavily on the experience of delegates to state constitutional conventions"). Indeed, the foundation for the federal Constitution was the so-called "Virginia Plan" presented to the Second Continental Congress on May 29, 1878, as an alternative to amending the Articles of Confederation. See Clinton, supra note 36, at 898. It incorporated a governmental structure that already existed in many of the states, which was based on the writings of Locke, Montesquieu, and others. See id. at 911. See generally THE FEDERALIST No. 39 (James Madison) (comparing provisions of many state constitutions with those of the new Federal Constitution).

42. See Holland, supra note 24, at 992 (noting that dividing sovereign power was a novel idea).

43. Without regard to the form of government (or organization) being discussed, there is a tendency for power to consolidate or centralize over time in the hands of a single individual or just a few individuals. While all of the early state constitutions guarded against consolidation of power in the hands of government officials, it was years later before any steps were taken to curb corporate power. Pennsylvania considered adopting a provision into its first constitution that provided "[t]hat an enormous Proportion of Property vested in a few individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." Robert F. Williams, The State Constitutions of the Founding Decade:
colonies were not anxious to find themselves under the control of another. They
The consolidation and centralization of power outside the hands of the
people to be governed is the essence of tyranny and was the first problem the
framers of state constitutions had to overcome. They attacked this problem
in three ways: 1) by distributing the key powers of government among
three different branches, each having some power to control the other two;
2) by further distributing the powers given to government among numerous
offices, thereby limiting any one office's ability to exercise unrestrained
power over the people; and 3) by creating constitutions that passed only a

Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism, 62 TEMP. L. REV. 541, 557 (1989) (quoting ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 133 (1976)). However, that proposal was rejected. It was during the Jacksonian era that states began to introduce constitutional restrictions on the powers of corporations and banks like those found in the 1838 Florida Constitution, which provided "[t]hat perpetuities and monopolies, are contrary to the genius of a free State, and ought not to be allowed." FLA. CONST. of 1838 art. I, § 24 (1838). Even stronger more detailed restrictions on corporate power and influence were adopted into state constitutions during the late 1800s, immediately prior to and after the adoption of the Sherman Antitrust Act. 15 U.S.C. § 1-7 (1994). See, e.g., Snure, supra note 5, at 672-73, 682 (discussing numerous specific restrictions on monopoly power that were included in the state of Washington's Constitution of 1889). Avoiding concentrations of power continues to be one of the primary purposes of constitutional law, the decisions of which continually assert that "rights protection cannot be entrusted to a monopoly guardian.” John Kincaid, Foreward The New Federalism Context of the New Judicial Federalism, 26 RUTGERS L.J. 913, 944 (1995).

44. See, e.g., Holland, supra note 24, at 991 (explaining that the newly independent states were fearful of any "central government, particularly one with substantial powers").

45. It was theoretically possible for people to join together and voluntarily place all political power in the hands of a single individual, or small group of individuals. "[T]he United States Constitution does not require a state to separate the exercise of its own sovereign power horizontally: among an executive, a Legislature, and a judiciary." Id. at 995 (emphasis added). It is possible, for example, for a state to create a democratic monarchy in which the people elect a queen and pass all of their powers over to her. However, the framers of the state constitutions universally chose not to follow that model. To do so would have been inconsistent with their heritage. See LOCKE, supra note 25, at xix-xxii (discussing Locke's thought that absolute monarchy is "inconsistent with civil society").

46. The key powers of government include the power to make laws, the power to execute the laws, and the power to pass judgment on the laws. See generally, LOCKE, supra note 25. Article II of each of the Florida Constitutions since the Constitution of 1838 has explicitly provided for the separation of these powers. See FLA. CONST. of 1838 art. II (1839); FLA. CONST. of 1861 art. II (1861), FLA. CONST. of 1865 art. II (1865); FLA. CONST. of 1868 art. II (1868); FLA. CONST. of 1885 art. II (1885); FLA. CONST. art. II, § 3 (1868).

47. For example, the powers of judges are limited in numerous ways. They have no power to take action at all until some party properly invokes their jurisdiction, which is limited by the constitution and by general law. See FLA. CONST. art. V (establishing certain courts and the boundaries of their jurisdiction, directing the Legislature to establish still other courts, and
portion of the peoples’ inherent powers to the states, reserving certain powers to individuals in the form of rights. Some, but not all, of these rights were enumerated in the state constitutions. Ultimately, the addition of a national constitution was intended to add another layer of protection against the exercise of tyrannical power.

The framers of the state constitutions also recognized that by placing the power to make governmental decisions in the hands of a majority of the people, the remaining “political minorities” might suffer injustices. As a practical matter, it was also unwieldy to expect all individuals to share in every decision by voting. Thus, to protect against “the tyranny of the majority,” and to aid the practical administration of government, the states authorizing the Legislature to take certain actions with regard to the courts and their jurisdiction. The decisions of trial judges are normally subject to appeal by disappointed litigants, and the power of appellate judges is limited to ruling on cases appealed from lower courts. See id. at §§ 3-5. Appellate judges also normally sit in panels and in order to rule they must secure the agreement of a majority of the other judges sitting on a panel with them. See also Fla. Const. art. V, § 3(a) (mandating that of the seven justices of the supreme court, five constitute a quorum and the concurrence of four justices is necessary for a decision); Fla. Const. art. V, § 4(a) (providing that in each district court of appeal, three judges consider each case and the concurrence of two is necessary for a decision). See, e.g., Fla. R. Jud. Admin. 2.030(a)(1) (establishing panel, quorum, and majority vote requirements for the Supreme Court of Florida). Similarly, no individual can exercise the power to make laws. Lawmakers must secure the agreement of a majority of the other legislators who sit in the Legislature with them before they can exercise any power at all. Fla. Const. art. III, § 7.

48. The constitutions of all 50 states contain a declaration of rights, bill of rights, or some other enumeration of individual rights.

49. Article I, section 1 of the Florida Constitution contains an “unenumerated rights clause” similar to the one found in the Ninth Amendment to the United States Constitution. Most other state constitutions contain similar provisions. See generally Louis Karl Bonham, Unenumerated Rights Clauses in State Constitutions, 63 Tex. L. Rev. 1321, 1321 (1985).

50. As James Madison said: “[A] double security arises to the rights of the people [because] [t]he different governments will control each other . . . .” The Federalist No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961).

51. The term “political minorities” must be distinguished from the currently popular usage of the word “minorities.” A group of people in disagreement with the majority on any issue is a political minority group. A political minority, or majority, can be widely diverse in all other respects so long as its members share a common view on some political issue. The greatest strength—and weakness—of a properly functioning democracy is that while the composition of the political majority shifts and changes as frequently as the issues being considered, most of the people are in the political majority most of the time. The result is, as Tocqueville observed, that in the United States, all parties are willing to recognize the rights of the majority, because they all hope at some time to be able to exercise them to their own advantage. I Tocqueville, supra note 1, at 264-80.

52. See I Tocqueville, supra note 1, at 254-70 (explaining the view that in a democracy the omnipotence of the majority poses the greatest threat to the people).
established systems of representational government. Instead of voting directly on issues, citizens voted to select individuals from amongst themselves who would then be given specific, limited powers, through the constitution, to act on behalf of the whole body of people they represent.\textsuperscript{53}

Our Federal Constitution, like the state constitutions before it,\textsuperscript{54} was based on the principles of what has come to be known as “republican democracy.”\textsuperscript{55} As previously noted, the people were very jealous of their independence, and they did not desire to come under the rule of a central government.\textsuperscript{56} Nonetheless, they saw the necessity of joining the states together for certain limited purposes.\textsuperscript{57} The theory underlying the nation-state relationship was that state officials derived their authority directly from the people via the state constitutions.\textsuperscript{58} That authority included the ability to

\begin{itemize}
\item[53.] After describing the dangers that result from absolute majority rule, Tocqueville went on to describe the solution:
\begin{quote}
If, on the other hand, a legislative power could be so constituted as to represent the majority without necessarily being the slave of its passions, an executive so as to retain a proper share of authority [independent of the people], and a judiciary so as to remain independent of the other two powers, a government would be formed which would still be democratic while incurring scarcely any risk of tyranny.
\end{quote}
\item[54.] Many features of the Federal Constitution were modeled after the earlier constitutions of other states. See Holland, supra note 24, at 995; Williams, supra note 43, at 541. See generally THE FEDERALIST NO. 1 (Alexander Hamilton) (drawing comparisons between the United States Constitution and the state constitutions).
\item[55.] See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”). Today when we refer to “republican democracy,” it is generally understood that we are describing self-government by the people through the election of representatives who are subject to constitutional controls. See In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non., 414 So. 2d 1040 (Fla. 1982) (distinguishing between democracy and republican democracy). However, this understanding has not always been so clear. See generally THE FEDERALIST NO. 39 (James Madison) (discussing the many different forms of government to which the term republic had been applied). It has been said about our nation’s founders that “[o]nly one thing was certain, Americans believed that republicanism meant an absence of an aristocracy and a monarchy. Beyond this, agreement vanished . . . .” Williams, supra note 43, at 550 (quoting Robert Shalhope, Toward a Republican Syntheses: The Emergence of an Understanding of Republicanism in American Historiography, 29 WM. & MARY Q. 49, 72 (1972)).
\item[56.] See supra note 46 and accompanying text.
\item[57.] See WEBSTER, supra note 28, at 220 (discussing the limits imposed on the federal government by the United States Constitution).
\item[58.] See supra notes 53-55 and accompanying text.
\end{itemize}
join together with other states to form a federation or confederation under the banner of a single constitution.\textsuperscript{59}

However, the states could grant the federal government no greater power than they received from their own people, and most of that power could not be conveyed.\textsuperscript{60} Thus, the power of the federal government was intended to be sharply limited to certain specific functions.\textsuperscript{61} A large portion of the Federal Constitution is dedicated to defining and establishing boundaries between the federal and state authorities, thereby limiting the federal government’s authority to act in contradiction of state power.\textsuperscript{62}

C. The Development of Constitutional Law in Florida

Florida is a comparative newcomer to statehood,\textsuperscript{63} and the drafters of our first state constitution in 1838\textsuperscript{64} undoubtedly relied heavily on the

\begin{itemize}
\item[59.] The question of whether the federal government derived its authority directly from the people or from the states for the benefit of the people has been a point of contention since the early days of our republic. In M’Culloch v. Maryland, 17 U.S. 316, 404-05 (1819), the United States Supreme Court concluded that “[t]he government of the Union...is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” \textit{Id.} In response to that decision, a critic writing under the pseudonym “Amphictyon” wrote: “The Constitution is not binding on any state, even the smallest, without its own free and voluntary consent... The respective states, then in their sovereign capacity, did delegate the Federal Government its powers, and in so doing were parties to the compact.” SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 309 (Samuel E. Morrison ed., 2d ed 1965).

