Abstract

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BRANDON FERNÁNDEZ
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WHAT IS A BOARD ATTORNEY’S DUTY WHEN THE BOARD TAKES ACTION DETRIMENTAL TO THE ORGANIZATION THE BOARD REPRESENTS?………………PAUL D. ASFOUR REBEKAH L. WELLS 1

SECOND-ORDER LOGROLLING: THE IMPACT OF DIRECT LEGISLATIVE AMENDMENTS TO STATE CONSTITUTIONS………………………………. JON M. PHILIPSON 23

NOTES AND COMMENTS

WORKERS’ COMPENSATION: NECESSARY CHANGES IN FAVOR OF THE INJURED WORKER………………………………………………………NICHOLAS A. PALOMINO 53

FLORIDA’S DECISION TO NOT DECIDE: LEAVING THE NEEDIEST STUDENTS WITHOUT A VOICE ...............OMAR J. PÉREZ 79

THROWING SHADE ON THE SUNSHINE STATE: THE PARIS AGREEMENT AND HOW FLORIDA UTILITY COMPANIES ARE FIGHTING TO CONTROL SOLAR ENERGY…………………..BRANDON FERNÁNDEZ 105
WHAT IS A BOARD ATTORNEY’S DUTY WHEN THE BOARD TAKES ACTION DETRIMENTAL TO THE ORGANIZATION THE BOARD REPRESENTS?

PAUL D. ASFOUR*
REBEKAH L. WELLS**

I. INTRODUCTION........................................................................................................... 1
II. WHAT IS AN ORGANIZATION?.................................................................................. 2
   A. The Organization’s Constituents .............................................................................. 3
   B. The Board’s Duty to the Organization .................................................................. 3
III. ATTORNEY’S ETHICAL DUTY TO HIS CLIENT ......................................................... 4
IV. BOARD ATTORNEY’S DUTY TO THE ORGANIZATION ........................................ 6
   A. Basic Duties ............................................................................................................ 6
   B. Duties When the Organization Commits a Criminal or Fraudulent Act ................. 7
      1. Duty to Disclose .................................................................................................... 7
      2. Duty to Withdraw .................................................................................................. 8
      3. Duty Not to Assist .................................................................................................. 8
   C. Duties When a Constituent Commits a Criminal or Fraudulent Act ...................... 11
V. DISCOVERY ................................................................................................................... 16
VI. DISCLOSURE ............................................................................................................... 18
VII. DISENGAGEMENT .................................................................................................... 20
VIII. CONCLUSION ............................................................................................................. 21

I. INTRODUCTION

In 1973, board members of the Ford Motor Company circulated a memo that addressed an issue in the manufacturing of one of its cars, the Ford Pinto.1 The Ford Pintos had defective gas tanks and some, when hit from behind, exploded, causing serious injury or death to the occupants.2

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2. Id.; see also Ben Wojdyla, The Top Automotive Engineering Failures: The Ford Pinto Fuel Tanks, POPULAR MECHANICS (May 20, 2011),
The board members, aware of the defect and the ramifications for Pinto occupants, decided against fixing the faulty design. Ford estimated that the settlement of future lawsuits by occupants of the Pinto would cost it less money than fixing the defect. 

Predictably, Ford was sued in several products liability cases. Ford’s lawyers, who were employed by Ford during the time the board members made their decision not to fix the gas tanks, were not sued. However, the case presents a legitimate question as to the role that Ford’s lawyers played in the situation. Did they know of the defective design? If they did, what were their duties and to whom did they owe them?

Almost forty years later, case law shows that if the Ford Pinto case existed today, Ford’s lawyers may have experienced serious ramifications for their failure to protect the organization from the wrongdoing of its board members. Legal analysis shows that a lawyer has a duty to proceed in the best interests of an organization, and this duty can be broken down into three remedial measures—discovery, disclosure, and disengagement.

II. WHAT IS AN ORGANIZATION?

An organization is a formal or informal group of people with a common interest. It includes “for-profit and nonprofit corporations, limited-liability companies, unincorporated associations, . . . general and limited partnerships, professional corporations, business trusts, joint


3. Grimshaw, 174 Cal. Rptr. at 361; Wojdyla, supra note 2.
5. See Grimshaw, 174 Cal. Rptr. at 383.
6. See generally id.
7. Grimshaw, 174 Cal. Rptr. at 371; see also infra Part III.
8. See Fla. Bar v. Brown, 790 So. 2d 1081, 1084 (Fla. 2001) (per curiam); FLA. RULES OF PROF’L CONDUCT r. 4-8.4 (2010); FLA. RULES OF PROF’L CONDUCT r. 4-1.2 (2006).
9. See Brown, 790 So. 2d at 1084; FLA. RULES OF PROF’L CONDUCT r. 4-8.4 (2010); FLA. RULES OF PROF’L CONDUCT r. 4-1.2 (2006).
11. See Brown, 790 So. 2d 1086–87; FLA. RULES OF PROF’L CONDUCT, 4-1.13, 4-1.2(d) (2006); FLA. STAT. § 112.311 (2015); RESTATEMENT (THIRD) OF AGENCY § 5.03–.04 (AM. LAW INST. 2005).
12. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (c) (AM. LAW INST. 2000).
ventures, . . . similar organizations, . . . [and] social club[s].”

A.  

The Organization’s Constituents

Pursuant to the comment to Rule 4-1.13 of the Florida Rules of Professional Conduct (“Florida Rules”), individuals who are part of an organization are referred to as constituents. They include officers, directors, employees, shareholders, stockholders, and members. Constituents who make decisions on behalf of the organization are either elected or appointed. Those constituents are often referred to as the Board of Directors (“Board”). The Board may be comprised of several constituents or just one, as in the case of an individual who owns 100% of a corporation’s stock or a sole member of an LLC.

B.  

The Board’s Duty to the Organization

The Board has a fiduciary duty to make decisions that are in the best interests of the organization. “Directors and officers must act in the best interests of the corporation, not the employee.” If there is only one constituent who sits on the Board, for example, the sole owner and shareholder of the organization, then that person also has a fiduciary duty to make decisions in the best interests of the organization, even though, in

13.  Id.
14.  See id.
15.  See Fla. Rules of Prof’l Conduct r. 4-1.13 cmt. (2006); Restatement (Third) of Law Governing Lawyers § 96 cmt. (b).
16.  Fla. Rules of Prof’l Conduct r. 4-1.13 cmt. (2006); see also Restatement (Third) of Law Governing Lawyers § 96 cmt. (b) (Am. Law Inst. 2000).
17.  See Fla. Rules of Prof’l Conduct r. 4-1.13 cmt (2006); Restatement (Third) of Law Governing Lawyers § 96 cmt. (b).
19.  Id.; see also Restatement (Third) of Law Governing Lawyers § 96 cmt. (b).
effect, he or she does not have to answer to anyone else.22 A government Board also has a fiduciary duty to make decisions that are in the best interests of both the organization and the public.23

The Board may engage attorneys to help it carry out its duties.24 Those duties may include—but are not limited to—drafting opinion letters, ensuring compliance with regulatory agencies, advising on practical matters, or even representing the organization in litigation.25

III. ATTORNEY’S ETHICAL DUTY TO HIS CLIENT

“As an advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”26 That is all well and good, but the question that has been around since there have been rules of professional conduct is: How far does zealous advocacy go?27

One could argue that zealous advocacy ends just where an attorney’s ethical obligations begin.28 That is somewhat analogous to what philosopher Zechariah Chafee, Jr. said when he wrote, “[y]our right to swing your arms ends just where the other man’s nose begins.”29

22. See Fla. Stat. § 607.0830; Grant, 117 So. 3d at 837.
   It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect heretofore regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

Id.

   In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: . . . “(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons’ professional or expert competence.”

Id.; see also Restatement (Third) of the Law Governing Lawyers § 96(b) (Am. Law Inst. 2000).

25. See Fla. Rules of Prof’l Conduct r. 4 pmbll. (2015); Fla. Rules of Prof’l Conduct r. 4-1.2 (2006); Restatement (Third) of Law Governing Lawyers § 96(b).


27. See id.

28. Id.; see also Model Rules of Prof’l Conduct pmbll. (Am. Bar Ass’n 2014).

There comes a point when an attorney must draw a line in the sand to separate zealous advocacy from unethical behavior.30 “While counsel does have an obligation to be faithful to [his clients’] lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty of zealous representation over all other duties.”31 “We must never permit a cloak of purported zealous advocacy to conceal unethical behavior.”32 Differentiating between unethical behavior and zealous advocacy is extremely important, since some clients may want their attorneys to continually cross that line and do things that might not only be unethical, but also illegal.33 Attorneys must never forget that they are also officers of the legal system.34

Separating zealous representation from unethical behavior is not an easy task, as the American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”) points out in paragraph nine of the Preamble.35 It clearly recognizes that an attorney must balance his ethical responsibilities “while earning a satisfactory living.”36 That is critical for attorneys just starting their own practices since, by alienating clients, they risk losing fees and future referrals they desperately need to pay both office and living expenses.37

31. Visoly, 768 So. 2d at 492.
32. Buckle, 771 So. 2d at 1133.
33. See Fla. Bar v. Brown, 790 So. 2d 1081, 1088 (Fla. 2001) (per curiam);
Buckle, 771 So. 2d at 1133–34; Visoly, 768 So. 2d at 492.
34. Malauetata v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993)
(providing that an attorney has a duty to refrain from advocacy that undermines or interferes with the functioning of the judicial system).
35. MODEL RULES OF PROF’L CONDUCT pmbl. 9 (2014).
In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these [r]ules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the [r]ules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.
Id.
36. Id.
37. See id.
It is also critical for attorneys employed by a Board, since they can be discharged at any time if they fail to do what the Board wants. This is especially true for public boards, such as Boards of County Commissions, School Boards, City Councils, etc., since attorneys representing these boards are quite often employees, especially in larger governmental agencies. Therefore, they do not have practices that include other clients, which could soften the blow of losing any one client.

It is safe to assume that many attorneys have faced the problem of choosing between retaining a client and upholding their own integrity as well as the integrity of their profession. What they do could very well determine the future of their entire legal careers.

Not all duties involve the attorney-client relationship. For example, a lawyer has a duty to maintain the integrity of the legal profession by refraining from acts of fraud, deceit, or misrepresentation.

IV. BOARD ATTORNEY’S DUTY TO THE ORGANIZATION

A. Basic Duties

Pursuant to Rule 4-1.13(a) of the Florida Rules, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” When a lawyer represents an organization, he has a duty to the organization itself, not to the individual constituents. General duties are triggered, such as duties of competence, diligence, and care to the organization.  


40. *See supra* text accompanying notes 38–39.


43. *See* Fla. Rules of Prof’l Conduct r. 4-1.2 (2006).

44. *Id.* r. 4-8.4(b)–(c) (“A lawyer shall not: . . . (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .”).

45. *Fla. Rules of Prof’l Conduct r. 4-1.13(a) (2006).*


Other duties are triggered only when the attorney’s client, the organization, or an organization’s constituent has committed a criminal or fraudulent act.48

B. Duties When the Organization Commits a Criminal or Fraudulent Act

1. Duty to Disclose

According to Rule 4-4.1(b) of the Florida Rules, “[i]n the course of representing a client, a lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”49 While the rule does not define the meaning of assistance, it implies that disclosure is a form of non-assistance.50 Furthermore, “a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation.”51

“In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.”52 “If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under [4-4.1(b), the lawyer is required to do so, unless the disclosure is prohibited by Rule 4-1.6.”53

48. Fla. Rules of Prof’l Conduct r. 4-4.1(b) (2006); see also Fla. Rules of Prof’l Conduct r. 4-1.16(a)(4) (2006); Fla. Rules of Prof’l Conduct r. 4-8.4(a), (c) (2010).

49. Fla. Rules of Prof’l Conduct r. 4-4.1(b) (2006); see also Fla. Rules of Prof’l Conduct r. 4-1.6(b)(1)–(2) (2015) (“A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary: to prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another.”).

50. Fla. Rules of Prof’l Conduct r. 4-4.1 cmt. (2006).

51. Id. [A] lawyer . . . shall withdraw from the representation of a client if . . . the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to discontinue and rectify the crime or fraud; or the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to discontinue and rectify the crime or fraud.

Fla. Rules of Prof’l Conduct r. 4-1.16(a)(4)-(5) (2006); see also Fla. Rules of Prof’l Conduct r. 4-1.16(a)(1) (2006) (“Except as stated in subdivision (c), a lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or law. . . .”) (emphasis added).

52. Fla. Rules of Prof’l Conduct r. 4-4.1 cmt. (2006).

53. Id. r. 4-4.1(b); see also Fla. Rules of Prof’l Conduct r. 4-1.6 (2006)
2. Duty to Withdraw

When a client crosses the line into a criminal or fraudulent act, and refuses to disclose and remedy the act, the Florida Rules states that an attorney may be required to withdraw.\textsuperscript{54} There are two separate scenarios that mandate withdrawal.\textsuperscript{55}

In the first scenario, the client persists in his course of action, which involves the lawyer’s services, and the lawyer reasonably believes\textsuperscript{56} that the action is criminal or fraudulent.\textsuperscript{57}

In the second scenario, the client has used the lawyer’s services to commit a crime or fraud.\textsuperscript{58} Notably, the Florida Rules do not include any reference to a lawyer’s belief as to whether or not the client’s act is criminal or fraudulent.\textsuperscript{59} It is also different from the first scenario in that the client’s act is in the past—\textit{has used}.\textsuperscript{60} Unfortunately, what constitutes a lawyer’s services is not defined in either scenario.\textsuperscript{61}

Even when a client is not committing or has not committed a criminal or fraudulent act, an attorney may still be required to withdraw if his representation of the client will result in violation of the law or the Florida Rules.\textsuperscript{62}

3. Duty Not to Assist

When a lawyer knows that a client is committing an act that is criminal or fraudulent, he is mandated \textit{not to assist} his client in the conduct.\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{54} \textit{Fla. Rules of Prof’l Conduct} r. 4-1.16(a)(4) (2006).
  \item \textsuperscript{55} \textit{Id.} at (a)(4)–(5) (2006).
  \item \textsuperscript{56} \textit{Fla. Rules of Prof’l Conduct} r. 4 pmbl. (2015) (“Reasonable belief or reasonably believes . . . denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”) (emphasis added).
  \item \textsuperscript{57} \textit{Fla. Rules of Prof’l Conduct} r. 4-1.16(a)(4) (2006); \textit{Fla. Rules of Prof’l Conduct} r. 4 pmbl. (2015) (“Fraud or fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”) (emphasis added); \textit{Fla. Rules of Prof’l Conduct} r. 4 pmbl. cmt. (2015) (“For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.”).
  \item \textsuperscript{58} \textit{Fla. Rules of Prof’l Conduct} r. 4-1.16(a)(5) (2006).
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{Id.}
  \item \textsuperscript{61} \textit{Id.} 4-1.16(a)(4)-(5) (2006); see also \textit{Fla. Rules of Prof’l Conduct} r. 4 pmbl. (2015).
  \item \textsuperscript{62} \textit{Fla. Rules of Prof’l Conduct} r. 4-1.16(a)(1) (2006) (“Except as stated in subdivision (c), a lawyer . . . shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or law . . .”).
  \item \textsuperscript{63} \textit{Fla. Rules of Prof’l Conduct} r. 4-1.2(d) (2006). “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably
In order to understand the definition of *not to assist*, it must be determined what *to assist* means. In *Florida Bar v. Brown*, the lawyer represented an organizational client. One member of the organization’s Board concocted a scheme to donate a large amount of money to a political campaign. He requested that the lawyer ask his employees at the law firm to donate $500 to a political campaign, with the understanding that he would reimburse the lawyer and his employees at a later date through the lawyer’s *premium billing* of the organization. The lawyer and his family also donated $500. The constituent’s scheme violated section 106.08 of the Florida Statutes, “which limits [campaign] contributions to . . . $500 per person and provides criminal penalties for [anyone who contributes] in excess of that amount.”

“The Bar charged Brown with violating eleven provisions of the Rules Regulating the Florida Bar.”

[T]he referee recommended that Brown be found guilty of violating [R]ule 4-1.2(d)—lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, [R]ule 4-8.4(a)—lawyer shall not violate or attempt to violate the rules of professional conduct, or do so through the acts of another—[R]ule 4-8.4(c)—lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

. . . The referee [then] recommended that Brown receive a public reprimand from the Board of Governors and be placed on probation for six months, with the conditions that Brown complete eight hours of continuing legal education and refrain from supervising other attorneys at his firm during the probationary period. [The Bar petitioned] for review, seeking review of several should know is *criminal or fraudulent.*” *Id.* (emphasis added). “A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers *is criminal or fraudulent*. The lawyer must, therefore, withdraw from the representation of the client in the matter.” *Id.* at r. 4-1.2 cmt. (emphasis added). “In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.” *Id.* “The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.” *Id.*
of the referee’s factual findings and recommendations as to guilt, as well as the recommended sanction.\textsuperscript{72}

The Florida Bar contended that Brown was in violation of “[R]ule 4-8.4(b)—lawyer shall not commit criminal act which reflects adversely on lawyer’s honesty, trustworthiness, or fitness,”\textsuperscript{73} “[R]ule 4-1.1—lawyer shall provide competent representation—for failing to realize the fraudulent nature of the reimbursement scheme,” \textsuperscript{74} and “[R]ule 4-1.13(b)—corporation’s lawyer to proceed in best interests of corporation when lawyer knows that officer is engaged in illegal conduct—for failing to report . . . illegal activity to a higher authority.”\textsuperscript{75}

The court approved the referee’s findings of fact as to guilt.\textsuperscript{76} The court stated that, “[b]y failing to question the legality of [his client’s] request, Brown assisted his client in conduct that Brown should have known was criminal or fraudulent.”\textsuperscript{77} However, the court modified the discipline and suspended Brown from the practice of law for ninety days.\textsuperscript{78}

In essence, the court interpreted assisting as a failure to act.\textsuperscript{79} In this case, it was the failure to question the nature of the client’s conduct.\textsuperscript{80} It is not an option for an attorney to do nothing when his client commits a criminal or fraudulent act.\textsuperscript{81} He must do something, whether it means dissuading his client from the act,\textsuperscript{82} disclosing the act,\textsuperscript{83} or disengaging.\textsuperscript{84}

\textsuperscript{72} Id. at 1084; see also Fla. Rules of Prof’l Conduct r. 4-1.2(d) (2006); Fla. Rules of Prof’l Conduct r. 4-8.4(a)(c) (2010).
\textsuperscript{73} Brown, 790 So. 2d at 1084; see also Fla. Rules of Prof’l Conduct r. 4-8.4(b) (2010).
\textsuperscript{74} Brown, 790 So. 2d at 1086; see also Fla. Rules of Prof’l Conduct r. 4-1.1 (2006).
\textsuperscript{75} Id.; see also Fla. Rules of Prof’l Conduct r. 4-1.13(b) (2006).
\textsuperscript{76} Brown, 790 So. 2d at 1087.
\textsuperscript{77} Id. at 1088.
\textsuperscript{78} Id. at 1089.
\textsuperscript{79} See id. at 1088.
\textsuperscript{80} Id. at 1087.
\textsuperscript{81} Brown, 790 So. 2d at 1088.
\textsuperscript{82} Fla. Rules of Prof’l Conduct r. 4-1.2, cmt (2006) (“In some cases . . . it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.”).
\textsuperscript{83} Fla. Rules of Prof’l Conduct r. 4-1.6(b)(1)-(2) (2015) (“A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary: (t)o prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another.”); Fla. Rules of Prof’l Conduct r. 4-1.1(a)-(b) (2006) (“In the course of representing a client a lawyer shall not knowingly: . . . [f]ail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . .”).
\textsuperscript{84} Fla. Rules of Prof’l Conduct r. 4-1.16(a)(4)-(5) (2006).
Do the rules change for attorneys when a constituent, as opposed to a client, commits a criminal or fraudulent act? The answer depends on who is making that determination, the Florida Bar or the court.

C. Duties When a Constituent Commits a Criminal or Fraudulent Act

A lawyer’s duties are different when a constituent commits a criminal or fraudulent act. Basically, a lawyer has a duty to proceed in the interests of the organization. Since proceed is not defined, it is unclear what it means. The fact that it is not defined may be intentional, so as to allow flexibility on the part of the Florida Bar as it determines the facts on a case by case basis.

To emphasize, Rule 4-1.13(b) of the Florida Rules revolves around a lawyer’s knowledge of the constituent’s violation, nature of the violation,

[A] lawyer . . . shall withdraw from the representation of a client if: . . . [t]he client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or . . . the client has used the lawyer’s services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

Id. (emphasis added). “Except as stated in subdivision (c), a lawyer . . . shall withdraw from the representation of a client if: . . . [t]he representation will result in violation of the Rules of Professional Conduct or law.” Id. at r. 4-1.16(a)(1) (emphasis added). “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.” Fla. Rules of Prof’l Conduct r. 4-1.2(d) (2006) (emphasis added). “A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.” Id. at r. 4-1.2 cmt (emphasis added). “In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.” Id. (citing Fla. Rules of Prof’l Conduct r. 4-1.1 (2006)). “The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.” Id.

85. See Fla. Rules of Prof’l Conduct r. 4-1.13(b) (2006).
87. See Fla. Rules of Prof’l Conduct r. 4-1.13 (2006).
88. Id. A lawyer has a duty to proceed in the “best interest of the organization” when he knows that [a constituent] is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization.

Id.

89. See id.
90. See id.
and the result of the violation. The obvious question is, therefore, what is knowledge?2

The preamble to Rule 4 of the Florida Rules states, “[k]nowingly, known, or knows denotes actual knowledge of the fact in question.”3 “A person’s knowledge may be inferred from circumstances.”4 The ABA Model Rules has a similar provision.5 Unfortunately, however, there are no comments in either the Florida Rules or the ABA Model Rules that define knowingly, known, or knows.6

Professor George M. Cohen suggests that lawyers’ ethical knowledge is less than stellar.7

The state of lawyers’ ethical knowledge is poor. By that, I mean that the [ABA Model Rules] and the authorities interpreting it do a poor job of defining knowledge; of explaining or justifying the use of the knowledge standard in the rules; and of relating the knowledge requirement to, and reconciling it with, other ethical and legal requirements. As a result, many lawyers have less knowledge of their ethical and legal obligations than they ought to have. Moreover, lawyers who understand the knowledge problem, such as drafters of ethics codes, are apparently unwilling to do anything about it. The reason is that lawyers often view the knowledge standard as an important means of limiting lawyer responsibility.8

Cohen poses three questions and states that the ABA Model Rules should be revised to answer the questions, providing better guidance to lawyers.9

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91. See Fla. Rules of Prof’l Conduct r. 4-1.13(b) (2006).
92. See id.
94. Id.
95. See Model Rules of Prof’l Conduct r. 1.0(f) (Am. Bar Ass’n 2014). “Knowingly, known, or knows denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Id. (emphasis added).
96. Id.; Fla. Rules of Prof’l Conduct r. 4 pmlbl. (2015). “The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative.” Fla. Rules of Prof’l Conduct r. 4 pmlbl. (2015).
98. Id. at 115–16.
99. Id. at 117–18.

First, does the knowledge standard include recklessness or willful blindness, which lies between know and reasonably should know? Second, how does the knowledge standard apply if a lawyer otherwise has a legal or ethical duty to inquire and fails to satisfy it? Third, how does the knowledge requirement interact with rules of imputation?
Cohen states that \textit{recklessness} should be incorporated into the definition of knowledge in the ABA Model Rules, or at least incorporate this “standard whenever a duty to inquire or a duty to communicate otherwise exists under the rules or other law.”\textsuperscript{100}

Cohen believes that a “deliberate breach of an otherwise existing duty to inquire” is “one way to show recklessness or willful blindness.”\textsuperscript{101} According to one author, “[t]he ordinary meaning of the word [recklessness] is a high degree of carelessness. It is the doing of something, which, in fact, involves a grave risk to others, whether the doer realizes it or not. The test is therefore objective and not subjective.”\textsuperscript{102}

Cohen also emphasizes that an attorney has a duty to communicate, and that is the basis for imputation,\textsuperscript{103} which is defined as “[t]he act or an instance of imputing something, [especially] fault or crime, to a person; an accusation or charge.”\textsuperscript{104} The doctrine of imputed knowledge is defined as:

The rule that a principal is deemed to know facts known to his or her agent if they are within the scope of the agent’s duties to the principal, unless the agent has acted adversely to the principal. The doctrine serves as a bridge for the applicability of defenses that a third party may assert against a principal in which knowledge is a necessary element, including \textit{in pari delicto}.\textsuperscript{105}

It is worth noting that imputing knowledge to another is not a new concept, since it is well established in agency law.\textsuperscript{106} Cohen continues by stating:

The imputed knowledge doctrine can apply to lawyers in several ways. First, lawyers are agents of their clients and so clients are bound by what their lawyers know. Second, lawyers practicing in firms are agents of those firms, and so a lawyer’s knowledge may be imputed to the lawyer’s firm.\textsuperscript{107}

With regard to imputation, it is important to note at this point that when an organization’s constituent commits a criminal or fraudulent act, the

\textsuperscript{100} \textit{Id.} at 117 (emphasis added).

\textsuperscript{101} Id. at 118.

\textsuperscript{102} Cohen, \textit{supra} note 97, at 118.

\textsuperscript{103} R.F.V. HEUSTON, SALMON ON THE LAW OF TORTS, 194 (17th ed. 1977).

\textsuperscript{104} Cohen, \textit{supra} note 97, at 118.

\textsuperscript{105} \textit{Imputation}, BLACK’S LAW DICTIONARY (10th ed. 2014).

\textsuperscript{106} \textit{Doctrine of Imputed Knowledge}, BLACK’S LAW DICTIONARY (10th ed. 2014).

\textsuperscript{107} RESTATEMENT (THIRD) OF AGENCY § 5.03 (AM. LAW INST. 2005).

\textsuperscript{108} Cohen, \textit{supra} note 97, at 139.
Florida Rules do not mandate that an attorney is required to disclose, discover, or disengage. However, in civil cases that involve constituents who commit criminal or fraudulent acts, the courts have not been as lenient as the Florida Rules. Unlike the Florida Rules, courts have held that an attorney has a duty to discover, disclose, and disengage.

In Brown, the Florida Bar requested that the court find that the attorney failed to disclose the constituent’s act to a higher authority. However, the court declined by stating that the attorney was not mandated, according to the Florida Rules, to disclose or withdraw when a constituent committed an illegal act. The rules state that the attorney “may refer the matter to a higher authority.”

As previously stated, the court in Brown agreed with the referee’s finding that the attorney violated Florida Rules 4-1.2(d), 4-8.4(c), and 4-8.4(a). Interestingly, although it was the constituent who committed the wrong, not the organization, the court charged the attorney with violation of the duty not to assist, which applies only when a lawyer assists a client who commits a fraudulent or criminal act, not a constituent.

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110. See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. at 1453 (holding that attorneys have a duty to disengage when a constituent commits fraud); Felts, 469 F. Supp. at 67.

The duty of the lawyer includes the obligation to exercise due diligence, including a reasonable inquiry, in connection with responsibilities he has voluntarily undertaken . . . . He must make a reasonable, independent investigation to detect and correct false or misleading materials. Moreover, the greater the relationship and duty to the purchaser of securities, the higher the standard of care for investigation and disclosure.

Felts, 469 F. Supp. at 67 (citations omitted).
111. Brown, 790 So. 2d at 1086.
112. Id.; see also Fla. RULES OF PROF’L CONDUCT r. 4-1.13(b) (2006).
113. Fla. RULES OF PROF’L CONDUCT r. 4-1.13(b) (2006).
114. Brown, 790 So. 2d at 1086; Fla. RULES OF PROF’L CONDUCT r. 4-1.13(b) (2006).
115. Brown, 790 So. 2d at 1088; see also Fla. RULES OF PROF’L CONDUCT r. 4-1.2(d) (2006); Fla. RULES OF PROF’L CONDUCT r. 4-8.4(a), (c) (2010).
116. Id. at 1083–84, 1088; Fla. RULES OF PROF’L CONDUCT r. 4-1.2(d) (2006). “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.” Id. (emphasis added). “A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.” Id. at r. 4-1.2 cmt. (emphasis added).
The court in Brown appears to have intentionally and implicitly imputed the constituent’s act to the organization. Imputation dictates that the organization—the client—be treated as if it had committed the acts of fraud and crime itself. As a result, the court should have ruled that the attorney had a duty to disclose and withdraw, which is triggered when a client commits a fraudulent or criminal act.

In civil cases, the courts have adopted a standard to determine whether to impute a constituent’s act to the organization. In general, when a constituent has committed fraud on behalf of the organization, it will be imputed to the organization. On the other hand, if a constituent has committed fraud against the organization, it will not be imputed. Did the court in Brown adopt this standard as well? Whether or not the court incorrectly imputed the constituent’s act to the organization, its decision in Brown established precedent.

When deciding how to discipline an attorney who represents an organization, the court has shown that, in a disciplinary case, it has the authority to impute the constituent’s act to the organization and, therefore, subject the attorney to rules that involve the acts of a client. Under these rules, disclosure and disengagement are not merely presented as suggestions.

Once a lawyer determines that he must proceed in the best interests of the organization, he must determine how to proceed. While it is not specifically defined how he should proceed, as discussed below, the duty to proceed can be broken down into three remedial measures—discovery,
disclosure, and disengagement. When a lawyer utilizes these measures, he protects the organization and, thereby, fulfills his fiduciary duty. Consequently, he protects himself from potential civil liability and disciplinary action. To be clear, a lawyer is not required to adopt any or all of the three remedial measures. It is his choice. But precedent shows that if he does, he is more likely to protect the organization and himself from both civil and criminal liability.

A lawyer may fulfill his duty to proceed in the best interests of the organization with the adoption of just one remedial measure, or he may adopt more. For example, if a boat is sinking because of a hole, a person may patch the hole, which may prevent the boat from sinking. But he may also empty water out of the boat, wear a life preserver, and call for help. It depends on the situation. Finally, a lawyer may utilize the remedial measures in the order that he deems best.

V. DISCOVERY

The first remedial measure, discovery, applies when a lawyer suspects that a constituent is committing a wrongful act. A lawyer should investigate, question the wrongdoer, and educate himself on the applicable laws. When a lawyer sees red flags, he should investigate a constituent’s suspicious activity. A lawyer may claim that he did not have knowledge

128. See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. at 1453; Brown, 790 So. 2d at 1086; Fla. Rules of Prof’l Conduct r. 4-1.16 (2006).
129. See Brown, 790 So. 2d at 1086.
131. See Brown, 790 So. 2d at 1086; Fla. Rules of Prof’l Conduct, r. 4-1.16 (2006); Restatement (Third) of Law Governing Lawyers § 96 (Am. Law Inst. 2000).
132. See Brown, 790 So. 2d at 1086; Fla. Rules of Prof’l Conduct r. 4-1.13, 4-1.16 (2006); Restatement (Third) of Law Governing Lawyers § 96.
133. See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1453, 1457 (D. Ariz. 1992) (holding that attorneys have a duty to disengage when a constituent commits fraud); Brown, 790 So. 2d at 1084, 87–88 (holding that a lawyer had a duty to discover a constituent’s fraud).
134. See Brown, 790 So. 2d at 1086.
135. See id.; Fla. Rules of Prof’l Conduct r. 4-1.13(b) (2006); Restatement (Third) of the Law Governing Lawyers § 96.
136. See Brown, 790 So. 2d at 1088; Fla. Rules of Prof’l Conduct r. 4-1.2(d) (2006).
137. See Brown, 790 So. 2d at 1088.
138. FDIC v. Clark, 978 F.2d 1541, 1549 (10th Cir. 1992); Cenclo, Inc. v. Seidman & Seidman, 686 F.2d 449, 451 (7th Cir. 1982) (auditors failed to discover fraud); In re Cauthen, 229 S.E.2d 340, 344 (S.C. 1976) (per curiam) (finding that the lawyer should have known that the client was committing fraud).
of suspicious activity, but “knowledge may be inferred from the circumstances.”

A lawyer may also claim that he was unaware at the time that he was violating any of the Rules of Professional Conduct. However, a lawyer has a duty to know the rules. “[W]e find no merit in [a] claim that ignorance of the Rules of Professional Conduct excuses [a] violation.” “It is every lawyer’s professional obligation to be aware of and be familiar with the Rules of Professional Conduct . . . .” “We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct.” “We would be remiss at this point if also we did not reject out of hand the Board’s curious suggestion that Respondent’s ignorance of professional rules constitutes an excuse for his conduct.”

Similarly, in In re Lewis, the court noted: “Just as an accused cannot use ignorance of the law as a defense, so too an attorney cannot rely on ignorance of the [R]ules of [P]rofessional [C]onduct as an excuse.”

In addition, a lawyer may claim that he was not aware that he was violating any laws. That defense does not pass muster. The lawyer in Brown testified that he was not familiar with the campaign laws. Therefore, he did not know that the constituent was committing fraud. However, the court concluded that the nature of the scheme “should have caused [the attorney] to question the legality of the scheme.” Noting the lawyer’s substantial experience in the practice of law, the court held that the red flags triggered the lawyer’s duty to discover a constituent’s fraud by questioning the act.

139. Fla. Rules of Prof’l Conduct r. 4 pmbl. (2015) (“Knowingly, known, or knows [means] actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”).
142. Ainsworth, 762 P.2d at 439; La. State Bar Ass’n v. Thalheim, 504 So. 2d 822, 826 (La. 1987) (“Ignorance of the Disciplinary Rules which set forth the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action is no excuse.”).
144. Whelan, 619 A.2d at 573.
146. 562 N.E.2d 198 (Ill. 1990).
147. Id. at 213.
149. Id. at 1087.
150. Id. at 1085.
151. Id. at 1086.
152. Id. at 1087.
153. Brown, 790 So. 2d at 1087.
The court in Brown noted that the lawyer had failed to question the constituent’s scheme, “blindly acquiesce[ed] to his client’s wishes without fully considering the consequences and impact of such actions,” failed to “fully consider the . . . legality of [the constituent’s] request,” and “should have known that the scheme was potentially fraudulent as well as illegal.” Consequently, since he did not investigate the legality of the constituent’s act, the lawyer was found to have assisted his client in the criminal act.

Common sense dictates that when a lawyer sees smoke, he has a duty to discover the source of it. If he does not, the organization may get burned through significant financial loss, and the lawyer may get burned through disciplinary action or a civil lawsuit.

VI. Disclosure

The second remedial measure, disclosure, may be accomplished through reporting the constituent’s act to a higher authority, which is normally “the [Board] or similar governing body.”

There are few disciplinary cases that address the issue of an attorney’s duty to disclose to a higher authority when a constituent commits a wrongful act. In Brown, the court concluded that the respondent attorney did not have a duty to disclose the constituent’s criminal and fraudulent act to a higher authority in the organization. The issue of disclosure to a higher authority has been addressed more frequently in civil liability cases where an attorney has been sued for the acts of a wrongdoing constituent.

If the higher authority does not respond, the lawyer may consider reporting to the highest authority, which may include “the independent directors of a corporation” or elsewhere. In some situations involving representation of a government organization, it has been suggested that the

154. Id. at 1087–88.
155. Id. at 1088 (“By failing to consider the legality of [the constituent’s] request, [the lawyer] assisted his client in conduct that [he] should have known was criminal or fraudulent . . .”).
156. See id. at 1088.
157. Id. at 1089.
158. See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. at 1453 (where plaintiffs sued attorneys for breach of fiduciary duty and the court upheld the claim because the attorneys had a duty to discover the constituent’s fraud).
161. Brown, 790 So. 2d at 1086.
162. See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. at 1453.
public may be the highest authority. But what if the wrongdoers are the highest authority? Should a lawyer disclose the wrongdoing to parties outside of the organization? In some cases, where creditors, shareholders, federal regulators, or investors are involved, a lawyer may be permitted to disclose to them in order to mitigate damages.

In SEC v. National Student Marketing, Corp., the law firm had represented an organization in a merger with another organization. During its representation of the organization, the law firm discovered that the constituents had deceitfully misrepresented that the organization had a net-profit in order to obtain shareholders’ and investors’ approval of the merger. Despite the constituents’ obvious fraud, the law firm assisted with the closing of the merger. The court held that the law firm aided and abetted the constituents’ violation of securities law through its failure to disclose the fraud to the shareholders or SEC.

Restatement (Third) of Law Governing Lawyers section 96 declines to answer whether a lawyer should disclose a constituent’s wrongful act to third parties, stating “[w]hether disclosure [to parties outside of the organization] is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position.” Clearly, the Restatement views disclosure outside the organization’s walls as an inherently risky endeavor.

Of the three remedial measures, disclosure is the remedial measure with the greatest potential for harm to the organization. In other words, there is such a thing as overcorrection, and the risk with disclosure is

165. See Cohen, supra note 97, at 134 n.83.
166. See id.
169. Id. at 700.
170. Id.
171. See id. at 713–15.
172. Id. at 714–15.
174. See id.
175. See Fla. Rules of Prof’l Conduct r. 4-1.13 (2006); Restatement (Third) of The Law Governing Lawyers § 96.
significant.  

The third remedial measure, disengagement, does not present the difficult issues involved with disclosure.  

VII. DISENGAGEMENT

The third remedial measure, disengagement, may take various forms such as withdrawal, disaffirmation of any opinion, document, or affirmation that may have been used to further the wrongful act, counseling the constituent to obtain a second legal opinion, or asking him to reconsider his actions.  

If a lawyer withdraws, he may include a notice of the withdrawal.  

This is referred to as a noisy withdrawal, and it serves to alert others that a constituent may have committed a wrong.  

It may be analogized to a trial lawyer who moves to withdraw the moment that his client commits perjury on the stand.  

In In re American Continental Corp./Lincoln Savings and Loan Securities Litigation, the defendants included a corporation, its subsidiary, lawyers who represented the corporation and subsidiary, and accountants who audited the corporation, among others.  

Plaintiffs included people who purchased securities stock or debentures of the corporation, as well as a receiver of the corporation and its subsidiary.  

While the majority of purchasing plaintiffs purchased their stock through a savings and loan company, which was a subsidiary of the corporation, others purchased stock through brokers.  

The receiver and the shareholders sued the organization’s lawyers for breach of fiduciary duty to the organization and professional negligence.  

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176. See Fla. Rules of Prof’l Conduct r. 4-1.13 (2006); Restatement (Third) of the Law Governing Lawyers § 96.

177. See Fla. Rules of Prof’l Conduct r. 4-1.6 (2015); Fla. Rules of Prof’l Conduct r. 4-1.13 (2016).

178. See Fla. Rules of Prof’l Conduct r. 4-1.13 (2006); Fla. Rules of Prof’l Conduct r. 4-1.16 (2006); Restatement (Third) of the Law Governing Lawyer § 96.

179. Fla. Rules of Prof’l Conduct r. 4-1.16(d) (2006).


181. Id.


183. Id. at 1432.

184. Id.

185. Id.

186. Id. Furthermore, the receiver plaintiff sued a second law firm for “breach of fiduciary duty, negligent misrepresentation, negligence per se, breach of contract, [and] aiding and abetting breach of fiduciary duty.” In re Am. Cont’l Corp./Lincoln Sav. & Loan...
The court opined that “[a]n attorney who represents a corporation has a duty to act in the corporation’s best interest[s] when confronted by adverse interests of directors, officers, or corporate affiliates.”\textsuperscript{187} It further noted that the law firm had a duty to “urge cessation of the [constituents’] activity and withdraw from representation [when] the firm’s legal services may contribute to the continuation of [a constituent’s violative] conduct.”\textsuperscript{188}

When the law firm argued that the use of remedial measures would have been pointless because the constituents, who controlled the corporation and its subsidiary, would not have listened, the court disagreed, stating “[c]lient wrongdoing . . . cannot negate an attorney’s fiduciary duty.”\textsuperscript{189} Thus, the court permitted the plaintiffs to proceed with their breach of fiduciary claim against the lawyers.\textsuperscript{190}

A lawyer’s silence, or his failure to counsel a constituent when he has committed a criminal or fraudulent act, may be interpreted as assisting the constituent in his criminal or fraudulent act.\textsuperscript{191} The Restatement (Third) of Law Governing Lawyers section 96 states that “[t]he lawyer thus must not knowingly or negligently assist any constituent to breach a legal duty to the organization.”\textsuperscript{192}

Lawyers are not always required to withdraw when a client commits a wrong, but it is better to be safe than sorry.\textsuperscript{193} Withdrawal is not only a wise move to protect the organization, but it protects the lawyer as well from “criminal, civil, or disciplinary sanctions.”\textsuperscript{194}

VIII. CONCLUSION

When in doubt, a lawyer can ensure that he fulfills his duty to proceed in the best interests of his organizational client through adoption of the three remedial measures—discovery, disclosure, and disengagement.\textsuperscript{195} While a lawyer is not required to utilize these measures, case law shows that

\textit{Sec. Litig.}, 794 F. Supp. at 1455. However, the court determined that the subsidiary was the one who was damaged, so the receiver’s claims were deemed invalid. \textit{Id.}

\textsuperscript{187} \textit{Id.} at 1453.