\item[60.] See \textit{infra} notes 101-08 and accompanying text (discussing the doctrine of nondelegation).

\item[61.] “The powers delegated... to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” THE FEDERALIST No. 45 at 292 (James Madison) (Clinton Rossiter ed., 1961).

\item[62.] See Holland, \textit{supra} note 24, at 997. Many provisions of the Federal Constitution were included specifically to insure the independence of the states, and of course, the entire Bill of Rights was intended to limit the federal government’s power over the people. Other amendments further define the federal-state relationship. \textit{See}, e.g., U.S. CONST. amend. II.

\item[63.] Florida became a unified entity in 1822 when East Florida and West Florida were combined into a single territory and did not become a state until 1845. \textit{See} MORRIS, \textit{supra} note 2, at 325. The federal government had established specific requirements that had to be met before a territory could be admitted to statehood, one of which was a requirement that the territory have a constitution establishing a Republican form of government.

\item[64.] The 1838 Florida Constitution was adopted in 1839 by a margin of only 104 votes. \textit{See} CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 126 (1971).
\end{itemize}
constitutions of the states that preceded Florida in becoming a part of the federal republic. More importantly, these early drafters relied on the same principles on which those predecessor constitutions were based. They also relied, to a significant extent, on contemporary writings of the times about the nature of constitutions and on the fundamental elements of republicanism and democracy. In addition, they relied to some degree on the Federal Constitution.

Over the years, the Florida Constitution has been revised numerous times. The first major revision occurred in 1861, when Florida seceded from the Union. In 1865, the state created a new post-war constitution that was intended to help Florida gain readmission to the Union. However, owing to

65. See supra note 43 and accompanying text.
66. See TEBEAU, supra note 64, at 126.
67. Some major works produced immediately prior to, or during, the framing of Florida's first constitution included Tocqueville's Democracy in America, first published in the United States in 1835. I TOCQUEVILLE, supra note 1. Justice Story's Commentaries on the Constitution was widely read and relied on by legal scholars, as was Blackstone's Commentaries on the Law of England. The framers of the 1838 constitution were also undoubtedly influenced by Jacksonian Democracy. This is evident both in the history of the 1838 convention and in the constitution itself. For example, the populists who swept Andrew Jackson into the White House feared the banking industry and its influence on government. See Andrew Jackson, Veto Message (July 10, 1832), in II MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (Richardson ed., 1897) (explaining that in his opinion “the existing [Bank of the United States] [was] unauthorized by the constitution, subversive of the rights of the states, and dangerous to the liberties of the people”). After taking office, Jackson abolished the central bank. See id. Historical accounts of Florida's 1838 constitutional convention relate that the convention continued for three times as long as originally planned because the delegates were deadlocked over banking provisions. See TEBEAU, supra note 64, at 128. While its other provisions speak forcefully about freedom and liberty, the delegates gave the Legislature extensive power to regulate banks and corporations and even went so far as to forbid bankers from holding statewide office or serving in the Legislature. See Holland, supra note 24, at 1000.

The state constitutions that were written during the presidency of Andrew Jackson... were often interested in popular sovereignty. Thus, the state constitutions of that time were often rights-conscious documents. Nearly all Jacksonian era state constitutions added or expanded Declarations of Rights and... placed them at the beginning of the document [as was the case with Florida's constitution of 1838].

Id. (citing James A. Henretta, Foreword: Rethinking the State Constitutional Tradition, 22 RUTGERS L.J. 819, 819-839 (1991)) (citations omitted).

68. The best evidence we have of direct reliance on the federal document is in the constitutions themselves. Sections 12, 13, and 14 of the Florida Constitution of 1838, for example, are virtually identical to similar provisions in the Federal Constitution.

the enactment of the Federal Reconstruction Acts\textsuperscript{70} and continued military occupation, the 1865 constitution was never fully effective.\textsuperscript{71}

In 1867, the federal government compelled a state constitutional convention.\textsuperscript{72} Because of its compulsory nature and other circumstances surrounding its enactment, the constitution produced by that convention—the 1868 constitution—was never treated by the people of Florida as a source of real authority.\textsuperscript{73} After the end of Reconstruction, the 1868 constitution was ultimately abandoned, and the 1885 constitution was adopted to take its place.\textsuperscript{74}

\textsuperscript{70.} See Reconstruction Acts, ch. 152, 14 Stat. 428 (1867); ch. 6, 15 Stat. 2 (1867); ch. 30, 15 Stat. 14 (1867); ch. 25, 15 Stat. 41 (1868); ch. 3, 16 Stat. 59 (1868).

\textsuperscript{71.} See TEBEAU, supra note 64, at 247 (noting that the federal military presence continued in Florida after 1865).

\textsuperscript{72.} The first Reconstruction Act divided the South into five military districts and placed Florida, as well as the other secessionist states, under formal military rule. See Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867). Military rule did not cause dramatic changes in Florida, since the state had been under military occupation since the end of the war anyway. The second, or supplemental, Reconstruction Act established procedures for conducting state conventions to establish new state constitutions that would satisfy certain requirements established by the federal government in the Act. See WILLIAM WATSON DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 446-47 (1964).

\textsuperscript{73.} The 1867 convention was in itself highly controversial. See Richard L. Hume, Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South, 51 Fla. Hist. Q. (1972). There were serious doubts about the credentials and authority of its participants. See DAVIS, supra note 72, at 491-516. In addition to the fact that the state was still under military rule, the voting districts were heavily gerrymandered to favor Republican candidates, and the referendum on the new constitution appears to have been further marred by widespread voter fraud. See R.L. Peek, Lawlessness and the Restoration of Order in Florida, 1868-1871, at 53-60 (1964) (unpublished Ph.D. dissertation, University of Florida) (on file with the University of Florida). One of the more extreme examples of the confusion that reigned in Florida during the years after the adoption of the Constitution of 1867 culminated in Governor Reed being forced to seek an advisory opinion from the Supreme Court of Florida to determine whether the Legislature had been successful in impeaching and removing him from office. See DAVIS, supra note 72, at 544-56. The court determined that Reed had not been removed from office, in part, because four members of Legislature that were necessary to achieve a quorum had accepted appointments to state office from Reed prior to the vote on his impeachment. Id. Reed had declared their legislative seats vacant prior to the impeachment vote; thus, the impeachment vote failed for lack of a quorum. Id. Before these issues were resolved, however, Lieutenant Governor Gleason, with the cooperation of Secretary of State Alden, had declared himself to be Governor. Id. Ultimately, Gleason was removed from office as the result of an action in \textit{quo warranto} filed by Reed; Secretary of State Alden was impeached. Id.

\textsuperscript{74.} See D’ALEMBERTE, supra note 7, at 8-9.
Although frequently amended, the 1885 constitution continued in force until it was replaced by the 1968 constitution. Florida's government continues to operate under the authority of the 1968 constitution. As previously noted, the 1968 constitution removed much extraneous political material from the 1885 constitution, with the intent to improve the constitution's ability to serve its basic purposes.

As was the case with the constitution of 1838, the 1968 constitution is a distinctly populist document that now includes five different methods of amendment, and an explicit statement that all political power originates with the people. It also contains an explicit separation of powers clause, sharp limits on the creation of laws by the legislative branch, some unique local government provisions, and a strong system of checks and balances. Finally, it contains the written embodiment of certain rights its authors
considered inalienable. As will be discussed, it also contains other significant provisions that limit governmental power over the people.

IV. FUNCTIONAL ANALYSIS OF THE FLORIDA CONSTITUTION

Over the years, scholars and courts have employed a wide range of methods for analyzing constitutions. Some principal methods include: deriving the meaning of the constitution from the pure and literal meaning of its text ("textualist"), finding meaning in the intent of the framers ("originalist"), and treating the constitution as a living document that must be interpreted to conform to the immediate needs of modern society ("interpretivist"). However, for the purposes of this article the constitution