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.}, 794 F. Supp. at 1453.

\textsuperscript{191} Fla. Bar v. Brown, 790 So. 2d 1081, 1086 (Fla. 2001) (per curiam).

\textsuperscript{192} \textit{Restatement (Third) of Law Governing Lawyers} § 96 cmt. a (AM. LAW INST. 2000).

\textsuperscript{193} \textit{Restatement (Third) of Law Governing Lawyers} § 32(3) (AM. LAW INST. 2000).

\textsuperscript{194} \textit{Id.} at cmt. f.

\textsuperscript{195} \textit{Restatement (Third) of Law Governing Lawyers} § 96 cmt. f.
if he does, he is not only more likely to protect his organizational client, but he lessens the possibility of facing disciplinary action or a civil lawsuit.  

196. *Id.; Restatement (Third) of Law Governing Lawyers § 32 cmt. f.*
SECOND-ORDER LOGROLLING: THE IMPACT OF DIRECT LEGISLATIVE AMENDMENTS TO STATE CONSTITUTIONS

BY JON M. PHILIPSON*

I. INTRODUCTION ........................................................................................................... 23
II. FUNDAMENTAL DISTINCTIONS BETWEEN LEGISLATION AND CONSTITUTIONS ........................................................................................................... 25
III. PROCEDURES TO AMEND THE FLORIDA CONSTITUTION ........................................ 28
A. The Revision Commission .................................................................................... 29
B. The Ballot Initiative Process .................................................................................. 33
C. Amendments Proposed by the Legislature ............................................................ 38
D. Constitutional Convention ....................................................................................... 39
E. Taxation and Budget Reform Commission ............................................................... 39
IV. DELAWARE’S LEGISLATIVE-BASED AMENDMENT PROCESS .................................. 40
V. COULD DELAWARE’S LEGISLATIVE AMENDMENT PROCESS BE IMPLEMENTED IN FLORIDA? ................................................................. 43
A. Delaware vs. Florida .............................................................................................. 44
B. Incumbency Effect and Its Interplay with Second-Order Logrolling ................. 45
C. Barriers to Information .......................................................................................... 47
D. Lack of Constitutional Check and Balance ............................................................ 48
E. Positive Law ............................................................................................................ 50
VI. CONCLUSION ........................................................................................................... 52

I. INTRODUCTION

The year 2018 marks the modern Florida Constitution’s golden anniversary—a time of celebration and possible consternation. In the spring of 2017, Florida, for the third time, will convene a Constitutional Revision Commission (“Revision Commission”) to examine the constitution and propose revisions to the document.1 The Revision Commission, composed

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The opinions and views expressed in this Article do not necessarily reflect those of the Author’s employer, and are the Author’s alone.

1. FLA. CONST. art. XI, § 2.
of thirty-seven Floridians, will spend two years analyzing the Florida Constitution. With this power comes great responsibility. The Revision Commission embodies a unique aspect of state constitutional law, as Florida is the only state with a constitutionally created commission that has the authority to place amendments directly before the citizens for adoption.²

As the day approaches, scholars and politicos have begun floating possible amendments to consider. One proposal would fundamentally transmogrify the Florida Constitution’s preamble from “[w]e, the people of the State of Florida” to “we, the Legislature of the State of Florida” and render the constitution nothing more than a souped-up statute.³ Such an amendment would invert James Madison’s fundamental constitutional principle that “the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty and a Constitution.”⁴

The proposed amendment would adopt the Delaware Constitution’s provision, which allows any member of the Delaware General Assembly to propose a constitutional amendment. If each house of the Delaware General Assembly adopts the amendment by two-thirds, then the Secretary of State will publish the amendment in various newspapers prior to the next general election. If the Delaware General Assembly, elected after that posting, passes the amendment again by two-thirds, the amendment automatically becomes part of the Delaware Constitution.⁵ In short, the Delaware Constitution may be amended without any direct vote by its citizens.

Why should Florida adopt this proposal? One, it is consistent with America’s republican form of indirect democracy. Two, it allows for more constitutional amendments to arise out of fulsome debate on the floor of a legislature. Three, it arguably counteracts the Florida ballot initiative

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3. FLA. CONST. pmbl.
5. The provision specifically provides:
   Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published; and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yea and nay vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.

DEL. CONST. art. XVI, § 1.
process that has cluttered the Florida Constitution with provisions, such as the confinement of pigs, marine net fishing, and high speed rail.

Yet, despite being consistent with republican principles, this remedy is “worse than the disease.” As this Article explains, the application of the proposed amendment in Florida would lead to: (1) second-order logrolling and a rider effect due to Florida’s size and the incumbency effect, (2) an end-around to Florida’s fundamental constitutional principles by removing a limitation on the power of the Florida Legislature, and (3) a positive-law based constitution subject to political whims.

II. FUNDAMENTAL DISTINCTIONS BETWEEN LEGISLATION AND CONSTITUTIONS

The structure of America’s polity is, has, and always will be wobbling atop a maelstrom of political emotions of factions counteracting factions, as we live in James Madison’s America. As Madison envisioned: “Ambition must be made to counteract ambition. . . . [For] [i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” Madison conjured this remedy because then, just as now:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

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6. FLA. CONST. art. X, § 21. Although cruelty of animals is an important issue deserving much attention and recourse, it arguably is more appropriately addressed in legislation rather than in a constitution. See infra Part III.
7. FLA. CONST. art. X, § 16.
8. Id. § 19.
11. THE FEDERALIST No. 51, supra note 9, at 319 (James Madison).
12. THE FEDERALIST No. 10, supra note 9, at 72 (James Madison).
Although legislatures can serve as the great laboratories for innovative, progressive, and illuminating discussions, these same bodies are composed of insatiable factions engulfed in impulses and passions,\(^{13}\) which can generate septic discussion focused on passing societal trends that appear provincial when later viewed through the lens of history.

That is why in the eye of every storm, there lay calm waters. In America and every state, those calm waters are constitutions. A constitution provides a stabilizing force during chaotic societal discussions. As a community’s mores evolve, the constitution steadies. By its Janus nature, it allocates power to various governmental entities while simultaneously limiting their power.\(^ {14}\) Because power originates from the people,\(^ {15}\) the constitution is a doctrine of limitation rather than positive law; it is more sacrosanct than legislative acts.

As former Florida Supreme Court Justice Parker Lee McDonald explicated:

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society’s consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.\(^ {16}\)

However, state constitutions, in comparison to the Federal Constitution, are on average almost five times longer, due, in part, to the frequency with which they are amended.\(^ {17}\) In fact, state constitutions are

\(^{13}\) See id. at 77.


\(^{15}\) FLA. CONST. art. I, § 1.


To use the Constitution for prescriptions of policy is to shackle future generations that should have the same right as ours to enact policies of their own. To use the Constitution as a forum for even our most favored views strikes a blow of uncommon harshness upon disfavored groups, in this case gay citizens who would never see this country’s founding charter as their own.


amended nine times more often than the Federal Constitution.\textsuperscript{18} Possible causes for such revisions are: (1) evolving political norms, (2) adaptation to modern society, and (3) less laborious amendment processes.\textsuperscript{19} As a result, state constitutions are beset by political campaigns for initiatives and proposed amendments rivaling those campaigns of political candidates.\textsuperscript{20} As constitutions have begun to devolve into “political documents,”\textsuperscript{21} the political changes at the state level may occur through constitutional revisions and amendments rather than through legislative acts.\textsuperscript{22}

From 2000 to 2012, states witnessed an increase in court-constraining amendments relating to social and economic issues—such as same sex-marriage, tort reform, and abortion—rather than amendments targeting criminal procedure and death penalty rulings, which were prevalent in past periods.\textsuperscript{23} This reflects a paradigmatic shift from treating constitutions as staunch documents of invariable principles to unhinged governing documents subject to social and economic whims.

Although distending a constitution with positive law creates a constitutional crisis and an unwieldy limitless document, constitutions are still not so sanctified as to be beyond revision.\textsuperscript{24} As William Saulsbury stated at the Delaware Constitutional Convention of 1897, “I do not believe in making a Constitution and [locking] it up and throwing the key away, but I do not believe in encouraging a constant uncertainty, conniving of all sorts, or continual agitation for changes.”\textsuperscript{25} Sharing Saulsbury’s sentiment, the drafters of Florida’s 1968 Constitution provided various manners by which to amend the Florida Constitution.

\textsuperscript{18} Id. For example, Alabama’s Constitution, which dates to 1901, is eighty times the length of the Constitution, and of its 376,000 words, 90\% of it is made up of amendments. Jennie Drage Bowser, \textit{Constitutions: Amend with Care}, ST. LEGISLATURES, Sept. 2015, at 14, 17.
\textsuperscript{19} Cauthen, \textit{supra} note 17, at 2150.
\textsuperscript{20} See \textit{id.} at 2155.
\textsuperscript{21} Id. (emphasis added).
\textsuperscript{23} Id. at 2108–09, 2113.
\textsuperscript{24} See D’ALEMBERTE, \textit{supra} note 2, at 19 (“Given the willingness of the legislature to propose amendments, the availability of the initiative process to the citizenry, and the frequent review by appointed commissions, it is clear that this history of the Florida Constitution will continue to be written in virtually every election.”).
\textsuperscript{25} \textit{The Delaware Constitution of 1897: The First One Hundred Years} 213 (Harvey Bernard Rubenstein ed., 1997) (alteration in original).
III. PROCEDURES TO AMEND THE FLORIDA CONSTITUTION

The Florida Constitution provides the most ways to amend a constitution. In fact, there are six different ways to amend the Florida Constitution. Under article XI of the Florida Constitution, various mechanisms include: (1) the Revision Commission, (2) initiatives, (3) proposals by the Florida Legislature, (4) a constitutional convention, and (5) a Taxation and Budget Reform Commission (“TBRC”).\textsuperscript{26} Beyond article XI, the Florida Legislature may eliminate language that is outdated through various constitutional provisions.\textsuperscript{27} A proposed amendment or revision to the Florida Constitution shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of [R]evision [C]ommission, constitutional convention, or [TBRC] proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a

\textsuperscript{26} Fla. Const. art. XI.
\textsuperscript{27} These various provisions address transitional changes to articles when revisions were made to the 1885 Florida Constitution. A special thank you to Talbot “Sandy” D’Alemberte for bringing these provisions to the author’s attention as a sixth manner by which the Florida Constitution may be amended. The provisions include:

(a) Under article V, § 20(i), the Florida Legislature has the power, by concurrent resolution, to delete from article V (the article addressing the judiciary), any subsection of section 20 (the Schedule to article V) “when all events to which the subsection to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. Fla. Const. art. V, § 20(i).

(b) Under article VIII, §(6)(g), the Florida Legislature has the power, by joint resolution, to delete from article VIII (providing for local government) any subsection of section 6 (the Schedule to article VIII), “when all events to which the subsection to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. Fla. Const. art. VIII, § 6(g).

(c) Under article XII, §11, the Florida Legislature has the power, by joint resolution, to delete any section of article XII (relating to the Schedule of changes to various provisions of the Florida Constitution), “when all events to which the section to be deleted is or could become applicable have occurred.” However, this legislative determination of fact is subject to judicial review. Fla. Const. art. XII, § 11.

Interestingly, this sixth manner of amending the Florida Constitution allows for unilateral legislative action with even less barriers than those imposed under Delaware’s Constitution. However, a critical caveat is that the Florida Legislature is limited to deleting dated provisions relating to transitional schedule provisions of the constitution, not the more substantive provisions. See Fla. Const. art. VIII, § 6(g). Moreover, any determination of fact by the Florida Legislature is subject to judicial review; hence, a clear check and balance. See infra Part V.D (discussing checks and balances).
single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.28

If the amendment is proposed by an initiative, it “shall be submitted to the electors at the general election, provided the initiative petition is filed with the custodian of state records no later than February 1 of the year in which the general election is held.”29

To be adopted, the amendment must be “approved by vote of at least [60%] of the electors voting on the measure.”30

A.  The Revision Commission

As discussed above, the Revision Commission, since 1978, convenes every twenty years to review the constitution. Although a novel concept developed to provide an apolitical review of the constitution, it is not without its critics.

Commentators have scrutinized the Revision Commission’s appointment process as pure political patronage,31 as the sitting Governor, Speaker of the House, and Senate President appoint thirty-three of the thirty-seven members.32 Additionally, one of the remaining four members is a political official—the Attorney General.33 They argue that this process lacks “any built in force to seat persons who are well prepared professionally to assess how well the existing state constitution serves its proper fundamental purposes . . . to create a governmental structure, to allocate powers among the departments, and to limit the power of all governmental entities.”34

Although the appointment process, by its nature, sways with the political party in power, prior appointees have included well-respected members of the legal community, such as:

- Martha Barnett, a future American Bar Association President;35

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28.  FLA. CONST. art. XI, § 5(a).
29.  Id. § 5(b).
30.  Id. § 5(e).
31.  Little, supra note 14, at 477–78.
32.  FLA. CONST. art. XI, § 2(a).
33.  See id. § 2(a)(1).
34.  Little, supra note 14, at 478.
- Justice Gerald Kogan, a Florida Supreme Court Chief Justice;\textsuperscript{36}
- Toni Jennings, Florida Senate President and future Lieutenant Governor;\textsuperscript{37}
- Stephen N. Zack, a future American Bar Association President;\textsuperscript{38}
- J. Stanley Marshall, CEO of James Madison Institute and former Florida State University President;\textsuperscript{39}
- Jon L. Mills, former Speaker of the House of Representatives, Director of Center for Governmental Responsibility, and future Dean of the University of Florida College of Law;\textsuperscript{40}
- Talbot “Sandy” D’Alemberte, a future American Bar Association President, a future President of Florida State University, a future Dean of Florida State University College of Law, and author of law review articles and textbooks on the Florida Constitution;\textsuperscript{41}
- DuBose Ausley, Fellow of the American College of Trial Lawyers, Chairman of Florida Commission on Ethics, and a future Chairman of Board of Regents;\textsuperscript{42}
- Ben Overton, a Florida Supreme Court Justice;\textsuperscript{43} and
- LeRoy Collins, former Governor of Florida.\textsuperscript{44}

\textsuperscript{40} PRFC 1997, supra note 35; Jon L. Mills, UF LAW, https://www.law.ufl.edu/faculty/jon-l-mills (last visited Dec. 16, 2016).
Nonetheless, commentators have valid arguments to challenge the credentials of other appointed members and their abilities to decipher the constitutional dilemmas posed when reviewing a constitution. However, a commission of only lawyers would be nonsensical and a remedy worse than the disease. In fact, the Revision Commission, which drafted the 1968 Florida Constitution, openly debated how many lawyers should be on the commission and whether the President of The Florida Bar should have appointment powers.45

Beyond the political criticisms, commentators have challenged the amendments proposed by these commissions and their success rate. Professor Joseph W. Little summed up the criticism: “The touted ‘free of [the] legislative oversight’ feature has transmogrified the ideal of an independent, deliberative, and expert evaluation of the basic governing document of Florida into occasional super-legislative opportunities to ‘one-up’ the Legislature by constitutionalizing non-constitutional issues.”46

However, these commissions have produced substantial, constitutional proposals such as: (1) a reapportionment of the legislature, (2) a restructuring of the elective cabinet, (3) an elimination of the popular election of judges, and (4) a local option for selection of judges.47

Further, although all of the 1977-1978 Revision Commission’s proposals were rejected by voters, more than 40% of that commission’s substantive proposals are now laws, including grand jury counsel for witnesses, an appointed Public Service Commission, broad public records, and public meeting laws.48

Many of these provisions were successfully proposed by the 1998 Revision Commission, initiatives, or the Florida Legislature.49 Two primary examples are Florida’s education system and the right to privacy.

The 1978 Revision Commission unsuccessfully proposed changing the composition of the Board of Education from the Governor and members of the cabinet to appointed officials serving six-year terms and the creation

46. Little, supra note 14, at 478.
47. Id. at 484–92.
49. Id.
of a board of regents overseeing the state university system.\textsuperscript{50} The measure was defeated 1,353,626 votes against with 771,282 votes in favor.\textsuperscript{51}

However, the 1998 Revision Commission successfully proposed a revision to the Board of Education to be composed of seven members appointed by the Governor for four-year terms.\textsuperscript{52} Additionally, a citizen initiative successfully proposed a single state university system with a board of governors.\textsuperscript{53}

The 1978Revision Commission also proposed\textsuperscript{54} a very often cited provision—the right of privacy.\textsuperscript{55} The proposed provision stated: “Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.”\textsuperscript{56} Although the amendment was defeated as part of a package of proposed revisions labeled Basic Document revisions to the Florida Constitution, the Florida Legislature, two years later, successfully re-proposed\textsuperscript{57} a right of privacy that is codified in article I, section 23 of the Florida Constitution.\textsuperscript{58}

Notwithstanding the foregoing debate, the criticisms of the Revision Commission pale in comparison to the criticisms lodged against the initiative process.


\textsuperscript{51} Id.


\textsuperscript{55} Id. at 35–41 (discussing the substantial case law addressing Florida’s right to privacy).

\textsuperscript{56} Id. at 35 n.67.


\textsuperscript{58} Florida’s Right of Privacy, as currently amended, states: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” Fla. Const. art. I, § 23.
B. *The Ballot Initiative Process*

Under section 3 of article XI, the citizens of Florida may propose a revision or amendment of any portion of the Florida Constitution so long as it embraces one subject and matter directly connected therewith.\(^{59}\) To invoke this section, the initiating party must file with

the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to [8%] of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.\(^{60}\)

Although stated succinctly, the initiative provision has generated reams of case law and law review articles.\(^{61}\) Analyzing the single-subject matter requirement, the Supreme Court of Florida explained that it is a “rule of restraint,” which “avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support.”\(^{62}\) In other words, this rule of restraint is to prevent logrolling.\(^{63}\)

Logrolling is often “defined as the practice of combining two or more dissimilar subjects into a single act to force simultaneous passage of the varied provisions.”\(^{64}\) Logrolling is a double-edged sword in the legislation making process because it facilitates compromise among disparate groups, but can also enhance the capacity of special interests to coopt the legislative process.\(^{65}\) In the voting context, the Supreme Court of Georgia succinctly summarized one of the worst externalities of logrolling, stating:

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60. *Id.*
63. D’ALEMBERTE, *supra* note 2, at 159.
64. Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1641 (2005); *see* JOHN F. COOPER & THOMAS C. MARKS, JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* 19 (4th ed. 2006) (“Logrolling is ‘a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.’” (citation omitted)).
65. Kastorf, *supra* note 64, at 1641; *see also id.* at 1644–46 (discussing distinctions between rider logrolling and coattails logrolling).
No voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves, or, in order to vote against the proposition which he desires to defeat, to vote also against the one which commends itself to the approval of his judgment.\textsuperscript{66}

One of the two types of logrolling is “rider logrolling,” in which unpopular measures are buried in a very popular or more complex measure.\textsuperscript{67} Beyond the potential logrolling effect, a greater concern regarding the citizen initiatives is the legislative nature of the proposed amendments, because the process “allow[s] interest groups to utilize state constitutions as socio-economic battle-grounds.”\textsuperscript{68} As Professor Daniel Gordon explained: “Including too many matters within a state constitution can lead to legal fossilization which undermines flexibility in serving the needs of the people through legislative and regulatory processes.”\textsuperscript{69} Gordon is not alone in his sentiment.

Commentators and scholars have criticized the initiative process as bloating the Florida Constitution—a doctrine of restraint—with matters more suitable for statutory laws.\textsuperscript{70} Many of these initiatives reflect highly charged

\textsuperscript{66} Id. at 1638 (quoting Rea v. City of La Fayette, 61 S.E. 707, 708 (Ga. 1908)). The Supreme Court of Florida described logrolling as: The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express the approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all.


\textsuperscript{69} Gordon, supra note 68, at 420.

social and economic interest driven proposals—the very issues Justice McDonald reasoned were more appropriate for statutory law—i.e., “legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.”