84. See Fla. Const. art. I, § 2.
85. The text of any constitution must, of course, be given great weight. Any analysis should begin with the literal meaning of the constitution's text, and, where the text is completely unambiguous, we should adhere to its plain language in determining what its creators intended. See, e.g., In re Advisory Opinion to the Governor, 374 So. 2d 959 (Fla. 1979) (construing the Florida Constitution by applying the plain ordinary meaning of the language it contains).
86. Where ambiguity exists, or where it has been injected by those who execute the laws or by judicial decision, we should look for clarification in the origins of our constitution and the reasoning of those who created it. See, e.g., Powell v. McCormack, 395 U.S. 486, 547 (1969) (relying heavily on the constitutional debates at the 1787 Philadelphia convention); Bailey v. Ponce de Leon Port Auth., 398 So. 2d 812, 814 (Fla. 1981) (noting that in construing state constitution courts must ascertain and give effect to the intent of the framers); Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) (court must interpret state constitution in a way that will best fulfill the intent of the framers).
87. An early example of the interpretivist philosophy can be seen in the United States Supreme Court's decision in M'Culloch v. Maryland, in which John Marshall wrote that "a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." M'Culloch v. Maryland, 17 U.S. 316, 415 (1819) (emphasis omitted). Thomas Jefferson responded to the decision in M'Culloch with the comment that "the judiciary of the United States is the subtle core of sappers and miners constantly working underground to undermine the foundations of our federal constitution." The Portable Jefferson 994-95 (Peterson ed. 1975). Yet, allowing room for some interpretation may reduce the extent to which we feel compelled to include large bodies of otherwise unnecessary material in our constitutions. As Governor Coke of Texas once said: "It will be found universally true that those State constitutions which contain the smallest number of provisions, [and] which adhere most closely to fundamental declarations . . . have been the wisest and most enduring." John Walker Mauer, State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876, 68 Tex. L. Rev. 1615, 1634 (1990) (quoting S.J. 555, 14th Leg., 1st Sess. (Tex. 1874)). However, not every problem has an answer in the constitution, and it should not be interpreted to provide answers to problems that are not constitutional in nature.
is not being applied to a specific set of facts. Rather, under consideration is whether the constitution's provisions are serving the purposes for which they were intended. A constitution may properly be regarded as a document in which the people set forth the structure of the government, including any powers they wish to convey to the government from themselves, and including any instructions they wish to include about how those powers are to be distributed, retained, altered, or removed. It may also include an enumeration of rights, but that is not strictly necessary because individual rights are considered inherent in the individuals for whom the government was created. Given these factors, and the purpose of this article which is to

The answers to most legal problems—and to social problems that can be addressed by law—can be found in the common and statutory law. See Holland, supra note 24, at 1000-01 (discussing that most of what we conceive to be rights can be found in the "common law"). See also Akhil Reed Amar, Forward: Lord Camden Meets Federalism—using State Constitutions to Counter Federal Abuses, 27 RUTGERS L.J. 845, 849-58 (1996) (explaining by hypothetical that violations of the Fourth Amendment right to be free of unreasonable searches could often be more successfully redressed under the state trespass laws). But see Hans A. Linde, Are State Constitutions Common Law?, 34 ARIZ. L. REV 215, 216-29 (1992) (discussing the unfortunate extent to which state courts merely parrot federal judicial opinions in applying state constitutions). Linde notes that "[o]nce the United States Supreme Court used the label 'privacy' for claims of personal relationships and autonomy, any mention of 'privacy' in a state constitution became talismanic, regardless of its origins, context, or evident purposes ...." Id. at 224 n.58. Where no answers can be found in the common or statutory law, solutions can be created through the democratic processes authorized under the constitution.

88. A constitution serves as the bedrock upon which the remainder of the positive law of a particular jurisdiction (in this case Florida) is built. If restricted to appropriate constitutional purposes, it should serve as one of the great forces for stability in the law and in society. To the extent that a constitution strays from those purposes, the government and the people are less well-served and their respective interests may be endangered. Of course, the difficulty lies in agreeing upon the things that are "constitutional" in nature. For example, the Chief Justice of the Supreme Court of Florida, Gerald Kogan, a member of the 1997-98 Constitution Revision Commission, suggested that a ban on certain kinds of fishing nets does not belong in the Florida Constitution. JOURNAL OF THE 1997-1998 CONSTITUTION REVISION COMMISSION, No. 2 (June 17, 1997). However, those who disagree with Justice Kogan correctly noted that the citizens’ initiative to ban fishing nets resulted from the Legislature’s failure to pass a bill directed to the issue. See, e.g., David Cox, Constitution panel hears net-ban debate, TAMPA TRIBUNE, July 23, 1997, at A19; Citizens Should Be Able To Petition For Change. How?, TALLAHASSEE DEMOCRAT, July 27, 1997, at B19.

89. See James M. Carson, The Constitution and the New Deal, Address Before the Birmingham Forum (Dec. 16, 1935), for an excellent description of constitutions as charters or contracts between citizens and government.

90. See supra notes 24-25 and accompanying text.
consider first "principles," the authors rely primarily on what can be fairly described as a "functional analysis" of Florida's Constitution.

A. Protecting Against Tyranny: The Separation of Powers

"In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.""91 Tyranny arises most easily when all power is concentrated in the hands of a single person or in the hands of just a few. A constitution that divides power in numerous ways and in numerous directions will best serve the constitutional function of protecting against tyranny.92 Accordingly, the Florida Constitution, the United States Constitution,93 and the constitutions of the remaining forty-nine states divide government into three branches: the legislative, the executive, and the judiciary.

Dividing government powers on paper, however, does no good, if the divisions are not respected in practice. The federal government and the states vary in the extent to which they allow one branch of government to engage in the essential functions of another. About his vision for the federal system, Madison commented:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights

91. THE FEDERALIST No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961).
92. Tyranny can arise in other ways as well, such as from bureaucracy. Indeed, once a bureaucratic tyranny has arisen it may be more difficult to eliminate than a tyranny of any other kind.
93. Morley stated:

It may be said that the federal form was historically ordained, by the fact that the original thirteen colonies were separately established and had by the time of the Revolution developed widely differing political and social customs. Only a system which protected those diversities could combine these varying units in a general unity. But behind the determination to keep the rights of the several States inviolate was the even deeper determination to protect the citizens of these states from centralized governmental oppression.

MORLEY, supra note 93, at 10.
of the people. The different governments will control each other, at the same time that each will be controlled by itself. 94

Thus, the framers of the Federal Constitution intended to create a system incorporating strong divisions of power. However, through judicial acquiescence and the constant pressure the branches of government exert on each other 95 those divisions have largely given way. 96

The Florida Constitution, unlike its federal counterpart, contains an explicit separation of powers requirement. 97 The purpose of this provision was to limit the extent to which any branch of government may perform functions assigned by the constitution to another branch. 98 Florida courts have indicated that Florida's separation of powers requirement is stronger than the federal requirement because it is explicit. 99

Under Florida's doctrine against encroachment, no branch of government may encroach on the powers delegated to another branch by the

94. THE FEDERALIST NO. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961). Madison, in using the term "departments" was referring here to the three branches of government that exist in both the state and national governments. See id.; MORLEY, supra note 91, at 232 n.1.

95. Constitutional republics are deliberately structured in a manner that results in some friction between the branches. As James Madison noted: "Ambition must be made to counteract ambition . . . . It may be a reflection on human nature that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?" THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). However, just as competitors in the private sector sometimes enter into tacit agreements not to compete, the branches of government may each sometimes quietly acquiesce to encroachments on authority by the other two branches. With regard to the federal-state relationship it has been noted that "vigorou state constitutionalism is imperative because it perpetuates the scheme of dispersal of powers envisioned by the framers." Randall T. Shepard, The Maturing Nature of State Constitutional Jurisprudence, 30 VAL. U. L. REV. 421, 433 (1996). For the same reasons, it is equally important to maintain the checks and balances that exist within a state's government. See infra note 134 and accompanying text (discussing the valuable competitive elements of constitutional government).


97. See FLA. CONST. art. II, § 3.
98. See, e.g., Pepper v. Pepper, 66 So. 2d 280, 284 (Fla. 1953).
99. See, e.g., Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).
For example, the Legislature cannot reserve to itself the right to execute the laws it creates because the power to execute the laws is reserved to the executive branch. Similarly, an officer of the executive branch cannot engage in lawmaking—a function that, because of its supreme nature, is reserved exclusively to the legislative branch—adjudicate the rights or claims of an individual, a function reserved to the judicial branch.

A concordant policy, the doctrine of non-delegation, was intended to prevent the Legislature from delegating its lawmaking power to either of the other two branches of government. While it could, and should, be given stronger effect, the courts have at least found that the doctrine forbids the Legislature from delegating its core functions without any guidance or limits as to how those functions are to be exercised. The doctrine against encroachment and the doctrine of non-delegation are valuable policies derived from hundreds of years of wisdom. While these doctrines can provide the people with a high level of protection against tyranny, the division of powers is not as strong as it once was. We have not been careful in guarding against a merger of the functions of government in the hands of a single branch. Accordingly, the Revision Commission should consider

100. FLA. CONST. art. II, § 3.
101. See LOCKE, supra note 25, at 82 ("[B]ecause it may be too great a temptation to human frailty . . . for the same persons who have the power of making laws to have also in their hands the power to execute them . . . ".
102. See FLA. CONST. art. III, §§ 1, 7.
103. See id at art. V, § 1.
105. See LOCKE, supra note 25, at 82 (asserting that "the legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have").
106. For example, Chapter 120, Florida Statutes (The Administrative Procedures Act), allows agencies of the executive branch to engage in lawmaking by establishing rules that govern the behavior of businesses and individuals. FLA. STAT. § 120.54 (Supp. 1996). After creating their own rules, agencies execute the rules and even conduct adjudicatory proceedings with regard to those who claim to be adversely affected by the agencies' actions. Id. Thus, it is not atypical for a single individual—an agency head—to make laws, enforce the same laws, and adjudicate rights under those laws. Id. Florida appellate courts have allowed this melding of constitutional functions because the agencies rules and actions are subject to review in the courts. However, when an aggrieved individual proceeds in the courts against an agency's actions undertaken pursuant to Chapter 120, the agency's interpretations of both rules and statutes, and its findings of fact are generally presumed to be correct. See, e.g., Ameristeel Corp. v. Clark, et. al., 691 So. 2d 473 (Fla. 1997) (finding that a party challenging an order of the Public Service Commission must overcome presumptions as to the Commission's jurisdiction, reasonableness of the order, and deference owed to the agency's interpretation of the statute it is charged with enforcing); Krivanek v. Take Back Tampa
whether the separation of powers under the Florida Constitution, and its related doctrines, can be strengthened.