For example, citizen initiatives that have passed include:

- defining “marriage as the legal union of only one man and one woman as husband and wife and . . . that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized,”
- “to protect people, especially youth, from addiction, disease, and other health hazards of using tobacco, the Legislature shall use some Tobacco Settlement money annually for a comprehensive statewide tobacco education and prevention program using Centers for Disease Control best practices. Specifies some program components, emphasizing youth, requiring one-third of total annual funding for advertising. Annual funding is 15% of 2005 Tobacco Settlement payments to Florida, adjusted annually for inflation,”
- “[t]o reduce traffic and increase travel alternatives, this amendment provides for development of a high speed monorail, fixed guideway or magnetic levitation system linking Florida’s five largest urban areas and providing for access to existing air and ground transportation facilities and services by directing the state and/or state authorized private entity to implement the financing,

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73. Protect People, Especially Youth, From Addiction, Disease, and Other Health Hazards of Using Tobacco 05-19, FLA. DEP’T STATE: DIV. ELECTIONS, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=41791&seqnum=1 (last visited Dec. 16, 2016); see FLA. CONST. art. X, § 27. Although a serious issue, the allocation of tobacco settlement funds is more appropriate for legislative action rather than the organic law of the state.
acquisition of right-of-way, design, construction and operation of the system, with construction beginning by November 1, 2003;”

• “no person shall confine a pig during pregnancy in a cage, crate or other enclosure, or tether a pregnant pig, on a farm so that the pig is prevented from turning around freely, except for veterinary purposes and during the prebirthing period.”

Supporters of these amendments argue that this initiative process is the only way to circumvent a legislature, which will not enact such legislation and is badly malapportioned. Critics rebut that the proper response by these proponents would be to remove those legislators at the voting booth rather than clog the arteries of Florida’s legal corpus. Even the late Florida Governor, Lawton Chiles, expressed concern regarding the path initiatives have taken, stating:

[W]e never imagined the proliferation of people paying to put initiatives on the ballot. I think this practice flies in the face of what a representative democracy is supposed to be. I believe our country was founded as a representative democracy—not a participatory democracy. There is a very clear difference. In a representative democracy, we elect officials to act on behalf of our people. It’s an important concept for us to understand.


76. Thomas C. Marks, Jr., Constitutional Change Initiated by the People: One State’s Unhappy Experience, 68 TEMP. L. REV. 1241, 1241 (1995) (“It is generally believed that decades of abuses perpetrated by a badly malapportioned legislature figured heavily in the decision to give the people a shot at constitutional change that did not involve that body.”); John G. Matsusaka, The Eclipse of Legislatures: Direct Democracy in the 21st Century, 124 PUB. CHOICE 157, 170 (2005) (noting that without initiatives, legislatures have a monopoly over what proposals are considered).

Madison would have concurred.\textsuperscript{78} Further, critics have noted that initiatives tend to be poorly worded, creating greater confusion and opposition among the voters.\textsuperscript{79}

One additional concern for initiatives is the financial impact of putting the amendment into action. For example, in 2000, Florida voters approved a statewide high-speed monorail linking Florida’s five largest urban areas. The amendment required that the monorail travel at a speed in excess of 120 miles per hour and connect to existing air and ground transportation facilities and that construction begin on or before November 1, 2003.\textsuperscript{80} Absent from the ballot summary submitted to voters were the costs and the source of funding.\textsuperscript{81}

As such, the Florida Constitution now provides that the Florida Legislature, by general law prior to the election, provide a statement of probable financial impact of any initiative.\textsuperscript{82} Interestingly, these financial impact statements are a double-edged sword—providing more information to voters about the financial impact, but also providing the Florida Legislature an avenue to attack or undermine an initiative it disfavors.\textsuperscript{83}

Although citizen initiatives attract the most attention, less discussion has occurred regarding the Florida Legislature, which has proposed 20% of the amendments to the Florida Constitution.\textsuperscript{84} In fact, since 1978, the Florida Legislature has proposed eighty-nine amendments to the Florida Constitution, eighty-one reaching a ballot vote.\textsuperscript{85} In comparison, only 34 of 337 proposed citizen initiatives reached a ballot vote, or 10% compared to

\textsuperscript{78} In Federalist Paper No. 10, Madison explicated, “Hence it is that such [direct] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.” \textit{The Federalist} No. 10, \textit{supra} note 9, at 76 (James Madison).

\textsuperscript{79} \textit{See} Minger, \textit{supra} note 67, at 886–89.


\textsuperscript{81} \textit{See id.}

\textsuperscript{82} \textit{Fla. Const.} art. XI, § 5.

\textsuperscript{83} \textit{See The Federalist} No. 51, \textit{supra} note 9, at 319 (James Madison) (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).


91% of the Florida Legislature’s proposed amendments.86 These statistics are consistent with the national norm, as legislative proposals make-up approximately 90% of all amendments to state constitutions.87 Why? One reason is the lower barrier to entry for a legislature.

C. Amendments Proposed by the Legislature

Under section 1 of article XI of the Florida Constitution, the legislature may propose an “[a]mendment of a section or revision of one or more articles, or the whole” of the Florida Constitution, so long as it is “proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature.”88 However, unlike the citizen initiatives, the Florida Legislature is not bound by the single-subject rule,89 despite the fact that any other legislation proposed by the Florida Legislature must “embrace but one subject and matter properly connected therewith, and the subject [must] be briefly expressed in the title.”90

The Supreme Court of Florida reasoned this discrepancy exists because the constitutional drafters must have determined that the legislative process provides sufficient opportunity for public hearings, debate, and drafting of any constitutional proposal and that input in the constitutional initiative drafting process is not present.91 However, this analysis presupposes a legislative majority, which can suppress its passions for ephemeral social issues in order to pursue public good. If it lacks this self-restraint, a legislature will suffer the same ailments that plague the citizen

87. Gerald Benjamin, Constitutional Amendment and Revision, in 3 State Constitutions for the Twenty-First Century: The Agenda of State Constitutional Reform 177, 181 (G. Alan Tarr & Robert F. Williams eds., 2006). But see, Cauthen, supra note 17, at 2157 (noting that over the last thirty years, the use of legislative proposals has decreased by half, while the use of initiatives has nearly doubled).
89. See Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984) (“Only the initiative process in section 3 contains the restrictive language that ‘any such revision or amendment shall embrace but one subject and matter directly connected therewith.’”).
90. Fla. Const. art. III, § 6. The Supreme Court of Florida reasoned that the purpose of this provision is “to prohibit the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage.” Fine, 448 So. 2d at 988. As discussed, that is the same concern this author has if Florida were to adopt Delaware’s legislative-based amendment process. See D’Alemberte, supra note 2, at 159 (noting the similarity between article III, section 6 and the single-subject rule for citizen initiatives).
91. Fine, 448 So. 2d at 988.
initiatives process\textsuperscript{92} and the constitution will become a vessel for positive law, not a document of definition and restraint.\textsuperscript{93}

If the Florida Legislature wishes to secure political cover for a socially based idea, it does not need to use the constitutional amendment process, because it already has the ability to condition the effectiveness of a law upon some stated contingency, including the approval of electors.\textsuperscript{94} As well, the Florida Legislature may prescribe for referenda by law.\textsuperscript{95} If the legislature were to use the constitutional amendment process instead, it would “lard the constitution with non-constitutional substance.”\textsuperscript{96}

D. \textit{Constitutional Convention}

Another avenue for constitutional amendments is the constitutional convention process. The objective of a convention is to revise the whole constitution.\textsuperscript{97} If a majority voting on the question votes for the convention at the next general election following a petition for a constitutional convention, each representative district will elect a member to the convention.\textsuperscript{98} No convention has been called under the modern Florida Constitution.\textsuperscript{99}

For the sake of brevity, this Article will not discuss this process further.

E. \textit{Taxation and Budget Reform Commission}

The TBRC was established to address tax and budget reform and has the power to place amendments directly on the ballot for voter approval if two-thirds of the commission approves the measure.\textsuperscript{100} It convenes every twenty years after 2007.\textsuperscript{101} The TBRC is composed of twenty-five voting

\textsuperscript{92} See \textit{The Federalist} No. 10, supra note 9, at 75 (James Madison) (“When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”).
\textsuperscript{93} Little, supra note 70, at 410. One commentator suggested that article XI, section 1 should be revised so that “[n]o amendment to the constitution may be placed upon the ballot to accomplish a purpose that is within the power of the Florida Legislature . . . .” \textit{Id.}
\textsuperscript{94} See City of Winter Haven v. State, 170 So. 100, 103 (Fla. 1936).
\textsuperscript{95} FLA. CONST. art. VI, § 5(a).
\textsuperscript{96} Little, supra note 70, at 408.
\textsuperscript{97} FLA. CONST. art. XI, § 4.
\textsuperscript{98} \textit{Id.} § 4(b).
\textsuperscript{99} COOPER \& MARKS, JR., supra note 64, at 16.
\textsuperscript{100} FLA. CONST. art. XI, § 6(c); D’ALEMBERTE, supra note 2, at 163.
\textsuperscript{101} FLA. CONST. art. XI, § 6(a). The TBRC first met in 1990 and was originally supposed to meet every ten years. D’ALEMBERTE, supra note 2, at 163. The 1998
members—eleven of which are appointed by the Governor, seven of which are appointed by the Speaker of the House, and seven of which are appointed by the Senate President. None of the appointees can be current members of the Florida Legislature; however, four non-voting ex-officio members shall be members of the Florida Legislature.

The TBRC has dual aspects: (1) serving as a constitutional revision commission for tax and budget matters and (2) serving as a special study commission for a broad-ranging study of tax and budget policy with a charge to report to the Florida Legislature. Specifically, the TBRC is tasked with reviewing, among other things, the state budgetary process, revenue needs, expenditure process, the state’s tax structure, and governmental productivity and efficiency. Beyond the ability to place constitutional amendments directly on the ballot, the TBRC must issue a report and may propose to the Florida Legislature statutory changes related to taxation and budgetary laws. For the sake of brevity, this Article will not discuss this process further.

IV. DELAWARE’S LEGISLATIVE-BASED AMENDMENT PROCESS

With the backdrop of Florida’s current amendment process, we can now evaluate the proposed method employed in Delaware relating to legislative-based amendments.

As previously described, in Delaware, either house of the Delaware General Assembly may propose an amendment to the constitution, and if two-thirds of each house approves the amendment, the Delaware Secretary of State will publish a copy of the amendment three months before the next general election in at least three newspapers in each county. After that publication, if the newly seated Delaware General Assembly after that general election approves by two-thirds in each house, the amendment automatically becomes part of the Delaware Constitution without any further consideration or approval by the voters or any review by the Delaware


102. FLA. CONST. art. XI, § 6(a)(1)–(2).
103. Id. § 6(a)(1)–(3).
104. D’ALEMBERT, supra note 2, at 163.
105. FLA. CONST. art. XI, § 6(d).
106. Id. § 6(e); Little, supra note 14, at 482 (discussing how the TBRC, unlike the Revision Commission, has the ability to propose non-constitutional measures rather than forcing positive law into the Florida Constitution, a major criticism of the other amendment processes).
Governor.\textsuperscript{107} Delaware is the only state to amend its constitution in this manner.\textsuperscript{108}

During Delaware’s convention, which produced the 1897 Delaware Constitution, Wilson T. Cavender indirectly raised the issue of excluding a popular vote by justifying its absence—specifically, arguing that (1) the amendments did not merit a popular ratification and (2) if they did, the time needed for popular ratification would be too long.\textsuperscript{109} As well, another reason raised for this adopted method was that the amendment’s publication and the intervening general election served as a proxy for a “popular referendum.”\textsuperscript{110}

The assumption underlying this last rationale was that a legislator would be elected on the issue raised in the proposed amendment prior to the vote on the second leg of the amendment. That assumption ignores the greatest danger of this method—second-order logrolling.

As previously noted, logrolling is the practice of combining two or more dissimilar subjects into a single act to force a simultaneous passage of the varied provisions. However, the externality this Article addresses is not the act of jamming two dissimilar provisions into one bill, but rather a form of rider logrolling of the second-order, in which, as discussed more fully below, voters are forced into a Hobson choice: to accept an amendment, which they disfavor, or not re-elect an individual with whom they agree on the majority of issues; i.e., take the bitter and the sweet.\textsuperscript{111} Hence, if the voter re-elects the incumbent, passage of the amendment on the second leg is more than likely.

This further assumes that the voter is able to gather sufficient information by which to vote on the amendment, while also evaluating the candidate for election on a panoply of issues. Interestingly, this amendment method could generate a rider effect, as well.\textsuperscript{112}

\textsuperscript{107} Del. Const. art. XVI, §§ 1, 4.


\textsuperscript{109} A constitutional convention is the only other manner by which Delaware amends its Constitution. Del. Const. art. XVI, § 2; Krislov & Katz, supra note 108, at 301 n.23. The Delaware Constitution does not permit amendments by popular initiative or through a commission. See Del. Const. art. XVI.

\textsuperscript{110} The Delaware Constitution of 1897: The First 100 Years, supra note 25, at 209–10.

\textsuperscript{111} Id. at 210.

\textsuperscript{112} Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 Colum. L. Rev. 687, 706 (2010) (“Courts disdain logrolling because it requires voters to decide more than one issue with a single vote and threatens to give legal force to policies that command only minority support.”).

\textsuperscript{112} See Cooter & Gilbert, supra note 111, at 707–08.
Because of its expediency, the Delaware General Assembly has employed this process frequently.\textsuperscript{113} Since the 1995-1996 session, the Delaware General Assembly has considered 196 amendments, including second legs of an amendment.\textsuperscript{114} Within these amendments, one notes certain trends. For example, in every session from the 1995-1996 session through the 2011-2012 session, State Senator David B. McBride has offered an amendment to require that voters ratify constitutional amendments and that voters be permitted to offer amendments through initiatives and referenda.\textsuperscript{115} McBride’s amendment proposed that after the General Assembly approved the amendment, the voters would vote on the amendment at the next general election. If the voters approved, the amendment would become part of the Delaware Constitution; if the voters reject the proposed amendment, the General Assembly could not submit the proposed amendment for a period of three years.\textsuperscript{116} McBride’s proposed amendments, with one exception, never made it out of the Delaware Senate Executive Committee.\textsuperscript{117}

Beyond these efforts to assert popular, direct democracy into the constitutional revision process, another trend appeared to develop. Beginning in the 2004-2005 session, the amendments began to shift from proposals addressing qualifications for attorney general, residency of the secretary of state, and court jurisdictions to more social and economic issues regarding consideration for stock issuance, prohibition on the recognition of same-sex relationships, and expansion of the gaming industry—all topics more appropriately addressed through the Delaware Code, rather than its

\textsuperscript{113} THE DELAWARE CONSTITUTION OF 1897: THE FIRST 100 YEARS, supra note 25, at 211.

\textsuperscript{114} Appendix of the proposed amendments to the Delaware Constitution is on file with the Author.


\textsuperscript{117} See supra note 115.
constitutions. Currently, if the Florida Legislature proposed such amendments, they would be subject to voter ratification; however, in Delaware, there is no check and balance by the voters, by the governor, or by the Supreme Court of Delaware. Thus, Delaware, through its current amendment process, expedites the legislating of a constitution, denigrating it from a doctrine of restraint to scrap paper of ephemeral social mores, subject to the changes in societal views and political majorities.

For example, in 2004, a Delaware senator proposed prohibiting the recognition of same-sex marriages. At that time, 55% of Americans opposed same-sex marriage and 42% were in favor of it. As of 2015, 60% of Americans approved of same-sex marriage, while only 37% disapproved. If the 2004 amendment had been adopted, it would have created a constitutional dilemma for Delaware in 2013 when it took the appropriate, non-constitutional path of amending its code to provide for same-sex marriages, rather using a constitutional amendment. This provides a cautionary tale about larding the constitution with legislative matters.

V. COULD DELAWARE’S LEGISLATIVE AMENDMENT PROCESS BE IMPLEMENTED IN FLORIDA?

When the Revision Commission evaluates possible amendments to propose, it should reject the proposal to provide for legislative amendments, consistent with the Delaware process. If Florida were to adopt the Delaware process, it would give the legislature unbridled power to amend the constitution, subject to its prevailing passions, regardless of which political persuasion was in power. This is because no fundamental check and balance on the legislative power would exist. Such checks and balances are

121. Id.
123. It is worth noting that other authors have suggested a similar proposal for legislative amendments. See Little, supra note 70, at 407. For example, one author suggested that the two houses of the Florida Legislature sit together to adopt a joint resolution to propose a constitutional amendment and that the resolution be approved by no less than three-fifths of the membership of each house in two successive regular sessions with an intervening
necessary to a functioning polity, as “[a] dependence on the people is, no doubt, the primary control on the government.”\textsuperscript{124} By removing the direct popular ratification of legislative amendments, no direct check exists on the legislative amendment—not even a gubernatorial veto or one-subject requirement.

Instead, what remains under a Delaware approach is the ultimate example of second-order logrolling. Florida voters may face the binary choice of re-electing a public official, with whom they may agree with 75% of the time, or electing another person purely on a single-issue encompassed in the proposed amendment that would be voted upon for a second time in the next legislative session. With the incumbency effect, this may not even be a true choice, and the indirect, electoral review of the amendment may be nothing more than a pro forma.

Before analyzing the legal and political effect of implementing the Delaware method in Florida, this Article will first analyze the practical impediments.

A. Delaware vs. Florida

Practical implementation of Delaware’s legislative amendment process illustrates its infeasibility in Florida.\textsuperscript{125} Delaware’s population is 945,934,\textsuperscript{126} in comparison to Florida’s population of 20,271,272.\textsuperscript{127} In terms of its legislative composition, Delaware’s General Assembly is composed of 21 senators\textsuperscript{128} and 41 representatives,\textsuperscript{129} while the Florida Legislature is

election of the House of Representatives. Id. At that point, the Florida Legislature could place the amendment on the ballot. See id. at 407–08. In that proposal, that author was addressing the overload of legislative proposals, but nonetheless still retained a popular review of the amendment before its enactment. See id. Another author proposed that before any amendment or revision to change article I of the Florida Constitution may appear on a general election ballot, that proposal, change, or amendment must be approved by the Florida Legislature after two consecutive general elections. Gordon, supra note 68, at 429. Again, that author’s proposal, which limits use of initiatives as “tools in socio-economic struggles in Florida,” still required a popular review before enactment. Id. at 428–29.

\begin{itemize}
\item \textsuperscript{124} The Federalist No. 51, supra note 9, at 319 (James Madison).
\item \textsuperscript{125} Del. Const. art. XVI, § 1.
\item \textsuperscript{126} QuickFacts: Delaware, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/10 (last visited Dec. 16, 2016).
\item \textsuperscript{127} QuickFacts: Florida, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/12,10 (last visited Dec. 16, 2016).
\item \textsuperscript{128} Senate Members and Districts-Delaware General Assembly, Del. St. Legislature, http://legis.delaware.gov/Senate (last visited Dec. 16, 2016).
\item \textsuperscript{129} House Members and Districts-Delaware General Assembly, Del. St. Legislature, http://legis.delaware.gov/House (last visited Dec. 16, 2016).
\end{itemize}
composed of 40 senators\textsuperscript{130} and 120 representatives.\textsuperscript{131} In other words, Florida’s House of Representatives, alone, is nearly double that of the entire Delaware General Assembly. Based on these demographics, it is unlikely for an electorate to make a significant realignment of members in Florida, such that voters can prevent ratification of an amendment during the second leg of voting. In contrast, in Delaware, the population is more compact, and with less of a voting population, the electorate can alter the make-up of the General Assembly more readily were the General Assembly to adopt an amendment contrary to the best interest of the polity.