B. The Legislative Branch

John Locke saw the establishment of legislative power as the first and foremost of all positive laws. He called the law-making function the “supreme power of the commonwealth” because it is the responsibility of the legislative branch to make laws that will govern all, including the executive and the judiciary. Accordingly, he believed that some sharp controls on the legislative power were necessary. The first of these controls is, of course, the people themselves, who protect against the rise of tyranny through their ability to remove legislators from office by the power of their votes. A second control on the Legislature is the fact that the lawmaking power is never concentrated in the hands of a single person or of a small group of people. In Florida, the constitution divides the Legislature between two separate houses—the House of Representatives, with one-hundred and twenty members, and the Senate, with forty members. Both houses must agree, by a majority vote of its respective members, before a law can be created, amended, or repealed. Still a third control on the Legislature, suggested by Locke and applied successfully in Florida, is the

Political Comm., 625 So. 2d 840 (Fla. 1993) (finding that the judgment of officials carrying out the elections process shall be presumed to be correct and reasonable); Xerox Corp. v. Blake, 415 So. 2d 1308, 1311 (Fla. 3d Dist. Ct. App. 1982), decision quashed by 447 So. 2d 1348 (Fla. 1984) (finding that tax assessment is presumed to be correct and any person challenging an assessment must present proof which excludes every hypothesis of legal assessment).

107. See LOCKE, supra note 25, at 75. However, he also noted that in areas governed by a legislative power that is not constantly in session, and in which the executive power is vested in a single individual who also has a share of the legislative power, that person might also be called “supreme.” Id. at 85. Thus, under Locke’s analysis, Florida retains supreme power in its elected representatives only by preventing its Governor from exercising any legislative power. This is perhaps why the framers of the Florida Constitution included an explicit prohibition against delegation of legislative power to the executive branch. See supra notes 101-08.

108. LOCKE, supra note 25, at 85-86.

109. See id. at 84-91.

110. See id. at 84; see also FLA. CONST. art. III, §§ 1, 13.

111. The constitution requires that there be between 30 and 40 senatorial districts and 80 and 120 representative districts. See FLA. CONST. art. III, §§ 1, 16. The exact number of districts is established by the Legislature, and as previously noted, there are currently 40 Senate Districts and 120 House Districts.

112. Id. at art. III, § 7. A two-thirds vote is required to override a law vetoed by the Governor. Id. at § 8.
part-time Legislature. Locke correctly noted that there is not a constant need for new laws. Accordingly, it is best that legislators meet on a part-time basis and then return home to live under the laws they have created. Finally, the Legislature is controlled by the executive veto power. Any law created by the Florida Legislature is subject to veto by the Governor.

Florida’s Constitution also has a significant set of rules that the Legislature must follow in creating laws, including restrictions on the kinds of laws it can make. The Florida Constitution may be considered superior to some others, in part, because of these rules. For example, the “single subject rules” found in the Florida Constitution have caused our state to develop a body of statutory law and an appropriations process that are far more clear and well-reasoned than those produced under the Federal Constitution. The great significance of these seemingly modest provisions lies in the fact that they are the only constraints, outside the Federal Constitution, on the Legislature’s ability to make any laws it chooses. The people can only be secure in granting the Legislature such broad power to

113. *Id.* at art. III, § 3.
114. See *Locke, supra* note 25, at 86.
115. “Constant, frequent meetings of the legislative, and long continuations of their assemblies without necessary occasion, could not but be burdensome to the people and must necessarily in time produce more dangerous inconveniences . . .” *Id.* at 88.
117. The ability to override the Governor’s veto with a two-thirds vote of each house of the Legislature establishes a constitutional control over the executive’s veto power that prevents the Governor from gaining control over the Legislature through its use. See *id.* at § 8(c).
118. *Id.* at art. III, § 11 (prohibiting certain special and local laws.).
119. *Id.* at art. III, § 6 (governing general acts of the Legislature and appropriations bills, respectively).
120. The absence of similar rules in the United States Constitution leaves Congress free to engage in “logrolling,” a practice that involves combining unpopular legislation with popular legislation to assure that the unpopular legislation will become law.
121. *U.S. Const.* art. VI (supremacy clause).
make laws, so long as there is a guiding foundation of moral law\textsuperscript{122} contained in the constitution, to which all other law is subservient.\textsuperscript{123}

One would also hope that in making legislative decisions, the Legislature would avoid creating laws that are sharply opposed to natural human interests or behaviors. Anticipating Lyndon Johnson's selection of the term "Great Society" to describe his unfortunate social agenda, Adam Smith once said:

[Man] seems to imagine that he can arrange the different members of the great society with as much ease as the hand arranges the pieces upon a chessboard; he does not consider that the pieces upon the chessboard have no other principle of motion than that which the hand impresses upon them; but that, in the great chessboard of human society, every single piece has a principle of motion of its own, altogether different from that which the Legislature may wish to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go

\textsuperscript{122} As Justice Douglas said about rights, "the law must have a broad base in morality, to protect man, his individuality and his conscience, against direct and indirect interference by government." \textsc{William O. Douglas, The Right of the People} (Alma Reese Candi ed., 1958). Without moral foundation the law would be arbitrary, and over time it would not be respected by those who are subjected to its power. Hence, without a moral basis for law, the government would ultimately lose its ability to motivate the people except through coercive means.

\textsuperscript{123} Murder, for example, is not wrong because it is illegal; it is illegal because it is wrong. The law against murder has a moral foundation in the constitution which is established for the benefit and protection of the lives, liberty, and property of those who live under it. Tocqueville's discussion of this country's laws in 1831 reflects an understanding that a society's laws can do little more than reflect the values of the people in that society. \textit{See generally, I Tocqueville, supra} note 1, at 321-22. That linkage between the law and morality persists in the public conscienceness and is frequently reflected in public commentary. \textit{See, e.g., Charles Whalen \& Barbara Whalen, The Longest Debate: A Legislative History of the Civil Rights Act} \textbf{227} (1985). The authors quote the speech given by President Lyndon Johnson upon signing of the Civil Rights Act of 1964 in which he stated with regard to racial injustice: "Our Constitution, the foundation of our Republic, forbids it. Morality forbids it. And the law I will sign...forbids it." Commenting on the Civil Rights Act, Johnson said: "Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity. We will achieve these goals because most Americans are law-abiding citizens who want to do what is right."). \textit{Id.} at 227-28.
on miserably, and the society must be at all times in the highest
degree of disorder.\textsuperscript{124}

Where the law allows them to do so, bureaucrats and other authorities
will impose unreasonable expectations on an unwilling populace.\textsuperscript{125} This is
one of the principle reasons why our foundational legal document should be
applied to limit the exercise of legislative power by executive branch
officials.\textsuperscript{126}

C. The Executive Branch

The executive branch is responsible for executing the laws the
legislative branch creates.\textsuperscript{127} While there is, as Locke suggested, an area of
executive "prerogative" that arises from the Legislature's inability to foresee
all circumstances in which immediate action might be required,\textsuperscript{128} the
executive risks being discredited whenever it acts without explicit legislative
authorization. Consequently, it is constrained to act only in those ways
unlikely to create public controversy.\textsuperscript{129}

In establishing the executive branch of government, the Florida
Constitution goes further than most other constitutions to protect the public
from tyranny by assigning certain duties and responsibilities to particular
officers and agencies of the government.\textsuperscript{130} Unlike the constitutions of some

\begin{itemize}
\item \textsuperscript{124} ADAM SMITH, THE THEORY OF MORAL SENTIMENT 233-34 (D.D. Raphael & A.L.
\item \textsuperscript{125} See generally id.
\item \textsuperscript{126} See supra notes 97-106 and accompanying text (discussing the doctrines of
unlawful delegation and encroachment).
\item \textsuperscript{127} FLA. CONST. art. IV, § 1.
\item \textsuperscript{128} LOCKE, supra note 25, at 92. Locke, however, contended that there might be some
instances in which the executive has the prerogative to act even against the law. See id. at 93-94.
\item \textsuperscript{129} See id. at 94 (noting that prerogative is always largest in the hands of the wisest
and best princes, because it may always be quickly restrained if exercised against the public's
will).
\item \textsuperscript{130} See FLA. CONST. art. IV. One positive effect of these distributions of power is to
establish numerous opportunities for citizen input and numerous ways by which citizens can
redress their grievances. One arguably negative consequence is that there may be some
duplication of government services with an attendant duplication of expense and
inconvenience to those involved in the process. However, it is as true of the Florida
Constitution as it is of the United States Constitution that while it imposes burdens that may
seem "clumsy, inefficient, [and] even unworkable.... There is no support in the
Constitution... for the proposition that the cumbersomeness and delays often encountered in

https://nsuworks.nova.edu/nlr/vol22/iss1/9
other states, the Florida Constitution does not vest all executive power in the state’s Governor. It establishes the Governor as the state’s chief executive officer, but then proceeds to divide the executive power among a wide range of other executive officers and agencies.

Florida’s Constitution is particularly unique in that it has an elected Cabinet consisting of six officers. Not unexpectedly, it has been a source of vexation to many governors, including the current one, that the Office of Governor must share its power with members of the cabinet who may be political opponents. However, establishing some competition at the complying with explicit constitutional standards may be avoided...

131. FLA. CONST. art. IV, § 1.
132. Id. at §§ 4, 6, 9.
133. FLA. CONST. art. IV, § 4(a). The offices of Secretary of State and Treasurer/Comptroller were originally established in the Florida Constitution of 1838. FLA. CONST. of 1838, art. III, §§ 14, 23. Like all of the state’s justices and judges, these executive branch officials were elected by a majority vote of both houses of the Legislature. See id. at art. V, § 11 (providing for justices and judges to be elected by the state Legislature). Id. at art. III, § 14 (establishing office of Secretary of State and providing for election by the Legislature); id. at art. III, § 23 (creating and providing for election by the Legislature of a “Treasurer and Comptroller of Public Accounts”). This first constitutionally authorized Legislature was quite powerful in relation to the other two branches of government. In addition to its power to make all judicial appointments, and the power to appoint key executive branch officers, the Florida Constitution of 1838 vested sole authority to amend or revise the constitution in the hands of the Legislature. Id. at art. XIV, §§ 1, 2. While the Governor was given veto power over legislation, the veto could be overridden by a simple majority confirming the Legislature’s will. FLA. CONST. of 1838, art. III, § 16.