B. \textit{Incumbency Effect and Its Interplay with Second-Order Logrolling}

Regardless of Florida’s demographics, the likelihood of a change of the electorate before the second leg of voting is minimal when one considers the current redistricting process\textsuperscript{132} and the incumbency effect.\textsuperscript{133}

According to the Quinnipiac Poll, Floridians consistently have held a low approval rating of the Florida Legislature’s job performance, with the disapproval rating as high as 50\%.\textsuperscript{134} Despite that fact, in 2012, 96\% of the incumbents in the Florida Legislature standing for re-election prevailed.\textsuperscript{135} This poses a quandary: How can voters disapprove of the legislature yet continue to re-elect the same members serving in that legislature?

\begin{footnotesize}
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\item[132] See Sanford C. Gordon & Dimitri Landa, \textit{Do the Advantages of Incumbency Advantage Incumbents?}, 71 J. OF POL. 1481, 1483 (2009) (noting that “[a]bsent redistricting, the ideological characteristics of a district tend to be relatively stable. Thus, an incumbent may enjoy an advantage over challengers in the same electorate that put her in power in the first place.”).
\item[133] See id. at 1481. According to Professor Yogesh Uppal’s study, a large advantage for re-election exists for members of a state legislature’s lower chamber as an incumbent candidate is about thirty percentage points more likely to win an election and receives 5.3 percentage points more votes in the next elections. Yogesh Uppal, \textit{Estimating Incumbency Effects in U.S. State Legislatures: A Quasi-Experimental Study}, 22 ECON. & POL. 180, 197 (2010).
\end{itemize}
\end{footnotesize}
A simple answer is the Fenno Paradox. Under this theory, people hate their legislative body but love their representative.\textsuperscript{136} One reason is that constituents may view the accomplishments of the general body as minimal, but see the immediate impact of their representative’s accomplishments for the district on a daily basis—a new park, funding for a community organization, or a grant for the local community college. Another reason is that voters are risk-averse to changes when incumbents present themselves as low-risk actors.\textsuperscript{137}

A more complex answer involves analysis of single member districts, gerrymandering, campaign financing favoring incumbents, the access to media and constituency through elected office, and game theory. Regardless, voters tend to re-elect their elected officials, absent a scandal or criminal charges. As an incumbent, a legislator: (1) has instant name recognition, (2) can attract news coverage, and (3) can utilize the powers of the office.\textsuperscript{136}

Utilizing this incumbency advantage, legislators can quickly spin the proposed legislative amendment and use resources of their offices to promote the benefits of the amendment in a short time-frame, while opposition to the amendment will lack the same amount of time to build a response.

Further, in this particular context, the incumbency-effect’s significance is that it perpetuates a second-order logrolling effect for possible amendments proposed by the Florida Legislature using the Delaware format. A Florida voter will be confronted with voting for the popular incumbent and accepting an unpopular amendment or voting down a popular incumbent, with whom she agrees on the majority of issues, in order to prevent a constitutional amendment.

As discussed above, according to the Supreme Court of Florida, one reason the Florida Constitution requires a one-subject requirement for citizen initiatives is that it “avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support.”\textsuperscript{139} If Florida were to adopt the Delaware method for


\textsuperscript{137} See David L. Eckles et al., Risk Attitudes & the Incumbency Advantage, 36 POL. BEHAVIOR 731, 746 (2014).

\textsuperscript{138} JOHN L. MOORE, ELECTIONS A TO Z 200, 202–03 (1999).

\textsuperscript{139} Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984).
amending the Florida Constitution, Florida voters would suffer this same malady, being forced to accept a constitutional amendment approved by the Florida Legislature or vote against their representative, with whom they may agree on a majority of issues. Hence, Florida voters will be forced to accept the bitter and the sweet—the essence of logrolling.\textsuperscript{140} Even worse, the Hobson choice will apply “legal force to policies that command only minority support,”\textsuperscript{141} enshrining in the Florida Constitution provisions that may not even reflect a passing fad of the then-polity.

Similar to the logrolling concern, this Hobson choice also creates a rider problem. “Riding occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second [one].”\textsuperscript{142} Here, the legislative amendment creates a riding effect because the majority of voters may approve of their representative but do not approve of the constitutional amendment awaiting a second leg vote; hence, the constitutional amendment free rides on to the re-election of that representative. Voters may prefer to keep their representative more than elect someone new in order to defeat the second leg vote from obtaining approval.

However, one may argue if the voter is passionate enough about the legislative amendment, the elected officials will not approve the second leg of voting in order to appease their constituents. Yet, this assumes the official does not have other political party or leadership pressures within the legislative body to appease\textsuperscript{143} and assumes voters have sufficient access to information about the legislative amendment to form an opinion.

C. Barriers to Information

Besides the incumbency effect, the proposed constitutional amendment assumes voters have sufficient access to information on which to vote on the proposed amendment and subsequent legislative amendments to the Florida Constitution. However, voters generally obtain information from television and the Internet, which can provide a skewed view.\textsuperscript{144}

\textsuperscript{140} See supra pages accompanying footnotes 63–67 (discussing logrolling).
\textsuperscript{141} Cooter & Gilbert, supra note 111, at 706.
\textsuperscript{142} Id. at 707.
\textsuperscript{143} Matsusaka, supra note 76, at 169 (noting theory and evidence suggesting that elected officials are less than perfect agents of the voters).
\textsuperscript{144} Diana Owen, The Internet and Voter Decision-Making 27, INTERNET, VOTING, AND DEMOCRACY CONFERENCE (Laguna Beach, Cal. May, 14–15 2011) (noting that the Internet will eventually become the major source for information); Pew Research Ctr., INTERNET GAINS ON TELEVISION AS PUBLIC’S MAIN NEWS SOURCE 2 (2011).
Scholars have argued that news coverage of initiatives, for example, are “often sloppy and lacking in analysis” and that advertisements “fail to analyze issues carefully or reveal all of a measure’s possible consequences,” as they are “designed to persuade, not educate.” Additionally, the Internet creates niche media outlets that tend to disseminate “ideological messages” that create an echo chamber, limiting a fulsome presentation of information for voters.

As information sources have increased, so has the difficulty for voters to obtain a thorough analysis of issues and topics on the ballot. In short, the excess of television and Internet coverage creates greater voter confusion and barriers to voters deciphering the nuances of the legislative amendments looming in the wings for a second leg vote when determining whether to elect their representative.

D. Lack of Constitutional Check and Balance

Beyond the logrolling effect, the Florida Legislature would have unbridled power to alter the structure of the Florida Constitution, as neither the Governor nor the Florida voters will have direct input on the amendment and may only challenge it, if possible, in a court of law, were the amendment to violate the United States Constitution. Hence, adopting the Delaware method would result in the removal of a check and balance on the Florida Legislature.

Suddenly, political majorities can crystallize partisan stances that may not stand the test of time by utilizing a direct amendment to the Florida Constitution without any popular vote ratification. The caution of the Supreme Court of Florida when addressing an initiative to create a unicameral legislature would equally apply here if the Delaware method were to be adopted:

The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the [s]tate a workable, accordant, homogenous and up-to-date document. All of this

146. OWEN, supra note 144, at 8–9.
147. See THE FEDERALIST NO. 51, supra note 9, at 319 (James Madison) (“[Y]ou must first enable the government to control the governed, and in the next place oblige it to control itself.”).
could disappear very quickly if we were to hold that it could be amended in the manner proposed in the initiative petition here.\textsuperscript{148}

Without the voter approval process, the Florida Legislature could potentially strip the constitutional framework to its studs, by utilizing its unchecked power to repeal the constitutional structure, including a limitation on judicial review.\textsuperscript{149}

This is not an unrealistic fear because recently the Florida Legislature has floated proposals of:

- splitting the Supreme Court of Florida into two Supreme Courts of five members each—one for civil cases and the other criminal—and thus opening the opportunity for more appointments by the party in power;\textsuperscript{150}
- eliminating merit selection of judges in favor of gubernatorial appointments without any form of a screening mechanism;\textsuperscript{151}
- requiring the Florida Senate approval of all Florida Supreme Court Justices and appellate judges, but giving the Florida Senate \textit{six months} with which to exercise its approval,\textsuperscript{152} thus creating a probationary period to evaluate, through a litmus test, the rulings of the appointed judges; and
- seizing from the judiciary final approval of all the rules of procedure, evidence, and conduct that govern Florida’s judicial branch.\textsuperscript{153}

\begin{itemize}
  \item \textsuperscript{148} Adams v. Gunter, 238 So. 2d 824, 832 (Fla. 1970).
  \item \textsuperscript{149} See Little, \textit{supra} note 14, at 479 (“Constitutional provisions such as those that prescribe a structure of government or a procedure for accomplishing governmental tasks, such as enacting laws, deprive the Legislature of the power to repeal the constitutional structure or to change the mandated procedures.”).
  \item \textsuperscript{150} Howard Troxler, \textit{Legislature Seeks to Saw Off the Judicial Branch}, \textit{Tampa Bay Times} (Mar. 19, 2011, 2:59 PM), http://www.tampabay.com/news/politics/stateroundup/legislature-seeks-to-saw-off-the-judicial-branch/1158471. Interestingly, President Franklin D. Roosevelt attempted this same tactic, expanding the United States Supreme Court in order to obtain favorable members for the New Deal. \textit{See generally} Daniel E. Ho & Kevin M. Quinn, \textit{Did a Switch in Time Save Nine?}, 2 J. Legal Analysis 69 (2010). (evaluating through a quantitative study, the alleged changed voting pattern of Justice Owen Roberts to thwart the proposed court-packing plan advocated by President Roosevelt).
  \item \textsuperscript{151} Troxler, \textit{supra} note 150.
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{See id.}
\end{itemize}
The great check on these proposals was that they needed to obtain voter approval.¹⁵⁴ The new method would unleash constitutional mischief.

E. **Positive Law**

Beyond the hollowing out of Florida’s constitutional framework, adoption of the Delaware method may lead to legislation in constitutional clothing. Why would a legislature approve of legislation that can be easily amended and is entitled to less deference when it can adopt the same social or economic policy through a constitutional amendment, which is more difficult to amend and entitled to greater deference? It would not.

Hence, commentators’ fear of social policy-based citizen initiatives will be ten-fold in the hands of a legislature, regardless of the political party in power, because of the lack of a checking mechanism. In Florida, without this constraint on the legislative action, Florida will lack protection “against precipitous and spasmodic changes in Florida organic law.”¹⁵⁵ As Professor Gordon predicted, the Florida Constitution will be “downgraded to statutory law and a constitutional junkyard.”¹⁵⁶

Quickly, the Florida Legislature could shape the constitutional law of Florida to fit passing social and political norms—a fear Justice McDonald raised.¹⁵⁷ Suddenly, the Florida Constitution will become a white paper for the political party in power. Democrats and Republicans will advocate and pass their agenda not through easily amended legislation, but through constitutional mandates that are not easily blunted. The Florida Constitution would revert to the 1885 to 1968 period during which the Florida Constitution was a chameleon and a bloating document with the proliferation of constitutional amendments.¹⁵⁸ This is not a partisan issue, but a constitutional one.

However, supporters of this proposal may: (1) quickly point to Delaware’s long use of the amendment process, (2) assert that a legislature allows for fuller debates of amendments than the initiative process, and (3) argue that at its core, America is a republic, not a direct democracy, and notwithstanding that point, voters still must re-elect members of the House of Representatives before the second leg of an amendment vote.

¹⁵⁵. Gordon, supra note 68, at 422.
¹⁵⁶. Id. at 414.
¹⁵⁷. Id. at 414.
As noted above, demographically, Florida is distinct from Delaware, and, due to that fact, more susceptible to the negative repercussions of this amendment process.\textsuperscript{159}

As to the second point, supporters may raise the rationale in \textit{Fine v. Firestone},\textsuperscript{160} that the legislative process “afford[s] an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal.”\textsuperscript{161} However, in that context, the court was discussing the current legislative amendment process, which allows for a popular vote check on the legislative amendments.\textsuperscript{162} Moreover, the voters have exercised this check on a routine basis, rejecting seventeen of the eighty-one proposed amendments by the legislature—21\% of the time.\textsuperscript{163} More important is which amendments the citizens rejected.\textsuperscript{164} When reviewing the rejected amendments, a common theme appears.\textsuperscript{165} Citizens typically reject amendments relating to social issues, limitations on the judiciary, or access to education.\textsuperscript{166} For example, some of the rejected proposed amendments include:

- allowing the Florida Legislature to reject the Supreme Court of Florida’s rules by a simple majority vote and blocking the re-adoption of the Supreme Court of Florida’s rules;\textsuperscript{167}
- allowing the Florida State Senate to have confirmation powers for nominations to the Supreme Court of Florida;\textsuperscript{168}
- generally prohibiting public funding of abortions and prohibiting the Florida Constitution from being interpreted to create broader rights to an abortion than those contained in the United States Constitution, and, by its adoption, overruling court decisions which conclude that the right of privacy under article I, section 23 of the Florida Constitution is broader in scope than that of the United States Constitution;\textsuperscript{169}

\begin{flushleft}
\textsuperscript{159} See \textit{supra} Part V.A (discussing demographic distinctions between Florida and Delaware).
\textsuperscript{160} 448 So. 2d 984 (Fla. 1984).
\textsuperscript{161} \textit{Id}. at 988.
\textsuperscript{162} \textit{Id}.
\textsuperscript{163} See \textit{Initiatives/Amendments/Revisions, supra} note 85.
\textsuperscript{164} See \textit{id}.
\textsuperscript{165} See \textit{id}.
\textsuperscript{166} See \textit{id}.
\textsuperscript{168} \textit{Id}.
\end{flushleft}
• removing the Blaine Amendment and permitting the use of revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination, or in aid of any sectarian institution;\textsuperscript{170}

• altering the class size reduction amendment to make the acceptable class sizes larger and reducing the burden on the Florida Legislature for funding.\textsuperscript{171}

Without this check, the Florida Legislature would have been able to assert unilaterally these types of amendments into the Florida Constitution.

Finally, the third argument against direct democracy is valid, as Madison forewarned of the anarchy that ensues within a direct democracy.\textsuperscript{172} Yet, a key principle to the functioning of a republican democracy is a check and balance, as 160\textsuperscript{173} “despots would surely be as oppressive as one.”\textsuperscript{174}

VI. CONCLUSION

Constitutions define our polity, providing a framework within which society can address pressing issues and proactively prevent them. These limiting documents are not without reproach or beyond alteration. However, the adoption of the Delaware amendment methodology is beyond mere alteration. Despite its potential advantages, its negative repercussions are too great to entertain such a proposal. As such, to prevent second-order logrolling and a bloated constitution, the Revision Commission should not recommend the proposed change to the amendment process.

\textsuperscript{170} H.R.J. Res. 1471, 2011 Leg., Reg. Sess. (Fla. 2011). The Blaine Amendment refers to state constitutional provisions that prohibit public support of religious schools and institutions, which were purportedly similar to a proposed federal constitutional amendment proposed by Representative James G. Blaine in 1875. For a history of the Blaine Amendment, see Cauthen, supra note 17, at 2141–50.

\textsuperscript{171} S.J. Res. 2, 2010 Leg., Reg. Sess. (Fla. 2010).

\textsuperscript{172} See The Federalist No. 10, supra note 9, at 76 (James Madison).

\textsuperscript{173} See supra Part V.A (showing the number of representatives in Florida Legislature). This Article is not questioning the motives of elected officials, who give their time and energy serve the public good. Rather, this Article argues that these elected officials’ desires for good, as they believe it, still need a checking mechanism, as Madison envisioned.

\textsuperscript{174} The Federalist No. 48, supra note 9, at 307 (James Madison); see also The Federalist No. 10, supra note 9, at 75 (James Madison) (“Enlightened statesmen will not always be at the helm.”).
WORKERS’ COMPENSATION: NECESSARY CHANGES IN FAVOR OF THE INJURED WORKER

NICHOLAS A. PALOMINO

I. INTRODUCTION ................................................................. 54
II. ATTORNEY’S FEES ............................................................ 56
A. Current Legislation ....................................................... 56
B. History ............................................................................ 56
C. Castellanos Ruling ......................................................... 59
1. Violation of Due Process ........................................... 61
   a. Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which It Legitimately Desired to Avoid .................................................. 62
   b. Whether There Was a Reasonable Basis for a Conclusion That the Statute Would Protect Against Its Occurrence .................. 63
   c. Whether the Expenses and Other Difficulties of Individual Determinations Justify the Inherent Imprecisions of a Conclusive Presumption ............................................. 64
2. Conclusion ................................................................. 65
III. DISABILITY BENEFITS .................................................. 66
A. Background .................................................................. 66
B. History ........................................................................... 67
C. Westphal Ruling .......................................................... 68
1. Denial of Access to Courts ....................................... 72
2. Conclusion ................................................................. 75

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IV. POSSIBLE EFFECTS TO FLORIDA’S WORKERS’ COMPENSATION SYSTEM

I. INTRODUCTION

Florida’s workers’ compensation is intended to provide a “reasonable alternative to tort litigation” by providing medical and wage-loss benefits to injured workers. The Workmen’s Compensation Act of 1935 was passed to give the employees simple, expeditious, and inexpensive relief from their work-related injury. In Florida, the workers’ compensation system is a no-fault system wherein the legislature’s intent is to assure a quick and effective delivery of remedies to employees injured in the course of their employment. However, over the years, “the workers’ compensation system has become increasingly complex”—which, in turn, forces employees to hire attorneys to ensure they receive all of the benefits to which they are rightfully entitled. Furthermore, if an injured employee were to be successful in his claim for benefits, the employer would be liable for the employee’s attorney fees. This allows the employee to retain the full amount of his benefits. However, the legislature has abolished all reasonableness in awarding attorney’s fees, pursuant to section 440.34 of the Florida Statutes, to the point where some attorneys are earning less than minimum wage for their successful services. Additionally, the legislature has diminished the time frame for temporary benefits to injured employees, to the point where a gap has been created between temporary and permanent benefits—leaving the injured employee without any benefits for an uncertain amount of time. Thus, the legislature made it impossible for the Supreme

6. See id.
7. See id.; Castellanos, 192 So. 3d at 433 (the claimant’s attorney made “$1.53 per hour for 107.2 hours,” and the lower courts and the Supreme Court of the United States ruled that the 107.2 hours were reasonable and necessary due to the complexity of the case).
8. See FLA. STAT. § 440.15(2)(a) (2015); Westphal v. City of St. Petersburg, 194 So. 3d 311, 321 (Fla. 2016) (the employee’s right to temporary benefits had reached its statutory time limit and he was not eligible for permanent benefits); Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 626 ( Fla. 1st Dist. Ct. App. 2011) (en banc), overruled by Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).
Court of Florida to construe the statutes regarding attorney’s fees and temporary benefits in “a manner so as to avoid an unconstitutional result.”

In *Castellanos v. Next Door Co.*, the Supreme Court of Florida ruled that the irrebuttable presumption in the attorney’s fee schedule was a violation of Florida’s Due Process Clause in accordance to section 440.34 of the Florida Statutes. In *Westphal v. City of St. Petersburg*, the Supreme Court of Florida ruled that the statutory time limit in section 440.15 of the Florida Statutes for temporary benefits was a denial of the right to access the court under article I, section 21 of the Florida Constitution.

This Comment will discuss the current legislation regarding the attorney’s fees statute and how it has been interpreted by the Supreme Court of Florida as unconstitutional. Second, this Comment will discuss the history of awarding attorney’s fees and how it has evolved to the point where the *Castellanos* court found the principle to be unconstitutional. Third, this Comment will discuss the *Castellanos* decision and how the current attorney’s fees statute is a violation of due process. Fourth, this Comment will discuss how current legislation of disability benefits is calculated and the history of the statutory time limit for temporary benefits. Fifth, this Comment will discuss the *Westphal* decision and how the 104 week limitation on temporary benefits is a violation of a person’s right to access the courts. Finally, this Comment will analyze the possible impact of the Supreme Court of Florida’s ruling on attorney’s fees and disability benefits, the reaction from the business community, and whether those reactions are justified.


10. 192 So. 3d 431 (Fla. 2016).

11. *Id.* at 449; see also *FLA. CONST.* art. I, § 9; *FLA. STAT.* § 440.34 (2009), *declared unconstitutional* by Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016).

12. 194 So. 3d 311 (Fla. 2016).

13. *Id.* at 327; see also *FLA. CONST.* art. I, § 21; *FLA. STAT.* § 440.15 (2009).

14. See infra Section II.A.

15. See infra Section II.B, II.C.

16. *FLA. STAT.* § 440.34 (2015); Castellanos, 192 So. 3d at 432; see also *FLA. CONST.* art. I, § 9; infra Section II.C.1.

17. See infra Sections III.A–B.

18. *Westphal*, 194 So. 3d at 313; see also *FLA. CONST.* art. I, § 21; infra Section III.C.