The Constitution of 1868 provided for the Governor to appoint and be “assisted” by a nine-member Cabinet of “administrative officers” consisting of a Secretary of State, Attorney General, Comptroller, Treasurer, Surveyor General, Superintendent of Public Instruction, Adjutant General, and Commissioner of Immigration. FLA. CONST. of 1868, art. V, § 17. However, this expansion of the Governor’s powers lasted only briefly. The Legislature amended the constitution in 1870 to once again provide for the popular election of Cabinet officers. See Amendments to the Constitution of 1868, General Assembly of 1870 (Article III, Cabinet Elections) (adopted February 12, 1870). Under the Constitution of 1868, the Governor and Cabinet served on a “Board of Commissioners of State Institutions,” which, much like the modern Florida Cabinet, was assigned particular responsibilities by the Legislature. FLA. CONST. of 1868, art. V, § 20. The Constitution of 1885 reduced the number of executive branch officers to seven, including the Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Superintendent of Public Instruction, and Commissioner of Agriculture, and continued to provide for them to be elected rather than appointed. FLA. CONST. of 1885, art. IV, § 20.

134. In the economic arena, it is commonly understood that competition drives down prices and produces higher levels of value for consumers. The early framers of constitutional government understood that in a divided government there would be competition among the...
highest levels of executive decision making sometimes causes an extraordinary level of inquiry and public debate to surround those decisions.\textsuperscript{135} In those areas of policy that require them to work with the cabinet, Florida's governors are undoubtedly more restrained and less capricious in making decisions.\textsuperscript{136} This provides some worthwhile protection for the people. While some Cabinet reform may be appropriately considered by the Revision Commission,\textsuperscript{137} the elimination of the elected Cabinet would not

\textsuperscript{135} A recent example of the extent to which the Cabinet can focus public attention on an issue involved a decision over whether to allow Florida Power and Light Company to burn a controversial fuel called "Orimulsion" at one of its power generating facilities. Individuals, environmental groups, and others offered testimony that consumed several days, generating hundreds of press reports. See, e.g., \textit{Orimulsion Hearings Delayed Until Jan. 15}, \textsc{St. Petersburg Times}, October 22, 1997, at F26; \textit{FPL Being Too Slick on Orimulsion Details}, \textsc{Palm Beach Post}, October 17, 1997, at G27; Robert P. King, \textit{Tar Fuel's Next Stop: Indiantown?}, \textsc{Palm Beach Post}, October 14, 1997, at E26; David Cox, \textit{Cabinet May Seek Delay in Hearing on Orimulsion}, \textsc{Tampa Trib.}, October 10, 1997, at C26; Jeremy Wallace, \textit{FPL Files Timeline for Fuel Hearing}, \textsc{Bradenton Herald}, October 4, 1997, at D26; Jeremy Wallace, \textit{Orimulsion Hearing Set}, \textsc{Bradenton Herald}, October 4, 1997, at B26; Alan Judd, \textit{FPL's Case on Fuel Sticky}, \textsc{Sarasota Herald-Trib.}, June 15, 1997, at A26.

\textsuperscript{136} A common complaint about Florida's elected Cabinet is that the agencies placed under Cabinet supervision lack accountability because they do not answer to a single individual. However, the vast majority of the Cabinet's responsibilities were established by the Legislature—not the constitution. See, e.g., \textsc{Fla. Stat.} § 20.24(1) (1995) (placing the Department of Highway Safety and Motor Vehicles under the control of the Cabinet); \textit{id.} at § 20.21(1) (1995) (placing the Florida Department of Revenue under the control of the Cabinet); \textit{id.} at § 20.201(1) (1995) (placing the Florida Department of Law Enforcement under the control of the Cabinet). The Legislature is free to reassign the Cabinet's current duties to the Governor, or to individual Cabinet officers, or to the extent that the Legislature believes the agencies under the Cabinet lack accountability it can impose additional controls. Thus, it does not appear that constitutional amendments are necessary to resolve this issue.

\textsuperscript{137} The Legislature has not always considered whether the functions it assigned to the Cabinet were of an executive, legislative, or judicial nature. While it is within the executive branch, the Cabinet now exercises some power associated with each of the three branches of government. The Commission should consider alleviating this condition.
serve any useful purpose. It would limit public debate and increase the Governor's power at the expense of the people. 138

The division of executive and legislative branch power does not stop with the cabinet. The Florida Constitution creates a multitude of constitutional agencies, offices, and commissions. These offices and agencies vary in the extent to which they are subject to the Governor's power139 and some agencies even have a measure of independence from legislative oversight. 140 These additional distributions of power were

138. The strength of the Office of Florida's Governor is commonly underestimated. The office, as it is currently comprised, is really quite strong, both in comparison to the office as it was comprised under earlier Florida constitutions, see supra note 133, and in comparison to the Office of Governor as it is comprised in other states. With the adoption of legislative and Cabinet term limits, see FLA. CONST. art. III, §§ 1, 2, 4, the Governor's position vis-a-vis the Legislature and the Cabinet has been strengthened. The Governor is the state's chief budget officer and shares that power with no other state official. Morris, supra note 2, at 13. The Governor's budget powers, and the ability to control programs, have been further expanded through an amendment to the constitution that gives the executive line item veto power. FLA. CONST. art. III § 8. And, while the Governor does not appoint Cabinet officers he or she does appoint the member of over 438 state boards, and makes more than 4000 appointments during his or her term of office. Morris, supra note 2 at 18-19. Moreover, history shows that a Governor's greatest power is the opportunity as the state's chief executive officer to lead by establishing values and standards - leading by moral suasion and example rather than by edict. See id.

139. See, e.g., FLA. CONST. art. XI, § 2(a)(2) (15 of the 37 members of the Constitution Revision Commission are appointed by the Governor. The Governor also designates the chairman); id. at art. II, § 8(f) (providing for an independent Commission on Ethics); FLA. STAT. § 112.321(1) (1995) (five of the nine members of the Commission on Ethics are appointed by the Governor, subject to confirmation by the Senate); FLA. CONST. art. IV, § 9 (all five members of the Game and Freshwater Fish Commission are appointed by the Governor, subject to confirmation by the Senate); id. at art. V, § 12(a)(3) (five of the 15 members of the Judicial Qualifications Commission are appointed by the Governor); id. at art. V, § 11(d) (providing for a judicial nominating commission to be established by general law); FLA. STAT. § 43.29(1)(b) (1995) (three of the nine members of the judicial nominating commission are appointed by the Governor); FLA. CONST. art. IV, § 12 (providing that the Legislature may establish a Department of Elderly Affairs); FLA. STAT. § 20.41(1) (1995) (the head of the Department of Elderly Affairs is appointed by the Governor, subject to confirmation by the Senate); FLA. CONST. art. IV, § 11 (providing that the Legislature may establish a Department of Veteran Affairs); FLA. STAT. § 20.37(1) (1995) (the head of the Department of Veteran Affairs is the Governor and the Cabinet. The executive director of the department is appointed by the Governor with the approval of three members of the Cabinet and subject to confirmation by the Senate).

140. Constitutional commissions and agencies include the following: the Constitution Revision Commission itself, FLA. CONST. art. XI, § 2, the Taxation and Budget Reform Commission, id. at art. XI, § 6, the Florida Game and Freshwater Fish Commission, id. at art.
intended to protect the people from tyranny. However, where any of these offices is not subject to an adequate system of checks and balances, they can become tyrannies within their area of authority. It may also be true that some agencies and offices have outlived their usefulness. It would behoove the Revision Commission to examine each of these agencies and offices carefully to consider whether they are subject to adequate controls in the form of checks and balances, whether they have continuing vitality, and whether they serve a constitutional purpose.

D. The Judicial Branch

Even when ruled by a king, "[b]etwixt subject and subject . . . there must be measures, laws, and judges . . . ." The third branch of government, the judiciary, which has been called the least dangerous branch, was developed in society to substitute for two powers that people had in nature. The first is the power to do whatever one sees fit to assure self preservation. The second is the power to punish those who attempt to.

IV, § 9; the Commission on Ethics, id. at art. II, § 8(f); the Judicial Nominating and Qualifications Commissions, id. at art. V, §§ 11(d), 12(a); the Department of Elderly Affairs, FLA. CONST. art. IV, § 12; and the Department of Veterans Affairs. Id. at art. IV, § 11. Constitutional officers include the following: Governor, id. at art. IV, § 1; Lieutenant Governor, id. at art. IV, § 2; Cabinet officers, id at art. IV, § 4; the members of the Legislature, FLA. CONST. art. III, § 1; the judiciary, id. at art. V, § 1; the clerks of the circuit courts, id. at art. V, § 16; supervisor of elections, id. at art. VIII, § 1(d); state attorneys, id. at art. V, § 17; and public defenders, FLA. CONST. art. V, § 18; property appraisers, id. at art. VIII, § 1(d); constitutionally elected sheriffs, and tax collectors. Id. While they are not constitutionally required under all circumstances, the constitution authorizes the creation of county commissioners, id. at art. VIII, § 1(e), and all 67 counties have done so.

141. To employ a simple example, if property appraisers were given unlimited power to appraise property without constitutional or statutory guidance, and without any controls by other agencies, officers, or courts, they would have tyrannical power within the area of authority given to them by the constitution. Even this modest power could be expanded to great lengths if not subject to adequate checks and balances. While the authors use the Office of Property Appraiser in this example, the authors do not intend to disparage property appraisers, or suggest that this particular office should be abolished or altered. The authors' purpose is to suggest that the Revision Commission examine constitutional offices to assure that they are subject to adequate checks and balances.