II. ATTORNEY’S FEES

A. Current Legislation

An employee is not required to pay for his own attorney’s fees if the employee succeeds in his claim against the employer.20 Once a claim is filed, the employer will not be liable for any attorney’s fees until thirty days after the filing date.21 This allows the employer the opportunity to settle the claim with the employee before the employer would be responsible for any attorney’s fees.22 However, the amount of attorney’s fees either party would have to pay is restricted by a statutory formula and calculated based solely on the benefits that were secured.23 Further, the Judge of Compensation Claims (“JCC”) has no discretionary power to allow the fees to be greater than the statutory formula.24 This statutory formula restricts attorney’s fees to “[20%] [for] the first [five thousand dollars] of [secured benefits], 15[ʼ%] for the next [five thousand dollars] . . . [and] 10[ʼ%] of the remaining amount of the benefits secured.”25

B. History

Awarding attorney’s fees in addition to compensability awards began in 1941, when the legislature realized that the assistance of an attorney was crucial.26 At the adoption of awarding attorney’s fees, the amount was based on a reasonableness criteria approved by the JCC.27 The purpose for awarding the attorney’s fees was to remain consistent with the legislature’s intent of granting employees an inexpensive relief and reducing the economic stress associated with a work-related injury.28 Additionally, conveying attorney’s fees over to the employer/Carrier (“E/C”) would deter the E/C from denying claims in an attempt to get a settlement.29

21. Id. § 440.34(3)(d).
22. See id.
23. Id. § 440.34(1).
24. Id.
27. Id.
The courts are guided by Canon 12 of the Rules of Ethics Governing Attorneys in determining reasonable attorney’s fees. However, without a fixed method of determining reasonable attorney’s fees, the courts rely on precedent and the factual record for indication as to the amount of work and time an attorney put into a case. Reasonable attorney’s fees should “not be so low as to” deter experienced attorneys from taking on a case, leaving the employee without adequate representation. At the same time, the attorney’s fees cannot be so excessive as to place a heavy burden on the E/C and the workers’ compensation program. Following Lee Engineering & Construction Co. v. Fellows, in 1977, the legislature amended section 440.34(1) of the Florida Statutes to include the statutory formula as a basis for calculating attorney’s fees, while adding discretionary factors the JCC can use to increase or decrease the fee to confirm that a reasonable attorney’s fee was awarded. The legislature determined reasonable attorney’s fees by having the JCC apply the statutory formula and then adjust the amount based on the discretionary factors for each case. The statutory formula acted as a starting point, where a departure was valid only if the

30. Castellanos, 192 So. 3d at 439 (citing Fla. Silica Sand Co. v. Parker, 118 So. 2d 2, 4 (Fla. 1960)).
32. Castellanos, 192 So. 3d at 439.
33. Id.
34. 209 So. 2d 454 (Fla. 1968).

(1) If the employer or carrier shall file notice of controversy as provided in s. 440.20, or shall decline to pay a claim on or before the [twenty-first] day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the claimant . . . shall have employed an attorney at law in the successful prosecution of the claim, there shall, in addition to the award for compensation, be awarded a reasonable attorney’s fee of 25 % of the first $5,000 of the amount of the benefits secured, 20 % of the next $5,000 of the amount of the benefits secured, and 15 % of the remaining amount of the benefits secured, to be approved by the judge of industrial claims, which fee may be paid direct to the attorney for the claimant in a lump sum. However, the judge of industrial claims shall consider the following factors in each case and may increase or decrease the attorney’s fee if in his judgment the circumstances of the particular case warrant such action: (a) [t]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) [t]he likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonisms with other clients; (c) [t]he fee customarily charged in the locality for similar legal services; (d) [t]he amount involved in the controversy and the benefits resulting to the claimant; (e) [t]he time limitation imposed by the claimant or the circumstances; (f) [t]he nature and length of the professional relationship with the claimant; (g) [t]he experience, reputation, and ability of the lawyer or lawyers performing the services; (h) [t]he contingency or certainty of a fee.

Id. at 1293–94.
formula would produce a manifestly unfair result. The legislature again amended 
section 440.34 of the Florida Statutes in 1980 by restricting the amount of 
attorney’s fees to only the benefits “that the attorney is responsible for 
securing.” Furthermore, in 1993, the legislature further limited the amount of 
attorney’s fees by lowering the percentages of the statutory formula to the percentages currently in place.

Ten years later, Governor Bush reformed Florida’s entire workers’ 
compensation system. In the Governor’s Commission on Workers’ 
Compensation Reform, the legislature abandoned the Lee Engineering 
discretionary factors used to determine the reasonableness of an attorney’s 
fee. However, according to the language of the statute, the JCC still had to 
approve reasonable attorney’s fees, but was strictly forced to follow the 
statutory formula in effect. The interpretation of the newly reformed 
statute implies that, in every instance, the statutory formula will equate to a 
reasonable award of attorney’s fees.

As Murray v. Mariner Health evidenced, this is not always the 
case. In Murray, the statutory formula resulted in an attorney’s fee for the 
prevailing employee’s attorney of $8 per hour for eighty hours of work. On 
the other hand, the E/C’s attorney received $125 per hour for 135 hours in its 
unsuccessful attempt to oppose paying benefits. The JCC stated that the 
employee’s attorney’s fees cannot be seen to be reasonable but instead 
“would appear to be manifestly unfair.” The court in Murray ruled that the 
statute’s plain language was ambiguous; yet, the court did not want to rule 
the statute was unconstitutional due to the statutory principle of avoiding 
unconstitutionality whenever it is possible. The Supreme Court of Florida

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41. Ch. 2003-412, § 26, 2003 Fla. Laws at 85; Castellanos, 192 So. 3d at 442; see also Lee Eng’g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).
44. 994 So. 2d 1051 (Fla. 2008).
45. Id. at 1057.
46. Id. at 1055.
47. Id.
49. Murray v. Mariner Health, 994 So. 2d 1051, 1057 (Fla. 2003).
stated in the Murray decision that the Lee Engineering factors be used once again as the standard for reasonableness, even though the legislature repealed them in the 2003 amendment to the attorney’s fees provision.\footnote{Id. at 1062 (The Supreme Court of Florida was unclear as to why the legislature took out the factors in the first place, because they still authorized entitlement to reasonable attorney’s fees, but now they did so without any standard to define what is considered reasonable.).}

Following the ruling in Murray, in 2009, the legislature removed the remaining ambiguity by removing any reference to reasonableness in section 440.34 of the Florida Statutes.\footnote{Id. (emphasis added); see also Murray, 994 So. 2d at 1062.} In effect, this resulted in strict compliance with the attorney fee schedule and removal of any discretionary power from the JCC to alter the fee schedule due to inadequate or excessive fees.\footnote{See Ch. 2009-94, § 1, 2009 Fla. Laws at 1; Castellanos v. Next Door Co., 192 So. 3d 431, 443 (Fla. 2016) (removing reasonableness effectively made the statute unambiguous with the same restriction as in the 2003 reform).} Therefore, this created an \textit{irrebutable presumption} that the fee schedule will guarantee a reasonable attorney’s fee.\footnote{See id.} Furthermore, this paved the way for the Supreme Court of Florida to hear the Castellanos case and rule section 440.34 of the Florida Statutes as unconstitutional.\footnote{Castellanos, 192 So. 3d at 432.}

C. \textit{Castellanos} Ruling

In Castellanos, the Supreme Court of Florida ruled the irrebuttable presumption in the statutory fee schedule of section 440.34 of the Florida Statutes as a violation of due process under the Florida Constitution.\footnote{See id.} In this case, the Petitioner, Marvin Castellanos, was a forty-six year old man that was injured during the course and scope of his employment as a press break operator for Next Door Company.\footnote{Id.; see also Fla. CONST. art. I, § 9.} Next Door Company was a manufacturer of metal doors and door frames, with their principal place of business in Miami, Florida.\footnote{Castellanos, 192 So. 3d at 433, 435.} Mr. Castellanos received multiple head, neck,
and right shoulder contusions as a result of the work-related injury.\textsuperscript{58} Subsequently, Next Door Company and their insurance carrier, Amerisure—collectively E/C—provided an authorized physician, who requested medically necessary treatment from the E/C.\textsuperscript{59} However, the E/C refused to authorize their chosen physician’s prescribed treatment—consequently, Mr. Castellanos filed a petition for benefits with his attorney.\textsuperscript{60} The E/C responded to the petition for benefits by denying compensability on the basis of section 440.09(4) of the Florida Statutes.\textsuperscript{61} The E/C filed twelve defenses during the proceedings, and the final hearing was composed of “numerous depositions, exhibits, and live testimony.”\textsuperscript{62} The JCC’s final compensation order awarded Mr. Castellanos compensation for his work-related injuries, entitling him recovery of attorney’s fees from the E/C.\textsuperscript{63}

Following the JCC’s ruling, Mr. Castellanos “filed a motion for attorney’s fees, seeking an hourly [rate] of $350 for” 107.2 hours of work.\textsuperscript{64} However, as a result of the mandatory fee schedule, Mr. Castellanos’ attorney was only allowed to recover a fee of $1.53 per hour.\textsuperscript{65} Because the fee schedule is based solely on the amount of benefits secured, a case with complex legal issues for only a minimum amount of benefits—as in Mr. Castellanos’ situation—would result in scant attorney’s fees.\textsuperscript{66} Expert witnesses testified on behalf of Mr. Castellanos that the amount of hours Mr. Castellanos’ attorney put forth was “reasonable and necessary . . . given that ‘this was a very difficult case.’”\textsuperscript{67} Additionally, the experts testified that there would have been no way for Mr. Castellanos to receive compensation for his injuries without the assistance of his attorney.\textsuperscript{68}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{58} Id.
\item\textsuperscript{59} Id.
\item\textsuperscript{60} Id. (A petition for benefits is the form that is used to file a claim under Florida’s workers’ compensation.).
\item\textsuperscript{61} Castellanos, 192 So. 3d 435; Fla. Stat. § 440.09(4) (2009); see also Fla. Stat. § 440.105(4)(b)(9) (2009) (An employee will not be entitled to compensability of benefits when they “knowingly [or intentionally] present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers’ compensation benefits.”).
\item\textsuperscript{62} Castellanos, 192 So. 3d at 435.
\item\textsuperscript{63} Id.; see also Fla. Stat. § 440.34(3)(b) (2015) (An employee is entitled to recover attorney fees “[i]n any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition.”).
\item\textsuperscript{64} Castellanos, 192 So. 3d at 435.
\item\textsuperscript{65} Id. at 436.
\item\textsuperscript{66} See Fla. Stat. § 440.34(1) (2015); Castellanos, 192 So. 3d at 443.
\item\textsuperscript{67} Castellanos, 192 So. 3d at 436.
\item\textsuperscript{68} Id.
\end{itemize}
\end{footnotesize}
An expert witness on behalf of the E/C testified that he had not seen one case where an employee was successful in litigating without an attorney and that the statutory fee “in this case was ‘an unreasonably low hourly rate’ and an absurd result.” However, the JCC was bound by precedent to follow the statutory fee schedule and did “not have the jurisdiction to declare a state statute unconstitutional,” even though the JCC was in agreement with the expert witnesses’ testimony. The First District Court of Appeal affirmed the JCC’s decision; however, the court noted that a constitutional issue arose as a result of this case. The Supreme Court of Florida granted review and ruled the statute unconstitutional “as a violation of due process.”

1. Violation of Due Process

“[T]he inability of any injured worker to challenge the reasonableness of the fee award in his or her individual case is a facial constitutional due process issue.” In order to assert a constitutional issue, the true party in interest must have standing. The courts do not look at the award of attorney’s fees “from the point of view of the attorney’s rights, because the attorney[s] have the discretion to take on a case.” Furthermore, putting a barrier on reviewing a decision of attorney’s fees would “ultimately result in a net loss of attorneys willing to represent” injured workers. Consequently, this would diminish the injured employee’s ability to challenge an E/C’s denial of benefits. Thus, the injured worker, not the attorney, is the true party in interest when awarding attorney’s fees. Accordingly, Mr. Castellanos had standing to assert the constitutional challenge of attorney’s fees.

In Recchi America Inc. v. Hall, the court concluded that the irrefutable presumption, in section 440.09(3) of the Florida Statutes, was a violation of due process because it did not allow the employee to overcome

69. Id.
70. Id. at 437.
71. Id.; see also Fla. Const. art. I, § 9.
72. Castellanos, 192 So. 3d at 437; see also Fla. Const. art. I, § 9.
73. Castellanos, 192 So. 3d at 443; see also Fla. Const. art. I, § 9.
74. See id. at 443–44.
75. Id. at 443.
77. Id.
78. Castellanos, 192 So. 3d at 443.
79. Id. at 443–44.
80. 692 So. 2d 153 (Fla. 1997).
the presumption that the intoxication was the cause of the industrial accident. The *Recchi America Inc.* court adopted a three-prong test to determine whether a statute’s irrebuttable presumption provision, such as the mandatory fee schedule in section 440.34 of the Florida Statutes, violates the constitutional right to due process. The three-prong test to determine the constitutionality of an irrebuttable presumption consists of:

(1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence, and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

a. **Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which It Legitimately Desired to Avoid**

The statutory fee schedule was created with the intent of standardizing the amount awarded for attorney’s fees. Prior to the creation of the irrebuttable presumption, the statutory fee schedule was used as a starting point in determining the award amount. However, the fee schedule was not intended to be the sole deciding factor in determining the award amount for attorney’s fees. The current irrebuttable presumption in section 440.34 of the Florida Statutes reflects the legislative intent to standardize the fee; however, it only considers the amount of benefits secured. The fee schedule lacks any consideration to the time and effort the attorney spent in a case. As the court in *Martin Marietta Corp. v. Glumb* stated, “[a]mong

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84. *Id.*


86. *Fumigation Dep’t v. Pearson, 559 So. 2d 587, 590 (Fla. 1st Dist. Ct. App. 1989).*

87. *Id.*

88. *Fla. Stat. § 440.34(1) (2015); see also Castellanos v. Next Door Co., 192 So. 3d 431, 444 (Fla. 2016). But see Martin Marietta Corp. v. Glumb, 523 So. 2d 1190, 1195 (Fla. 1st Dist. Ct. App. 1988) (“[A]lthough the amount of benefits obtained is a significant factor, it is not determinative of the maximum amount that can be awarded . . . .”).

89. *Castellanos, 192 So. 3d at 444.*

90. *523 So. 2d 1190 (Fla. 1st Dist. Ct. App. 1988).*
the major considerations involved in the determination of a workers’ compensation attorney’s fee are the time and labor reasonably required to prosecute the claim, and the hourly fee customarily charged in the area for similar services.”

As to the claim that the legislature aimed to avoid excessive attorney’s fees, the legislature had already taken that into consideration with Lee Engineering factors they had previously codified. Additionally, the statutory fee schedule limits only the injured employee’s—claimant—attorney’s fees without limiting the employer’s attorney’s fees. In the first ten years of the codification of the irrebuttable presumption in section 440.34 of the Florida Statutes, the claimant’s attorney’s fees have decreased from 48.91% of the aggregate fees to 36.27%, while the employer’s attorney’s fees have increased from 51.09% of the aggregate fees to 63.73%. Additionally, the claimant’s attorney is barred from agreeing to a reasonable lump sum with the claimant without the approval of the JCC, who in turn is forced to approve only an amount equal to the statutory fee schedule.

b. Whether There Was a Reasonable Basis for a Conclusion That the Statute Would Protect Against Its Occurrence

Assuming the legislative intent of avoiding excessive attorney’s fees passes the first prong of the due process test, there is no evidence the irrebuttable presumption actually serves that purpose. On the contrary, in some cases, the fees can be excessive as well as inadequate as the court in Murray explained:

In some cases such as the present case [and the Castellanos case], the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits. In other cases, the amount of benefits is substantial, but

91. Id. at 1195.
92. See Act effective July 1, 1977, ch. 77-290, § 9, 1977 Fla. Laws 1284, 1293–94 (“the time and labor required, the novelty, [complexity], and difficulty of the questions involved, and the skill requisite to perform the legal service properly”); Lee Eng’g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).
94. Castellanos, 192 So. 3d at 445.
95. See FLA. STAT. § 440.34(1) (2015) (“The JCC shall not approve . . . a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter, which provides for an attorney’s fee in excess of the amount permitted by this section.”).
97. See Castellanos, 192 So. 3d at 445–46.
the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience. In the former case, a mandatory, rigid application of the formula results in an inadequate fee; in the latter, such application of the formula results in an excessive fee. 98

Additionally, the First District Court of Appeal explained that a customary hourly rate to calculate attorney’s fees will be more effective in cases in which the value of the attorney’s services greatly outweighs the financial benefits those services secured. 99 As in Castellanos, the attorney’s value of service and dedication to persevere through the twelve defenses of opposing counsel greatly outweighs the limited, yet necessary, benefits sought by Mr. Castellanos. 100 Therefore, the removal of the JCC’s discretionary authority to alter attorney’s fees, whether excessive or inadequate, frustrates the workers’ compensation system. 101 The irrebuttable presumption does not protect against the occurrence of an excessive fee. 102

c. Whether the Expenses and Other Difficulties of Individual Determinations Justify the Inherent Imprecision of a Conclusive Presumption 103

This final prong of the due process test weighs heavily against the irrebuttable presumption in the fee schedule. 104 The JCC is the individual who makes the determination of whether the expenses and difficulties justify the irrebuttable presumption. 105 However, the irrebuttable presumption does not allow the JCC to do anything regarding an unreasonable attorney fee. 106 In fact, before the irrebuttable presumption was created, the fee schedule was used as a starting point to award a reasonable attorney fee. 107 Additionally, the JCC has been able to determine reasonable attorney’s fees since the role’s enactment in 1941 without “undue expense or difficulty to avoid unfairness and arbitrariness” through the use of the Lee Engineering factors

98. Murray v. Mariner Health, 994 So. 2d 1051, 1057 n.4 (Fla. 2008); see also Castellanos, 192 So. 3d at 445–46.
100. See Castellanos, 192 So. 3d at 435–36; Alderman, 805 So. 2d at 1100.
101. Castellanos, 192 So. 3d at 446.
102. Id.; see also Murray, 994 So. 2d at 1057 n.4.
104. Castellanos, 192 So. 3d at 445–46.
105. See id. at 446.
106. See id.
107. Id. at 444, 446.
as a guideline for the determination of reasonableness. Therefore, prior to the creation of the irrebuttable presumption, “[t]his type of review to control abuse, limit excessive fees, and award reasonable fees provide[d] no basis” to depart from this type of review.

2. Conclusion

The goal of the Florida’s workers’ compensation system has remained the same, which is “the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment at a reasonable cost to the employer.” However, the legislature has granted the E/C the opportunity to take advantage of the workers’ compensation system by eliminating reasonableness as a prerequisite to awarding attorney’s fees. In turn, the E/C is incentivized to delay and resist paying benefits by raising multiple defenses, as was done in Castellanos, to encourage a settlement between the employee and their attorney. Conversely, awarding reasonable attorney’s fees will benefit the injured employee because attorneys will be inclined to take on a case even for a modest, albeit necessary, benefit because the attorney will be paid a reasonable fee for his time and labor.