142. Some agencies and officers could, perhaps, be as effective if they were created by statute.

143. LOCKE, supra note 25, at 52.
145. See LOCKE, supra note 25, at 72.
146. Id.
infringe the right of self preservation. Upon joining society, a person gives up both of these rights, but in exchange receives the support of the civil authorities to accomplish these matters on his behalf.

In western society, these objectives are accomplished through the law of torts, the criminal law, and the laws of free economy that allow parties to apportion rights, duties, and privileges amongst themselves with the support of the government. If these remedies ceased to be available the people would resort to self-help, as if in nature. Furthermore, since as Locke noted, "[t]he great end of men’s entering into society being the enjoyment of their properties in peace and safety..." there would be no reason for people to continue under the laws of a society if these interests were not protected.

Article V of the Florida Constitution establishes a system of courts and judges consistent with the fundamental purpose of the judiciary by establishing that all judicial officers of the state shall be "conservators of the peace." As Tocqueville explained:

The great end of justice is to substitute the notion of right or that of violence... The moral force which courts of justice possess renders the use of physical force very rare and is frequently substituted for it; but if force proves to be indispensable, its power is doubled by its association with the idea of law.

Thus, the principal function of the judiciary is public and private dispute resolution. The courts have the power under article V to review the constitutionality of legislative acts. But, like the other branches of government, the courts are confined to the exercise of those powers assigned to them under the constitution. The courts must take care that, in rendering their opinions, they do not go beyond the Legislature’s intent, thereby

147. Id. Having given up the authority to protect their own interests through force, individuals may now rely on the government to act on their behalf. Id.
148. See id.
149. See LOCKE, supra note 25, at 72-73.
150. Id. at 75.
151. See id.
152. FLA. CONST. art. V, § 19.
153. I TOCQUEVILLE, supra note 1, at 145.
154. See generally id. (noting that the judiciary is an alternative to violent dispute resolution).
155. See FLA. CONST. art. V (explicitly providing for the supreme court to review decisions of the district and circuit courts affecting the constitutionality of statutes, thereby implicitly establishing the power of "judicial review" in the lower courts). Id. at art. V, § 3(b)(3).
creating new laws of their own. Similarly, it is beyond the power of the courts to execute the laws.

Florida's judicial officers have enormous independence. Appellate judges, including the Justices of the Supreme Court of Florida, do not stand for popular election as do the officers of the executive and legislative branches. Instead, they are initially appointed and must stand for a merit retention election every six years thereafter. If a majority of the electors casting ballots do not vote for retention, the Governor must appoint a replacement. The practical effect of merit retention elections has been to give judges permanent tenure, subject only to the requirement that they retire at age seventy. Because this is the case, some have expressed concern that Florida's judges are too far removed from the public will.

Judges, like all other public officers, derive their power from the people. If the judiciary is not subject to adequate checks and balances, judges, like other public officers, can exert tyrannical power over the people. Unlike officers of the executive and legislative branches who are directly responsible to a majority of the voters, judges should be free from day-to-day political pressures. One of the principal functions of the courts is to protect political minorities from "the tyranny of the majority."

156. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).
157. See generally id. (noting that the judiciary is the least dangerous branch because they have neither the power of the sword nor the purse).
158. See FLA. CONST. art. V, § 10(a).
159. See id.
160. See id. at art. V, § 11(a).
161. See id. at art. V, § 8. No Florida judge has ever failed to survive a merit retention election.
162. The most striking expression of public concern over perceived judicial activism in Florida occurred when voters amended article I, section 12 of the Florida Constitution (search and seizure) to eliminate what they perceived to be an overly-broad judicial interpretation of the "exclusionary rule." See D'ALEMBERTE, supra note 7, at 28; see FLA. CONST. art. I, § 12 (requiring that interpretations of the Florida Constitution conform to the opinions of the United States Supreme Court). Proponents of the citizen initiative can point to that incident as an example of the need to maintain the right of citizen initiative to insure that state officials do not stray too far from the public will. See also supra note 7 and accompanying text (discussing citizen initiatives as a means of overcoming legislative gridlock). Many conservative analysts will find this an inappropriate delegation of state power to federal authorities.
163. See FLA. CONST. art. I, § 1.
164. See generally THE FEDERALIST Nos. 46, 47, 48 (James Madison) (suggesting that when any branch is not limited by the system of checks and balances tyranny may result).
165. See MORLEY, supra note 93, at 27 ("'general government' must be given sufficient power to safeguard 'the rights of the minority,' . . . 'in all cases where a majority are united by
However, the judiciary should not be so far removed from public control that judges can afford to consistently ignore the public will. Because of the concerns that have arisen in this area, the Revision Commission should consider whether the judiciary is subject to adequate checks and balances. The Commission might also wish to consider whether it is appropriate to maintain a mandatory retirement age for judges. If adequate external controls are lacking, then the Revision Commission should recommend changes to the voters. When considering revisions that would affect the judiciary, one point deserves consideration. It is clear that the Florida Constitution contains some provisions that lend themselves to expansive judicial interpretation. Our judiciary would be more restrained if we had a

---

166. FLA. CONST. art. V, § 8.

167. See discussion infra notes 234-238 and accompanying text.
more restrained constitution. Thus, the Revision Commission should consider making changes that move the constitution in a direction more conducive to judicial restraint.

E. Local Government

Just as there are some tasks of government that can best be accomplished at a national or state level, there are also tasks that can most beneficially be performed at the local level. In considering revisions to the Florida Constitution, the Revision Commission should consider whether there are additional functions and responsibilities that can be delegated to local governments.

Only a few thousand people voted on the adoption of Florida's first constitution in 1838. The state's population was, of course, much less than today. State government was much closer to the people and it represented much less of an intrusion into citizens' daily lives. Indeed, in many respects, the state government of 1838 was a local government. The change in the nature of the relationship between individuals and state government that has developed over the intervening years—simply through growth—represents an enormous loss of value to the people. Democracy works best in small units. A democracy composed of only six individuals is far more likely to satisfy its constituents’ concerns than a democracy of six thousand. Thus, it is appropriate that Florida has chosen to authorize the transfer of a significant portion of the people’s political power to counties and municipalities through our state constitution. However, as previously

168. Accordingly, one of the “important thrusts” of the local government article of the 1968 Constitution was to expand local government power by removing the Legislature’s power to make local government decisions and turning that power over to local officials. D’ALEMBERTE, supra note 7, at 123.

169. In 1831, Tocqueville noted:

N[ot]hing is more striking to a European traveler in the United States than the absence of what we term the government, or the administration. Written laws exist in America, and one sees the daily execution of them; but although everything moves regularly, the mover can nowhere be discovered. The hand that directs the social machine is invisible.

1 TOCQUEVILLE, supra note 1, at 72-73.

170. See 1 TOCQUEVILLE, supra note 1, at 40. Tocqueville noted with some admiration that in America “the township was organized before the county, the county before the state, the state before the union.” Id. at 42.

171. See D’ALEMBERTE, supra note 7, at 121-33 (discussing the prominent role of local governments under the Florida Constitution). See also, MORLEY, supra note 91, at 5. It was Morley’s belief that “[t]he essence of federalism is reservation of control over local affairs to
noted, the state has grown tremendously, and there has been a significant consolidation of power at the state level. Many people have lost faith in government simply because it seems so remote. Because of their relatively smaller size and the smaller number of people they must serve, the units of local government are better equipped to serve their constituents, in most respects, than the state. 172

In examining the provisions of our constitution, the constitution revision commission should generally avoid imposing any new limits on the authority of our local institutions and should consider ways in which those institutions can be strengthened. Where appropriate, the commission should consider transferring power from the state to local authorities where it is more easily controlled by the people themselves. This would help to restore both the perception and the reality of the people's control over the government they have created.

F. The Boundary Between State and National Government

Upon joining the Union, the State of Florida became a part of a federalist system of government established more than 200 years ago. 173 Our state constitution, together with its national counterpart, establishes a separate sphere of influence for our state's laws as opposed to the laws of the federal government. 174 Together, these two documents establish what is properly understood as the "Federal Government." When Tocqueville visited the United States in 1831, he found "twenty-four small sovereign nations, whose agglomeration constitutes the body of the Union." 175 He described the relationship between the federal government

---

172. See I TOCQUEVILLE, supra note 1, at 100. ("I [have] heard a thousand different causes assigned for the evils of the state, but the local system was never mentioned among them. I heard citizens attribute the power and prosperity of their country to a multitude of reasons, but they all placed the advantages of local institutions in the foremost rank.").

173. See generally THE FEDERALIST No. 39 (James Madison) (discussing the differences between a national and a federal government). Federal governments consist of a joining between the national government and the state governments. Id.

174. See generally Ann Althouse, How to Build a Separate Sphere: Federal Courts and State Power, 100 HARV. L. REV. 1485, 1495 (1987). The courts have long ago concluded that federal and state constitutions leave some areas in which both the federal and state governments can act. However, this reasoning is contrary to the Ninth and Tenth Amendments to the Federal Constitution, which leaves no aspect of the power given by the people to the government undistributed. U.S. CONST. amends. IX-X.

175. I TOCQUEVILLE, supra note 1, at 61.
and the states as "completely separate and almost independent." The federal government being "circumscribed within certain limits and only exercising an exceptional authority over the general interests of the country." Conversely, "fulfilling the ordinary duties and responding to the daily and indefinite calls of a community" fell to the states.