In effect, the fundamental purpose of awarding attorney’s fees is to deter the employer from unnecessary delay and to allow the employee to receive a net recovery of his benefits. This purpose is completely eviscerated by eliminating the requirement of a reasonable attorney’s fee. It is irrelevant whether the attorney’s fee schedule can produce reasonable attorney’s fees because that is not the constitutional issue; the facial due process violation is in regards to the irrebuttable presumption in section 440.34(1) of the Florida Statutes that “precludes every injured worker from challenging the reasonableness of the [attorney’s] fee award.” As Justice

108.        Id. at 446, 449; Lee Eng’g & Constr. Co. v. Fellows, 209 So. 2d 454, 458–59 (Fla. 1968).
109.        Castellanos, 192 So. 3d at 446.
111.       Castellanos, 192 So. 3d at 436.
112.       Id. at 435, 447–48; Ohio Cas. Grp. v. Parrish, 350 So. 2d 466, 470 (Fla. 1977).
113.        Castellanos, 192 So. 3d at 448; Ohio Cas. Grp., 350 So. 2d at 470.
114.        Castellanos, 192 So. 3d at 439, 447–48; Ohio Cas. Grp., 350 So. 2d at 470.
115.       Castellanos, 192 So. 3d at 448.
116.       Id. at 434; see also FLA. STAT. § 440.34(1) (2009), declared unconstitutional by Castellanos v. Next Door Co., 192 So. 3d 431 (Fla. 2016); FLA. CONST. art. I, § 9.
Pariente of the Supreme Court of Florida stated: “Without the ability of the attorney to present, and the JCC to determine the reasonableness of the fee award and to deviate where necessary, the risk is too great that the fee award will be entirely arbitrary, unjust, and grossly inadequate.”\textsuperscript{117} Therefore, section 440.34 of the Florida Statutes violates Florida’s constitutional guarantee of due process.\textsuperscript{118} The proper remedy would be to revive the statute’s interpretation in \textit{Murray}, where the court held that the \textit{Lee Engineering} factors would be used to confirm that a reasonable award of attorney’s fees is provided.\textsuperscript{119} This is because “Florida law has long held that, when the [l]egislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless, it too would be unconstitutional.”\textsuperscript{120}

III. \textbf{DISABILITY BENEFITS}

A. \textit{Background}

In Florida, once an employee gets injured on the job, they are entitled to receive disability benefits if the injury results in more than twenty-one days of disability.\textsuperscript{121} After the twenty-one days, the employee is entitled to disability benefits, the amount of which is dependent on his or her work status and earnings.\textsuperscript{122} An employee’s average weekly wages (“AWW”) is used to determine the amount of disability benefits an employee is entitled to receive.\textsuperscript{123} AWW considers an employee’s average earnings in the thirteen weeks prior to his injury.\textsuperscript{124} Once the AWW is set and the authorized physician has put the employee on a limited work status, the employee may be entitled to partial temporary disability (“PTD”) benefits—only if the employee is currently earning less than 80% of his AWW each week.\textsuperscript{125} When an employee is entitled to PTD benefits, he or she will receive 80% of the difference of 80% of the employee’s AWW and current weekly

\begin{itemize}
  \item \textsuperscript{117} Castellanos, 192 So. 3d at 448.
  \item \textsuperscript{118} Fla. Stat. § 440.34(1) (2009); Castellanos, 192 So. 3d at 448; see also Fla. Const. art. I, § 9.
  \item \textsuperscript{119} See Castellanos, 192 So. 3d at 448–49; Murray v. Mariner Health, 994 So. 2d 1051, 1062 (Fla. 2008); Lee Eng’g & Constr. Co. v. Fellows, 209 So. 2d 454, 458 (Fla. 1968).
  \item \textsuperscript{120} B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) (per curiam).
  \item \textsuperscript{121} Fla. Stat. § 440.12(1) (2015).
  \item \textsuperscript{122} Id.; Fla. Stat. § 440.14(1) (2015).
  \item \textsuperscript{123} Fla. Stat. § 440.14(1) (2015).
  \item \textsuperscript{124} Id. § 440.14(1)(a).
  \item \textsuperscript{125} Fla. Stat. § 440.15(4)(c) (2009).
\end{itemize}
earnings.\textsuperscript{126} If the physician has put the employee on a no-work status, then
the employee is entitled to receive total temporary disability ("TTD") benefits.\textsuperscript{127} As part of the TTD benefits, the employee will receive 66.67% of
the employee’s AWW.\textsuperscript{128} However, temporary benefits, whether partial or
total, will terminate after 104 weeks or when the authorized physician has
placed them at maximum medical improvement ("MMI").\textsuperscript{129}

Only an employee who has reached MMI can become eligible for
permanent disability benefits.\textsuperscript{130} Impairment income benefits, also known as
permanent partial disability benefits, are given to those employees who have
reached MMI and are based on the percentage of the employee’s total body
that is permanently impaired due to the work-related injury.\textsuperscript{131} At that point,
the employee will be given an impairment rating by the authorized physician,
and, depending on the impairment rating percentage, the employee will
receive 75% of TTD benefits for a certain number of weeks for each
percentage point.\textsuperscript{132} Finally, an employee is eligible for PTD benefits if he
or she can prove that he or she can no longer work, even in a limited
capacity, and that the permanent disability was caused as a result of the
work-related injury.\textsuperscript{133} However, PTD benefits are available only for
employees who are incapable of engaging in employment beyond the date of
MMI or employees with catastrophic injuries.\textsuperscript{134}

B. History

Since the enactment of the Florida’s workers’ compensation system,
section 440.15 of the Florida Statutes has governed the payment of disability
benefits.\textsuperscript{135} Initially, MMI did not govern PTD benefits, but rather PTD was
determined “in accordance [to] the facts.”\textsuperscript{136} Additionally, TTD benefits had
a maximum duration of 350 weeks.\textsuperscript{137} Before the codification of MMI,
Corral v. McCrory Corp. had already established that “[MMI] mark[ed] the end of temporary disability and the beginning of permanent disability [benefits].” In 1979, the legislature added the term MMI with the meaning established in Corral, along with the addition that MMI be “based upon reasonable medical probability.” The definition of MMI continues to be the “date after which . . . recovery . . . or lasting improvement . . . can no longer reasonably be anticipated, based [on] reasonable medical probability.”

In 1990, the legislature reduced the maximum duration for temporary benefits from 350 weeks to 260 weeks. Four years later, the legislature decided this reduction in 1990 was insufficient, and reduced the maximum duration for temporary benefits to 104 weeks.

C. Westphal Ruling

In 2009, Bradley Westphal, a fifty-three year old fireman, suffered an injury in the course of his employment duties. Westphal suffered severe injuries to his lower back and lost feeling in his left leg below the knee. Additionally, he required spinal fusion surgery and other surgical procedures. Due to his no work status, Westphal began receiving workers’ compensation benefits in the form of medical benefits and TTD benefits. At the time of the accident, pursuant to section 440.15(2) of the Florida Statutes, TTD benefits were terminated “[o]nce the employee reach[e]d the maximum number of weeks allowed, [104 weeks], or the employee reach[e]d the date of [MMI], whichever occurs earlier . . . and the injured worker’s permanent impairment shall be determined.” The permanent impairment refers to assigning a rating percentage used to pay impairment income benefits pursuant to section 440.15(3)(b) of the Florida Statutes. However, Westphal was not eligible to receive impairment income benefits

138. 228 So. 2d 900 (Fla. 1969).
139. Id. at 903 (establishing that “[MMI] is the date after which recovery or lasting improvement can no longer reasonably be anticipated”).
140. Act effective July 1, 1979, ch. 79-40, § 2, 1979 Fla. Laws 215, 221; see also Corral, 228 So. 2d at 903.
141. Fla. Stat. § 440.02(10) (2015); see also Corral, 228 So. 2d at 903.
144. Westphal v. City of St. Petersburg, 194 So. 3d 311, 315 (Fla. 2016).
145. Id.
146. Id.
147. Id. at 315–16.
149. Id. §§ 440.15(3)(b), .02(22).
because those benefits did not become due until MMI had been reached.\footnote{150} In 2009, MMI was defined in section 440.02(10) of the Florida Statutes as “the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability.”\footnote{151}

Although Westphal was not placed on MMI, his TTD benefits ceased after he had reached the statutory time limit of 104 weeks.\footnote{152} At that time, Westphal, following the advice from his physicians, was still not able to return to work or obtain any employment due to the severity of his injuries.\footnote{153} Accordingly, Westphal filed a petition for benefits seeking permanent total disability benefits.\footnote{154} Section 440.15(1) of the Florida Statutes governs entitlement to PTD benefits; however, it limits that entitlement to a certain class of individuals:

\begin{quote}
No compensation shall be payable under this section if the employee is engaged in, or is \textit{physically capable of engaging in}, at least sedentary employment. . . . In the following cases, an injured employee is presumed to be permanently and totally disabled unless the employer or carrier establishes that the employee is physically capable of engaging in at least sedentary employment within a fifty-mile radius of the employee’s residence.
\end{quote}

\ldots

In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is not able to engage in at least sedentary employment, within a fifty-mile radius of the employee’s residence, due to his or her physical limitation. . . . \textit{Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are eligible for permanent total benefits.} In no other case may permanent total disability be awarded.\footnote{155}

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\item \footnote{151} \textit{Fla. Stat.} § 440.02(10) (2009).
\item \footnote{152} \textit{Westphal}, 194 So. 3d at 316.
\item \footnote{153} \textit{Id.}
\item \footnote{154} \textit{Id.}
\item \footnote{155} \textit{Fla. Stat.} § 440.15(1)(a)–(b) (2009) (emphasis added); \textit{see also} \textit{Westphal}, 194 So. 3d at 316, 319–20.
\end{itemize}
The legislature has made it clear through the statute’s plain language that PTD benefits are limited to injured workers with catastrophic injuries, as defined in the statute, and those who are incapable of obtaining employment.156 Further, by definition, catastrophic injuries entail a permanent impairment—and, pursuant to section 440.02 of the Florida Statutes, permanent impairment is defined as “any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury.”157 Consequently, Westphal must have been able to prove, upon the cessation of his temporary benefits, not only that he was completely disabled, but also that he will remain completely disabled “after the date of [MMI].”158 Unfortunately, in Westphal’s situation, the authorized physician opined that determining whether he will remain totally and permanently disabled after the date of MMI was too speculative.159 In effect, Westphal was fully deprived “from [his] disability benefits for an indefinite amount of time.”160

As demonstrated in Westphal’s case, the statutory scheme has created a gap wherein an injured worker who has not yet reached MMI at the end of the 104-week maximum duration of TTD benefits would remain ineligible for PTD benefits until the injured worker has reached MMI.161 Consequently, the JCC denied Westphal’s claim for PTD benefits.162

The JCC denied Westphal’s claim based on the precedent set by Matrix Employee Leasing, Inc. v. Hadley,163 in which the court recognized the possibility of a gap in temporary and permanent benefits to injured workers who had not reached MMI.164 However, since the statute’s language is clear and unambiguous, the courts do not have the power to interpret the statute to eliminate the possibility of a gap in disability benefits because that remedial power lies with the legislature.165

156. Fla. Stat. § 440.15(1)(b) (2009); see also Westphal, 194 So. 3d at 319.
158. Matrix Emp. Leasing, Inc., 78 So. 3d at 625 (alteration in original); see also Westphal, 194 So. 3d at 316–17.
159. Westphal, 194 So. 3d at 316.
160. Id.
161. See Fla. Stat. § 440.15(2) (2009); Westphal, 194 So. 3d at 316.
162. Westphal, 194 So. 3d at 316.
164. Id. at 624.
165. Id. at 626.
On appeal, the First District Court of Appeal agreed with Westphal’s assertion that the 104-week limitation on TTD benefits was an unconstitutional denial of access to the courts.\textsuperscript{166} The court relied on\textit{Kluger v. White}\textsuperscript{167} to conclude that the statutory limitation on benefits amounted to an inadequate remedy when compared to the original 350-week limitation on TTD benefits.\textsuperscript{168} This equated to a denial of access to the courts because the legislature does not have the power to abolish the 350-week limitation without providing a reasonable alternative.\textsuperscript{169}

“Subsequent to the panel[’s] decision, the First District granted” an en banc rehearing, where it attempted to save the statute’s constitutionality by setting forth a new interpretation.\textsuperscript{170} The new interpretation had construed the meaning of\textit{permanent impairment} in section 440.15(2)(a) of the Florida Statutes to indicate that the injured worker has reached MMI.\textsuperscript{171} Consequently, the court held that when an injured worker is totally disabled at the expiration of his TTD benefits, the employees are automatically deemed at MMI.\textsuperscript{172} The First District Court of Appeal receded from the decision in\textit{Hadley} that had recognized the possibility of a statutory gap in disability benefits.\textsuperscript{173} The First District Court of Appeal did not further address the constitutionality issue due to the new interpretation of the statute, which discredited the\textit{Hadley} ruling.\textsuperscript{174} However, the First District Court of Appeal discredited the\textit{Hadley} ruling with a statutory interpretation that they had already condemned in that case:

The statutory interpretation advocated by the dissent would eliminate the \textit{gap} by equating the expiration of the eligibility for temporary benefits with the date of MMI, as that phrase is used in the definition of\textit{permanent impairment}. The main problem with this interpretation is that “date of maximum medical improvement” is statutorily-defined as the date after which the employee is not reasonably anticipated to have further medical recovery or improvement from the injury, . . . whereas the date temporary benefits cease by operation of law has nothing to do with the employee’s ultimate medical condition or prognosis.\textsuperscript{175}

\begin{flushleft}
166. \textit{Westphal}, 194 So. 3d at 317.  \\
167. 281 So. 2d 1 (Fla. 1973).  \\
168. \textit{Westphal}, 194 So. 3d at 317; see also\textit{Kluger}, 281 So. 2d at 1.  \\
169. \textit{See Kluger}, 281 So. 2d at 4.  \\
170. \textit{Westphal}, 194 So. 3d at 317.  \\
171. FLA. STAT. \$440.15(2)(a) (2009); \textit{Westphal}, 194 So. 3d at 317.  \\
172. \textit{Westphal}, 194 So. 3d at 317.  \\
173. \textit{Id.}; see also\textit{Matrix Emp. Leasing, Inc.}, 78 So. 3d at 621.  \\
174. \textit{Westphal}, 194 So. 3d at 317; see also\textit{Matrix Emp. Leasing, Inc.}, 78 So. 3d at 621.  \\
175. \textit{Matrix Emp. Leasing, Inc.}, 78 So. 3d at 626 n.6 (citations omitted).
\end{flushleft}
Therefore, the First District is contradicting itself in interpreting the statute with an interpretation it had discredited two years earlier. 176 Nonetheless, the First District certified the question “as one of great public importance” and the Supreme Court of Florida granted review.177

However, the Supreme Court of Florida concluded that the First District’s new statutory interpretation from the “en banc opinion is an impermissible judicial rewrite of the [l]egislature’s plainly written statute.”178 The court recognized that “statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome.”179 However, the First District’s attempt to preserve the constitutionality of the statute is invalid because “the clear language of the statute” does not permit it.180 It is clear the legislature intended for temporary benefits to cease at 104 weeks.181 “It is further clear that the [l]egislature intended to limit the class of” injured workers eligible for PTD benefits “to those with catastrophic injuries” who cannot work within a fifty-mile radius of their homes.182 Consequently, the legislature “create[d] a gap in disability benefits for those injured workers who are totally disabled upon the expiration of temporary disability benefits, but fail to prove prospectively that total disability will exist after the date of MMI.”183 Even though it may be unfair or unwise to leave open a statutory gap in benefits for injured workers, the courts do not have the power to rewrite the statute; therefore, the First District’s en banc opinion was withdrawn, and now the Supreme Court of Florida turns to the constitutional issue regarding whether the 104-week limitation of temporary benefits violates a person’s right to access the court.184

1. Denial of Access to Courts

Pursuant to article I, section 21, of the Florida Constitution, “[t]he courts shall be open to every person for redress of any injury, and justice

177. Westphal, 194 So. 3d at 317.
178. Id. at 318.
179. Id. at 320.
180. Id.
182. See Fla. Stat. § 440.15(1)(b) (2009); Westphal, 194 So. 3d at 319, 321.
184. Westphal, 194 So. 3d at 317–18, 321; Matrix Emp. Leasing, Inc., 78 So. 3d at 626; see also Fla. Const. art. I, § 21.
shall be administered without sale, denial, or delay.”185 In Kluger, the court explained how the access to courts provision is applied and what is needed to show a constitutional violation:

[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to [section 2.01 of the Florida Statutes], the [l]egislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the [l]egislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.186

Prior to the enactment of the access to courts provision, Florida’s Legislature had already abolished any tort remedy for an employee to sue an employer.187 Instead, the legislature provided the employee with a workers’ compensation system that placed the burden on the employer and allowed the employee to be relieved of the economic stress resulting from the industrial injury in a simple, expeditious, and inexpensive manner.188 Further, the court in Kluger held that Florida’s workers’ compensation system fell within one of the exceptions to the right to redress for an injury, wherein the workers’ compensation system equated to “a reasonable alternative to tort litigation” because it provided “adequate, sufficient, and even preferable safeguards for an employee who is injured on the job.”189 Therefore, a statute will pass constitutional muster as long as it provides a “reasonable alternative to tort litigation.”190

Accordingly, when the legislature first reduced the maximum weeks for temporary benefits from 350 to 260 weeks, the court in Martinez v. Scanlan191 ruled that the reduction did not violate the access to courts provision, as Florida’s workers’ compensation continued to be a “reasonable alternative to tort litigation.”192 The reduction to 260 weeks for temporary

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186. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); see also FLA. CONST. art. I, § 21.
187. Westphal, 194 So. 3d at 322.
188. Id.
189. Id. at 322–23 (quoting Kluger, 281 So. 2d at 4).
190. Id.
191. 582 So. 2d 1167 (Fla. 1991).
192. Id. at 1171; Westphal, 194 So. 3d at 322–23; see also FLA. CONST. art. I, § 21.
benefits passed constitutional muster because it continued to be a “reasonable alternative to tort litigation” by continually providing “adequate and sufficient safeguards for injured employees.” Accordingly, “[i]t continue[d] to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation.” Therefore, when encountered with a constitutional challenge based on the access to courts provision, the question is “whether the law ‘remains a reasonable alternative to tort litigation.’” That is, it must provide adequate and sufficient safeguards for the injured employee, as in providing full medical and wage-loss disability benefits regardless of fault.

Applying the reasonable alternative test, the further reduction to 104 weeks does not merely reduce the number of weeks, as it did in Martinez; rather, it creates a statutory gap in benefits that completely cuts off benefits to the injured worker. As Justice Pariente of the Supreme Court of Florida illustrated, “there must eventually come a ‘tipping point,’ where the diminution of benefits becomes so significant as to constitute a denial of benefits—thus creating a constitutional violation.” Also, the denial of benefits would be for an indefinite period of time because the authorized physician could not confirm that Mr. Westphal was at MMI—nor could they determine when or if he would ever reach MMI—leaving Mr. Westphal without disability benefits for an indefinite period of time. Hypothetically, even if Mr. Westphal were to reach MMI, allowing him to be eligible for PTD benefits, he would not be able to recover the disability benefits he had lost during the time between the end of his temporary benefits and the start of his permanent benefits.

As illustrated, decreasing the period of payments from 350 weeks to 104 weeks—a 70% reduction—alone is a dramatic change from the workers’ compensation system since 1968—the year the access to courts provision was adopted. Judge Van Nortwick, in the dissenting opinion in Matrix

193. Westphal, 194 So. 3d at 323 (quoting Martinez v. Scanlan, 582 So. 2d 1167, 1171–72 (Fla. 1991)).
194. Martinez, 582 So. 2d at 1172.
195. Westphal, 194 So. 3d at 323; Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973) (“[T]he [l]egislature is without power to abolish such a right—[350 weeks for temporary benefits]—without providing a reasonable alternative to protect the rights of the people . . . .”); see also Fla. CONST. art. I, § 21.
196. See Westphal, 194 So. 3d at 323; Martinez, 582 So. 2d at 1172.
197. Westphal, 194 So. 3d at 323.
198. Id.
199. Id. at 324.
200. See id.
201. Id.; see also Fla. CONST. art. I, § 21.
Employee Leasing, Inc., had recognized how the statutory gap in benefits would have constitutional implications:

[I]n the case of a totally disabled claimant whose rights to temporary disability benefits has expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant’s cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers’ Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.\textsuperscript{202}

The reduction to 104 weeks by the legislature has crossed the \textit{constitutional tipping point} wherein the injured employee’s “cause of action has been effectively eliminated.”\textsuperscript{203} Therefore, the reduction in temporary benefits to 104 weeks, which resulted in a statutory gap of disability benefits, is a constitutional violation of the injured employee’s right to access to courts because the statute no longer equates to “a \textit{reasonable alternative} to tort litigation.”\textsuperscript{204}

The proper remedy in this situation is for the previous time frame of 260 weeks—which has already passed constitutional muster by being a reasonable alternative to tort litigation—to be automatically revived.\textsuperscript{205} This is because “Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor.”\textsuperscript{206} Even though a 260-week limitation on temporary benefits still leaves open the statutory gap, it adds an additional three years for temporary benefits, which is a significant and sufficient amount of time for an injured employee to attain MMI.\textsuperscript{207}

2. Conclusion

The access to the court’s provision, under article I, section 21 of the Florida Constitution, allows a person to redress their injuries without denial

\begin{itemize}
  \item \textsuperscript{202} Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 634 (Fla. 1st Dist. Ct. App. 2011) (en banc), \textit{overruled by} Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st Dist. Ct. App. 2013).
  \item \textsuperscript{203} Westphal, 194 So. 3d at 325 (quoting Matrix Emp. Leasing, Inc., 78 So. 3d at 634).
  \item \textsuperscript{204} \textit{Id.; see also} FLA. CONST. art. I, § 21.
  \item \textsuperscript{205} Westphal, 194 So. 3d at 327.
  \item \textsuperscript{206} B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) (per curiam).
  \item \textsuperscript{207} Westphal, 194 So. 3d at 327.
\end{itemize}
or delay. 208 In Kluger, the court established a precedent, wherein the legislature is without authority to deny a person’s right, which predates the adoption of the access to courts provision “without providing a reasonable alternative to protect th[at] right[].”209 Prior to the adoption of access to the courts provision, Florida’s workers’ compensation abolished the right to sue an employer in tort litigation by providing an alternative system wherein the employee is provided “full medical care and wage-loss payment for total or partial disability regardless of fault.”210 Thus, the workers’ compensation system provides adequate safeguards for employees injured on the job.211 At that time, the limit on temporary benefits was 350 weeks.212