The level of state independence Tocqueville saw in this country soon disappeared in the aftermath of the Civil War. The constitutional relationship between the branches of government was formally altered by the adoption of the post-Civil War amendments to the Federal Constitution. However, the courts have subsequently agreed that in adopting those amendments, the states did not intend to completely eliminate their separate and independent nature. While the dividing lines between state and national government have been blurred, we still have a strong federalist system of government that continues to grow stronger. That system forms an important part of the division of power that was intended to exist under the original state and national constitutions. The Federal Constitution was created not just to authorize the creation of a federal government, but for the benefit and protection of the states as independent legal entities. It contains numerous provisions protecting the states from federal encroachment. There are also several constitutional doctrines that have developed over the years to protect a separate sphere of influence for the

176. Id.
177. Id.
178. Id. ("The Federal government . . . is the exception; the government of the states is the rule.").
179. U.S. CONST. amends. XIII-XV.
181. See generally THE FEDERALIST NO. 37 (James Madison) (explaining that federalism fosters stability for the federal government as well as the states).
182. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

states, including the "Erie doctrine," the "adequate state grounds doctrine," and the doctrine that allows the states to grant citizens greater rights under state law than exist under federal law. There is, and should be, a constant tension over the proper boundary line between federal and state authority. As with economic competition in the private sector, this competitive aspect of our system of government is beneficial to the people and, wherever it appears to be endangered, the Revision Commission should consider whether steps can be taken to assure its preservation.

V. THE NATURE OF RIGHTS

In addition to providing an organizational framework that protects the citizenry from governmental abuses, the Florida Constitution, like other constitutions, establishes the relationship between government and the people by enumerating certain rights. These rights, as well as others, are

183. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (establishing that "there is no federal general common law" and thereby limiting the ability of federal courts to "create" new law without a specific basis of authority such as state law, the United States Constitution, or federal statutes).

184. The original formulation of the adequate state grounds doctrine provided that where a state court entered a decision based on an "adequate state ground," such as a state constitution or state statute, federal courts would not intervene to disturb the decision. Herb v. Pitcairn, 324 U.S. 117, 125 (1945). While its use has slowed the past few years, in the early 1980s the United States Supreme Court turned this doctrine on its head and used it as a device to assume jurisdiction over state court decisions based on state law. See, e.g., Michigan v. Long, 463 U.S. 1032, 1042 (1983). Until the Court returns to its early formulation of the doctrine it will be of no use in defining the boundary between federal and state governments.


186. See D'ALEMBERTE, supra note 7, at 15 (discussing the 1968 Commission's concern over federal intrusion on state authority).

187. See discussion supra note 25 and accompanying text. These rights are inherent in the individual. Constitutions do not create rights in any classic sense. Explicit identification of specific rights in constitutions is intended to assure that those rights will not be infringed. Governments have provided for the enumeration of rights in their constitutions because assurance of those rights is important to the continuation of democratic governments. As Tocqueville noted, "if ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force." TOCQUEVILLE, supra note 1, at 279. The minorities referred to here are, of course, political minorities. See supra note 51.
said to be retained by the people, and are required to be kept free from state interference.\textsuperscript{188}

The scope of this article does not allow for a complete exploration of every "right" that one might envision. As previously discussed, there are certain fundamental rights that are inherent in all people.\textsuperscript{189} However, the term "right" has not been limited to its constitutional usage. It has often been used interchangeably with the word "entitlement" to describe both tangible and intangible goods and services to which individuals or groups believe they have some legal claim.\textsuperscript{190} Accordingly, it is perhaps more useful when considering revisions to the constitution to engage in a discussion of the nature of rights and the significance of rights in our society.

John Locke asked the rhetorical question: "I[f man] in the state of nature be so free . . . [in] his own person and possessions . . . why will he . . . subject himself to the dominion and control of any other power?"\textsuperscript{191} Not surprisingly, Locke also supplied the answer to his question and in that answer we can perceive the boundaries of rights:

[I]n the state of nature he has such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others. . . the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates, which I call by the general name 'property.'\textsuperscript{192}

As seen in Locke’s statement, the concept of rights in society involves something of a trade-off. While the members of a society continue to possess all rights, they agree to accept limits on the exercise of certain rights.

\begin{itemize}
\item \textbf{188.} See FLA. CONST. art. I, § 1.
\item \textbf{189.} See discussion supra note 25 and accompanying text.
\item \textbf{190.} A useful way of examining rights to determine if they are inherent is to consider whether they can be lost. Truly inherent rights can never be lost. For example, the right of free speech can be dishonored or ignored, but it still exists within the individual. An expansive right to health care, at public expense, or public education would be a right that is dependent upon the cooperation of others for its implementation. It is not inherent in the individual and, unless enforced by the society, it ceases to exist. By interpreting the constitution to include disguised wealth transfers, we impair its moral basis thereby weakening the authority with which it speaks to other issues of a truly constitutional nature.
\item \textbf{191.} LOCKE, supra note 25, at 70.
\item \textbf{192.} Id. at 70-71.
\end{itemize}
in exchange for the right to partake of and enhance certain others. As one commentator has noted:

[S]ociety must have rules, and... those rules inevitably encroach on personality. If the warden permits me to play solitaire in my prison cell I am at liberty to cheat all I want; nobody else is affected thereby. But if my freedom is somewhat enlarged, to permit me to play bridge with three fellow-prisoners, I must observe the rules of the game, arbitrary though they may seem to me. For the freedom of a social game I have surrendered the liberty I had at solitaire.\footnote{193}

Outside of society, people have absolute freedom to do as they please. Upon joining society they give up some portion of their freedom in exchange for the ability to exercise particular rights to a greater extent than would be possible outside society.\footnote{194} Tocqueville correctly noted that “[t]he Revolution of the United States was the result of a mature and reflecting preference for freedom, and not of a vague or ill-defined craving for independence.”\footnote{195} It resulted from a “love of order and law.”\footnote{196} If we seek to understand the nature of rights we must first understand that the concept of rights within society developed to facilitate the security of those who sought to be governed.\footnote{197} While rights are individual in nature and society’s recognition of inherent rights will protect political minorities, a society will not tolerate the exploitation of these rights for the purpose of avoiding justice or engaging in extensive wealth transfers at the majority’s expense.\footnote{198}

\footnote{193. \textit{Morley}, \textit{supra} note 91, at 37-38. The rights that individuals forego are not extinguished but are transferred to the society in the form of powers to be exercised on the individual’s behalf. For example, the power to punish those who infringe our property rights.}

\footnote{194. See generally \textit{Locke}, \textit{supra} note 25.}

\footnote{195. I \textit{Tocqueville}, \textit{supra} note 1, at 73. \textit{See also Morley}, \textit{supra} note 90, at 34. Morley was of the opinion that “[w]hat we really mean by individualism is the latitude of a person to choose for himself among the many fruits of a civilization in which he actually participates. It is not merely unfair but also impossible to cut oneself off from the disagreeable results of collective action, while continuing to benefit substantially from those regarded as pleasurable.” \textit{Id.}}

\footnote{196. I \textit{Tocqueville}, \textit{supra} note 1, at 73.}

\footnote{197. \textit{See Morley}, \textit{supra} note 91, at 27-28.}

\footnote{198. \textit{See Mary Ann Glendon, Rights Talk, The Impeoverishment of Political Discourse} 14 (1991) (explaining that insistence on translating every interest into a right “promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground”).}
It is also commonly understood that:

Since people, in a competitive or any other society, are by no means always just to each other, some regulation by the state . . . is unavoidable . . . [But] the greatest injustice of all is done when the umpire forgets that he too is bound by the rules, and begins to make them as between contestants in behalf of his own prejudices. 199

In addressing this concern, Locke described four restrictions on governmental power that, in his view, arose from the proposition that all governmental power was derived from the individuals who composed society. 200 The first restriction was that “[government] is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people.” 201 Elsewhere, he described this restriction to mean that governments “are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.” 202 This restriction on government has been embodied in constitutional law under the broad heading of “equal protection of the laws.” 203

Next, Locke said that “these laws also ought to be designed for no other end ultimately but the good of the people.” 204 Locke was referring to the necessity that laws be for the ultimate good of all people and not just for the benefit of a select few. This restriction on governmental power is related to the concept of equal protection of the laws and is also reflected in the so-called “public purpose doctrine.” 205

199. MORLEY, supra note 91, at 13.
200. See LOCKE, supra note 25, at 76-82. Under Locke’s approach, government can receive no greater power than it is given by the people, and there are moral limits on the exercise of those powers. Accordingly, government power is subject to the same moral restrictions that existed in individuals before they joined in a society. See id.
201. Id. at 76.
202. Id. at 81.
203. See, e.g., U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 2.
204. LOCKE, supra note 25, at 81. Elsewhere Locke noted that “a rational creature cannot be supposed, when free, to put himself into subjection to another of his own harm . . .” Id. at 93. Thus, it must be assumed that all laws should be created for the benefit of those to be governed.
205. See FLA. CONST art. VII, § 10(c); Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97, 100 (Fla. 1983).
Locke went on to explain that "the supreme power [the Legislature] cannot take from any man part of his property without his own consent." This restriction is embodied in the Due Process Clause of the Florida Constitution.

Locke further explained that this includes efforts by a government to "raise taxes on the property of the people without the consent of the people."

Finally, Locke said "the Legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have..." As discussed above, this restriction is embodied in the separation of powers requirement under the Florida Constitution.

A. The Right to Equal Protection of the Laws

Because it is so significant to the exercise of all rights in society, the right to equal protection of the laws deserves some special attention. Every Floridian has an inherent right to equal protection of the laws of this state. As noted above, this right arises from the fact that the individual relinquishes a certain amount of freedom in order to secure the rights society has to offer. However, there is no right of equality of outcomes. Anatole France once mockingly said that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." While this comment is both harsh and humorous, it is also true. The Florida Constitution does not attempt to cure all of the injustices

206. LOCKE, supra note 25, at 79.
207. See FLA. CONST. art. I, § 9; U.S. CONST. amend. XIV, § 1.
208. LOCKE, supra note 25, at 81.
209. Id. at 82.
210. See discussion supra Part IV.A.
211. See FLA. CONST. art. I, § 2 (enumerating the inherent right to equal protection of the laws). The question of when a right is fundamental, such that it falls within the scope of the theory of inherent rights, can normally be determined by ascertaining the answer to one simple question: Can the right be exercised without the aid of the government or others? Sometimes the answer to this question can be ascertained by determining whether some wealth transfer is necessary to enforce the supposed right. If a right can only be secured through the government’s coercion of others, then it is not an inherent right and is not, in any classic sense, a fundamental right.
212. Many rights are either not naturally available to isolated individuals, or would have no meaning to an isolated individual. See, e.g., Harold Demsetz, Toward a Theory of Property Rights, AM. ECON. REV. 347-57 (1967). It was that author’s view that “In the world of Robinson Crusoe property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations that he can reasonably hold in his dealings with others.” Id. at 347
and hardships of life, to do so would be beyond the power of any constitution.\textsuperscript{214} The right of equal protection of the laws forbids the government from treating those things that are similarly situated as though they are different, but it does not require the government to treat those things which are in fact different as though they are the same.\textsuperscript{215}

As Locke said:

\begin{quote}
Though . . . all men by nature are equal, . . . [a]ge or virtue may give men a just precedence; excellence of parts and merit may place others above the common level; birth may subject some, and alliance or benefits others, to pay an observance to those whom nature, gratitude, or other respects may have made it due; and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion one over another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man has to his natural freedom, without being subjected to the will or authority of any other man.\textsuperscript{216}
\end{quote}

Recently, there has been a strong trend in our society to extend the constitutional theory of equal protection of the laws to require equality of outcomes for particular groups or arbitrary classifications of people.\textsuperscript{218} All

\begin{quote}
\textsuperscript{214} See Lindsey v. Normet, 405 U.S. 56, 74 (1972) (explaining that even the United States Constitution cannot “provide judicial remedies for every social and economic ill”).


\textsuperscript{216} LOCKE, supra note 25, at 31.

\textsuperscript{217} It is important at this point to note the difference between constitutional rights and legislatively created rights. Subject to the limits imposed by the constitution, the Legislature is free to create statutory economic rights. See, e.g., FLA. STAT. § 440.01-.60 (creating the right to receive workers’ compensation under certain statutorily prescribed circumstances).

\textsuperscript{218} Often these efforts are accompanied by demands for government spending or increases in taxation for the purpose of making various kinds of economic opportunities available to groups of people who are believed to be disadvantaged. See, e.g., Allen W. Hubsch, \textit{The Emerging Right to Education Under State Constitutional Law}, 65 TEMP. L. REV. 1325 (1992); Mary Ellen Cusack, \textit{Judicial Interpretation of State Constitutional Rights to a Healthful Environment}, 20 B.C. ENVTL. AFF. L. REV. 173 (1993); Bert B. Lockwood Jr. et. al., \textit{Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor}, 2 WM. & MARY BILL RTS. J. 1 (1993). These efforts are misplaced. As Locke noted, “[t]he great and chief end, therefore, of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.” LOCKE, supra note 25, at 71. Government does not normally produce wealth; it obtains wealth through the taxation of its citizens. Establishing economic rights in certain
\end{quote}
rights of a constitutional nature are vested in individuals, not in groups. When we attempt to confer preferences upon groups as opposed to individuals, we move in direct violation of the principle of equal protection.\footnote{A simple demonstration of this idea is that all citizens have an inherent right to petition the government for redress of grievances. This right arises based upon the individual’s relationship with the government; it does not arise by virtue of membership in any particular group. Confining the right to redress grievances to members of particular groups, or granting some groups a more expansive right, would deprive all others of the equal benefit of that right. Thus, it is not only contrary to the notion of “individual” liberties to find that rights arise from groups, but doing so directly violates the principle of equal protection of the laws. We may not all agree on which rights are constitutional in nature. But, we can all agree on a core of rights that belong in the constitution, and we must recognize that grossly expanding these rights into controversial areas can cause even core rights to be called into question. This is not to suggest that Legislatures are forbidden from conferring benefits, it simply means that government is not compelled to do so as a matter of constitutional law.}

individuals necessarily implies a need to take money from some other individuals to meet the demand imposed by the new economic right. In doing so, government risks impairing its relationship with those from whom it removes wealth for the benefit of others.\footnote{See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).}

\footnote{U.S. CONST. art. I; FLA. CONST. art. I, § 5.}


\footnote{See discussion supra pp. 29-33. Equal protection of the laws requires that persons who are similarly situated be treated as though they are the same. Thus, if government chooses to confer benefits on individuals for arbitrary reasons it would run afoul of the equal protection requirement. Government can confer benefits, but it must comply with the law in doing so.}
B. Rights in Property

From the foregoing discussion, it can be seen that property should not normally be acquired by individuals from government. Additionally, the rights properly considered constitutional are those that caused us to join into society, and without which we would not have willingly joined the society at all. These rights can be summarized as those necessary to enjoy life, liberty, and property within the bounds of a civilized society. Locke considered all such rights under the notion of property, and described the circumstances under which primitive property rights evolved from common ownership. He believed “acquisition and improvement” created a right of individual ownership. One of the incidents of ownership is, of course, the power to convey an ownership interest to others, so property rights could be continued. Natural limits to property rights existed in the form of limits on the amount of property a person could put to a useful purpose, without waste.

The obvious limit to Locke’s theory, the one he left unexplored, is the lack of sufficient property available for “acquisition and improvement.” This may cause market-based societies to appear unfair. However, free markets are constantly devising new forms of property, new ways of executing transactions in property, and new ways of taking ownership in property. Thus, the problem Locke left unexplored, the potentially limited supply of property, seems to be constantly in the process of being overcome.

224. Government was not intended to be, and is normally not a wealth producer. Accordingly, the wealth it transfers to one must usually be obtained from others. 225. See U.S. CONST. amend. XIV, § 1. 226. LOCKE, supra note 25, at 16-30. 227. Id. at 18-19. 228. Id. at 28. 229. Id. at 19. 230. Id. at 16-30. 231. For example, we now recognize a wide range of intellectual property. 232. Much like their peasant forebears who gleaned fallen grain from the fields of land owners, arbitrageurs now sit at computer terminals and “glean” small fractional profits by exploiting the differences in the price of stocks between the stock exchanges. Some have grown quite wealthy through this modern day gleaning process. 233. In modern times, we have developed stock markets in which anyone can buy an interest in a publicly traded company. The right to purchase or sell stocks at a future date is also a valuable property interest (“futures”) that can be freely traded, and one can even purchase futures in the currency used to purchase stocks or other commodities (“currency futures”).
VI. OTHER PROVISIONS OF THE FLORIDA CONSTITUTION

The Florida Constitution contains a body of non-fundamental legal material. Much of this material was incorporated at various times for political reasons. While most of these provisions taken individually are quite harmless, the overall importance of the constitution is diminished in the minds of the public and lawmakers when legal material of lesser significance is included in its pages. To the extent that these provisions are innocuous, there is no real reason to remove them from the constitution other than as a kind of housekeeping exercise. However, some provisions that are purely gratuitous have the potential to be misinterpreted and should be considered for removal. For example, article IX, section 1, establishes the requirement that "[a]dequate provision shall be made . . . for the establishment, maintenance and operation of institutions of higher learning and other public education programs . . ." This provision is particularly troubling because as Tocqueville said:

It cannot be doubted that in the United States the instruction of the people powerfully contributes to the support of the democratic republic; and such must always be the case, I believe, where the instruction which enlightens the understanding is not separated from the moral education which amends the heart.

However, some interpret article IX, section 1 to require a particular level of school funding and would use it as a basis for allowing individuals to sue the state for additional educational funding. If the judiciary were to expand on this simple statement, it could be used as a basis for requiring

234. D'ALEMBERTE, supra note 7, at 16 (describing some constitutional language as "meaningless" but "politically popular").
235. Id. at 17 (noting that some provisions of the Constitution of 1968 were merely "statements of aspirations" or were "precatory" in nature).
236. FLA. CONST. art. IX, § 1.
237. I TOCQUEVILLE, supra note 1, at 329.
238. One attempt to secure an expansive interpretation of this language was a partial failure. See Coalition For Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). However, because the court left the door open to future challenges, the suit secured a measure of success for those who wish to compel a higher level of school funding. See also Barbara J. Staros, School Finance Litigation in Florida: A Historical Analysis, 23 STETSON L. REV. 497 (1994); Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 VAND. L. REV. 101 (1995); John Powell, Segregation and Educational Inadequacy in Twin Cities Public Schools, 17 HAMLINE J. PUB. L. & POL'Y 337 (1996).
wealth transfers for the benefit of particular individuals or groups. Therefore, its continued inclusion in the Florida Constitution offers little value in exchange for the associated risk.

VII. CONCLUSION

For the most part, the Florida Constitution has served us well and should not be changed. In considering whether specific constitutional revisions should be adopted, we should ask ourselves the following questions: What is the appropriate relationship between government and the people, and is that relationship properly reflected in the social order that has developed under the constitution? If not, can the problems we find in the social order be addressed through the constitution? Are they fundamental in nature, or should they be addressed through some other means?

With regard to each of the three branches of government, as well as each officer and agency, we should ask if the system of checks and balances in the constitution is well-ordered, and whether the divisions of power are being respected. As a practical matter, we should ask whether the government is functioning well, or whether the people would benefit from some reorganization that must be accomplished through constitutional means.

In answering these questions, the text of the document as well as the purpose and ideas of the people who created the constitution should be honored. It was once said that “[t]he people reign in the American political world as the Deity does in the universe.”239 This statement was intended to mean that, collectively, the people exercise complete control over their government. If the Revision Commission accomplishes nothing else, we hope that it will take some small steps towards restoring the truth of that statement for the people of Florida.

239. I TOCQUEVILLE, supra note 1, at 60. Tocqueville further comments that, “[i]n America, the people form a master who must be obeyed to the utmost limits of possibility.” Id. at 64.