The legislature first reduced the limit to 260 weeks, in which the Supreme Court of Florida, in Martinez, ruled that the time frame still provided a “reasonable alternative to tort litigation” by continuing to provide full medical benefits to injured employees regardless of fault.213 However, the further reduction of temporary benefits to 104 weeks resulted in creating a statutory gap in benefits.214 Section 440.015 of the Florida Statutes states that the legislature’s intent for the workers’ compensation system was “to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker’s return to gainful reemployment.”215 The further reduction is the opposite of this intent when it cuts off benefits to an injured worker for an indefinite amount of time.216 The legislature is not assuring “quick and efficient delivery” of benefits to assure reemployment when it creates a gap in benefits, leaving a severely injured worker—as in Westphal—without any medical or disability benefits.217 Consequently, this time frame of 104 weeks fails to provide full medical and wage-loss benefits regardless of fault to an injured worker.218 Accordingly, the 104-week limitation on temporary benefits in section 440.15(2)(a) of the Florida Statutes does not equate to a reasonable alternative to tort litigation because it lacks any adequate safeguard for the

209. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973); see also FLA. CONST. art. I, § 21.
210. Westphal, 194 So. 3d at 314 (quoting Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991)); see also FLA. CONST. art. I, § 21.
211. Kluger, 281 So. 2d at 4.
212. FLA. STAT. § 440.15(2) (1941).
213. Act effective July 1, 1990, ch. 90-201, § 20, 1990 Fla. Laws 894, 935; see also Martinez, 582 So. 2d at 1171–72.
214. Westphal, 194 So. 3d at 314.
216. Westphal, 194 So. 3d at 314.
217. See id.
218. Id.; see also Martinez, 582 So. 2d at 1172.
injured employee. 219 Therefore, the 104-week limitation on temporary benefits is a constitutional violation of a person’s right to access the courts, and the 260-week limitation should be revived as the proper remedy. 220

IV. POSSIBLE EFFECTS TO FLORIDA’S WORKERS’ COMPENSATION SYSTEM

The National Council on Compensation Insurance ("NCCI") is a license rating organization that works with Florida’s Office of Insurance Regulation ("OIR") in proposing new premium rates for the workers’ compensation insurance companies. 221 The OIR is the office that regulates and enforces statutes relating to insurance companies covering businesses. 222 The NCCI has come up with a proposal for new premium increases for businesses, wherein the NCCI projected a 15% rate increase in response to Castellanos and a 2.2% rate increase in response to Westphal. 223 Further, these proposal rates went into effect October 1, 2016. 224 In response to this proposal, the president of the Florida Chamber of Commerce, Mark Wilson, stated: “[We have] led efforts for more than [ten] years to help lower workers’ comp rates by almost 60[%], and now that personal injury trial lawyers and an activist court are forcing rates to likely skyrocket, [we are] not about to back down.” 225

The increased rate on workers’ compensation insurance premiums will “adversely affect [Florida’s] economy, job growth, and small businesses.” 226 Additionally, the rate increase could affect homeowners, because contractors will have to quote higher prices, which may not be

219. See Westphal, 194 So. 3d at 314–15.
220. Id. at 315.
222. See Press Release, Fla. Office of Ins. Regulation, Office Receives Amended NCCI Workers’ Compensation Rate Filing (July 1, 2016).
223. Id.; Press Release, Fla. Office of Ins. Regulation, supra note 221; see also Westphal, 194 So. 3d at 327; Castellanos v. Next Door Co., 192 So. 3d 431, 449 (Fla. 2016).
affordable to Florida’s consumers.227 Business advocates are outraged that most of the revenues resulting from these increases will go into “the pockets of lawyers.”228

Accordingly, the business industry is spinning the focus of the rate increase on attorneys and their fees; however, it is more of a significant victory to the injured worker because they will now have the ability to seek the benefits they rightfully deserve.229 This problem was evident in those cases such as Castellanos—wherein the employee sought minimal benefits relating to a complex claim.230 Yet, in the grand scheme of things, those minimum benefits are crucial to those injured workers who are making ends meet—for some families, it could make the difference between putting food on the table and having an apartment to live in.231

Lastly, it is noted that business premiums have gone down 60% since the legislative reform in 2003.232 However, the legislature created the opportunity for insurance companies to charge lower premiums at the expense of the injured worker’s benefits.233 At the same time, this results in a workers’ compensation system so complex that the injured employee cannot navigate through the system without the assistance of an attorney.234 Business lobbyists might overlook these factors, but the court has recognized the diminution of benefits that the legislature has been cutting away from the injured workers.235 Florida’s workers deserve better, and only time will tell whether the legislature will amend the statute or the entire workers’ compensation system will fundamentally be reformed.236

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228. Id.
229. See Gary Blankenship, Court Strikes Fee Limits in WC Cases, FLA. B. NEWS (May 15, 2016), https://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/648531A40726BDEC85257FAB0049B8DF.
230. Id.; see also Castellanos v. Next Door Co., 192 So. 3d 431, 443 (Fla. 2016).
231. Blankenship, supra note 229.
234. Castellanos, 192 So. 3d at 434 n.3.
235. See id.; Marcus, supra note 226.
236. See Saunders, supra note 19.
FLORIDA’S DECISION TO NOT DECIDE: LEAVING THE NEEDIEST STUDENTS WITHOUT A VOICE

OMAR J. PEREZ*

I. INTRODUCTION ........................................................................................................ 79
II. SCHOOL FINANCE SUITS ...................................................................................... 81
   A. Challenges to Florida’s System ........................................................................... 83
III. FLORIDA’S CITIZENS CALL FOR CHANGE ..................................................... 86
   A. Article IX Section 1(a) ....................................................................................... 88
   B. A Major Victory for Education Reformers ....................................................... 90
IV. CITIZENS FOR STRONG SCHOOLS ................................................................. 91
   A. The Initial Hurdle .............................................................................................. 92
   B. Opening Statements ......................................................................................... 94
   C. Judge Reynold’s Opinion ............................................................................... 97
   D. Motion for Certification ................................................................................. 99
V. SCHOOL FINANCE IN THE STATE OF WASHINGTON ................................... 100
   A. Seattle School District No. 1 of King County ............................................... 100
VI. THE FUTURE OF CITIZENS FOR STRONG SCHOOLS AND FLORIDA’S SYSTEM ........................................................................................................... 102
   A. The Supreme Court of Florida ...................................................................... 102
   B. 2017-2018 Florida Constitution Revision Commission ................................ 103
VII. CONCLUSION ...................................................................................................... 103

I. INTRODUCTION

Since the seminal case, San Antonio Independent School District v. Rodriguez,¹ school finance suits have been relegated to a state issue.² All of

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2. Carlee Poston Escue et al., Some Perspectives on Recent School Finance Litigation, 268 EDUC. L. REP. 601, 601–02 (2011); see also Areto A. Imoukhuede, The Fifth Freedom: The Constitutional Duty to Provide Public Education, 22 U. FLA. J.L. & PUB. POL’y 45, 47 (2011) (discussing the fact that although education was considered by President Lyndon B. Johnson to be the freedom from ignorance, the Supreme Court of the United States has held that education is not a fundamental right); Charles J. Ogletree, Jr., The Legacy and
the fifty states’ constitutions contain an education provision, with each provision containing varying levels of requirements. Lawsuits claiming that a state is providing an unconstitutional level of education are assessed according to these provisions. However, in the most recent Florida cases, the courts of Florida have refused to interpret the meaning of the education provision in the Florida Constitution. Despite having the authority to interpret the language of the provision, the Florida courts have deferred to the legislature on this issue because of fears of breaching the separation of powers doctrine. The legislature, in turn, has refused to clarify the meaning.

Implications of San Antonio Independent School District v. Rodriguez, 17 RICH. J.L. & PUB. INT. 515, 522 (2014) (discussing the Supreme Court of the United States’ decision to show deference to the State Legislature, which had traditionally operated education because these localities were in the best position to make such decisions); Richard J. Stark, Education Reform: Judicial Interpretation of State Constitutions’ Education Finance Provisions — Adequacy vs. Equality, ANN. SURVY. AM. L. 609, 623 (1991).


4. Swenson, supra note 3, at 1156.

5. See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam) (holding there were “[no] judicially discoverable and manageable standards” for the court to determine whether the state had achieved an adequate level of education); Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., No. 09-CA-4534, slip op. at 28–29 (Fla. 2d Cir. Ct. May 24, 2016) (final judgment ruling in favor of the Florida State Board of Education). The courts claim the education provision does not contain any justiciable standard. Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 408; Citizens for Strong Sch., Inc., slip op. at 18–19.

6. Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1992) (holding one of the primary functions of the Supreme Court of Florida is to interpret the constitution, and the doctrine of separation of powers is not violated by a decision that negatively affects the executive or legislative branch); see also 10 FLA. JUR. 2d Constitutional Law § 55 (2016).

A constitutional provision should be construed as a whole in order to ascertain the general purpose and meaning of each part . . . must be read in light of the others to form a congruous whole so as not to render any language superfluous. Each provision in the [c]onstitution was inserted with a definite purpose and all its sections and provisions must be construed together in order to determine its meaning, effect, restraints, and prohibitions and the purpose of the people in adopting it. Indeed, it is a fundamental rule of construction and interpretation of constitutions that not only should a constitutional provision be construed in its entirety, but all the provisions of the constitution should be interpreted with reference to each other unless a different intent is clearly manifested.

10 FLA. JUR. 2d Constitutional Law § 55.

of the education provision. The effect of the inactions of the courts of Florida and the Florida Legislature is that children in ineffective school districts have no avenue available to challenge the constitutionality of the level of education provided to them.

This Comment will explain the current landscape of school finance reform in Florida by examining the history of school finance suits within the state, and attempt to explain why the Supreme Court of Florida should interpret the language in the education provision. Part II will briefly discuss school finance suits within the United States and, more specifically, in Florida. Part III will examine the 1998 amendment to the education provision in the Florida Constitution, which received heavy support from the citizens of Florida, along with the subsequent Supreme Court of Florida decision in Bush v. Holmes. Part IV will examine the most recent challenge to Florida’s school finance system. Part V will examine how the Supreme Court of Washington held that it had the power and duty to interpret its own constitutional education provision. Part VI will explain why the Supreme Court of Florida should interpret the education provision and what the next step for education reformers is if the court does not. Lastly, Part VII will offer a conclusion.

II. SCHOOL FINANCE SUITS

Since the 1960s, there have been three significant waves of education finance related litigation in the United States. The first wave, beginning in the 1960s, was premised on the Equal Protection guarantee of the Fourteenth Amendment and came to an end with the infamous Supreme Court of the United States decision San Antonio Independent School District in 1973. When the Supreme Court of the United States held that education is not a fundamental right under the United States Constitution, challenges to

9. Id.
10. See infra Parts II–VI.
11. See infra Part II.
12. 919 So. 2d 392 (Fla. 2006); see also infra Part III.
13. See infra Part IV.
14. See infra Part V.
15. See infra Part VI.
16. See infra Part VII.
17. Escue et al., supra note 2, at 601–02.
education reform found a different route in state equal protection and the education provisions in state constitutions.\textsuperscript{19}

"Th[is] second wave, which lasted from the" \textit{Robinson v. Cahill}\textsuperscript{20} decision until 1989, focused on equality, specifically, the difference in resources and quality of education between the wealthy and poor school districts.\textsuperscript{21} This disparity was a result of an over-reliance on funding schools through local property taxes.\textsuperscript{22} Inconsistent decisions marked this second wave, as some states found their public school financing systems to be unconstitutional while other states found them to be constitutional.\textsuperscript{23}

The third wave began with \textit{Rose v. Council for Better Education, Inc.},\textsuperscript{24} and \textit{Helena Elementary School District No. 1 v. State}.\textsuperscript{25} Both cases focused on the issue of whether an adequate education had been provided by the state, with both courts ultimately finding that some schools failed to reach this minimum standard.\textsuperscript{26} While some scholars argue there are several variables that could help explain how one court decides that its school finance system is constitutional or not,\textsuperscript{27} this third wave also had inconsistent rulings, as was seen in the second wave of school finance litigation.\textsuperscript{28} Other states have found the issue to be a non-justiciable question for the courts,\textsuperscript{29} alleging that the legislature is better equipped to handle school finance policies.\textsuperscript{30}

The difference between equity and adequacy warrants a brief explanation.\textsuperscript{31} These terms’ definitions differ from jurisdiction to jurisdiction.\textsuperscript{32} However, generally speaking, “[p]ublic education systems are

\begin{itemize}
\item[19.] Escue et al., \textit{supra} note 2, at 602–03, 617; Mills & McLendon, \textit{supra} note 7, at 335–36.
\item[20.] 306 A.2d 65 (N.J. 1973) (per curiam).
\item[21.] \textit{See} Escue et al., \textit{supra} note 2, at 602.
\item[22.] Mills & McLendon, \textit{supra} note 7, at 336–37.
\item[23.] \textit{Id.} at 337.
\item[24.] 790 S.W.2d 186 (Ky. 1989).
\item[25.] 769 P.2d 684 (Mont. 1989); \textit{see also} Escue et al., \textit{supra} note 2, at 602–03.
\item[26.] \textit{Rose}, 790 S.W.2d at 189; \textit{Helena Elementary Sch. Dist. No. 1}, 769 P.2d at 685, 690; \textit{see also} Escue et al., \textit{supra} note 2, at 603.
\item[27.] \textit{See generally} Swenson, \textit{supra} note 3 (stating that judicial selection procedures, the state constitution’s education clause, percent revenue from local sources, size of wealth gap, per pupil expenditure, legislative reform prior to court decisions, ideology of the mass public, and the party of the governor are all factors which can be used to determine whether a state’s Supreme Court will find its education system constitutional or not).
\item[28.] Mills & McLendon, \textit{supra} note 7, at 341–42.
\item[29.] \textit{Id.}
\item[30.] Swenson, \textit{supra} note 3, at 1149.
\item[32.] \textit{See} id.
\end{itemize}
designed to produce equity [or] fairness in the treatment of their students.”33 Equity standards examine whether schools receive similar funding.34 On the other hand, adequacy generally concerns “the amount of money needed by a system of education to deliver a specific result.”35 The focus of adequacy is the accomplishment of a stated outcome based on student performance, or whether a student’s needs are met.36 It is widely regarded that adequacy is a better tool for reforming an education system, because adequacy focuses on needy students, while a ruling on equity may result in system-wide reform for all schools—even high achieving schools.37 Therefore, state courts have been more willing to adjudicate on issues of adequacy over issues of equity.38

A. Challenges to Florida’s System

Scholars have developed four different categories in order to evaluate the level of duty imposed on a state’s legislature by an education clause contained in the state constitution.39 “[S]tates with the lowest requirements” are considered Category I, while the highest level of duty is considered a Category IV.40 These categories are vital to understanding the evolution of Florida’s education provision within Florida’s Constitution.41

The first major change to the education provision within the Florida Constitution came in 1868, which contained the requirement for a public school system in the state.42 Article VIII, section 1 of the 1868 Florida Constitution made it “the paramount duty of the [s]tate” to provide for “the education of all . . . children residing within its borders, without distinction

33. Id. at 6.
34. Id. at 5.
35. Id. at 2.
37. Stark, supra note 2, at 665.
38. Id.
40. Id.
41. See id. at 343-44.
or preference." 43 Under this strong language, the education clause in Florida’s Constitution would have been classified as Category IV, or “imposing a great duty on the [state].” 44 The constitution also contained language, which “directed the legislature to provide a uniform system of common schools.” 45

Unfortunately for advocates of education, the Florida Constitution of 1885 dropped the paramount duty language and the new provision read, “[t]he [L]egislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.” 46

The first case to examine the uniform system language was State ex rel. Clark v. Henderson. 47 The Supreme Court of Florida “held that the uniform system [language] required free public schools to be ‘established upon principles that are of uniform operation throughout the state and that such a system [shall] be liberally maintained.’” 48 The court also noted that “[t]he purpose intended to be accomplished in establishing and liberally maintaining a uniform system of public free schools is to advance and maintain proper standards of enlightened citizenship.” 49 This interpretation of uniform system required the state to operate uniformly across every school district. 50

The Supreme Court of Florida revisited the issue of uniformity in two cases in the 1990s. 51 In 1991, in St. Johns County v. Northeast Florida Builders Association, 52 the court held:

The Florida Constitution only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature. The constitutional mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because

43. FLA. CONST. of 1868, art. VIII, § 1.
44. Staros, supra note 42, at 501; see also FLA. CONST. of 1868, art. VIII, § 1.
45. Staros, supra note 42, at 501; see also FLA. CONST. of 1868, art. VIII, § 2.
46. FLA. CONST. of 1885, art. XII, § 1; Mills & McLendon, supra note 7, at 349.
47. 188 So. 351 (Fla. 1939); Mills & McLendon, supra note 7, at 352.
48. Staros, supra note 42, at 502; see also Henderson, 188 So. 3d at 352.
49. Henderson, 188 So. 3d at 353.
50. See id.; Mills & McLendon, supra note 7, at 352.
51. See Fla. Dep’t of Educ. v. Glasser, 622 So. 2d 944, 947 (Fla. 1993); St. Johns Cty. v. N.E. Fla. Builders Ass’n, 583 So. 2d 635, 641 (Fla. 1991).
52. 583 So. 2d 635 (Fla. 1991).
of higher or lower property values . . . will always favor or disfavor some districts.53

Moving away from the interpretation of uniformity in Henderson, the court essentially redefined uniformity to mean only an equal chance and not true equality.54 Two years after the St. John County decision, the Supreme Court of Florida decided Florida Department of Education v. Glasser.55 Justice Kogan reiterated and even cited to St. John County in his concurring opinion in Glasser, which states:

Florida law now is clear that the uniformity clause will not be construed as tightly restrictive, but merely as establishing a larger framework in which a broad degree of variation is possible. . . . Variance from county to county is permissible so long as no district suffers a disadvantage in the basic educational opportunities available to its students, as compared to the basic educational opportunities available to students of other Florida districts.56

Justice Grimes leveled another blow to advocates of education in his concurring opinion when he stated that while the Florida Constitution calls for a “uniform system of free . . . schools, it stops short of declaring public education to be a fundamental right.”57

The Supreme Court of Florida would decide the most crucial case to understanding the current challenge to Florida’s school finance system in 1996.58 After previous challenges to Florida’s school finance system failed to provide relief to Florida’s children, advocates had to adjust their strategy.59 In Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,60 the court addressed both the issues of uniformity and adequacy.61 The plaintiffs in this case sought declaratory relief, claiming that a fundamental right to an adequate education existed under the Florida Constitution.62 The court held that it could not determine the meaning of

53. Id. at 641.
54. Mills & McLendon, supra note 7, at 353.
55. 622 So. 2d 944, 949 (Fla. 1993); St. Johns Cty., 583 So. 2d at 642.
56. Glasser, 622 So. 2d at 950 (Kogan, J., concurring).
57. Id. at 950 n.8; see also Staros, supra note 42, at 514.
59. Gordon, supra note 8 at 279.
60. 680 So. 2d 400 (Fla. 1996) (per curiam).
61. Id. at 405–06; Mills & McLendon, supra note 39, at 30.
62. Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 402; Gordon, supra note 8, at 280.
adequacy, as there were no “judicially discoverable and manageable standards.”63 The court evaded the constitutional challenge to the education provision by claiming that a decision would infringe on the legislature’s powers.64

On its face, this decision seemed like a failure to funding advocates, but in actuality, it opened the door for future legal arguments in favor of adequacy.65 The majority, once again, rejected any notion of a fundamental right to education.66 However, the majority also held that the plaintiffs had failed to provide an appropriate standard for determining adequacy, meaning that if an appropriate standard were provided in the future, the court could revisit and adjudicate the issue.67 Justice Overton, writing a concurring opinion, went even further when he wrote that “[w]hile adequate may be difficult to quantify, certainly a minimum threshold exists below which the funding provided by the legislature would be considered inadequate.”68 This decision clearly invited another suit by a party who could make the proper allegations and gave a strong indication that future litigation on the issue of adequacy could be heard.69

III. FLORIDA’S CITIZENS CALL FOR CHANGE

In light of the Supreme Court of Florida’s hesitation to rule on school finance and failure to provide relief in the 1990s, supporters of

63. Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 408; see also Mills & McLendon, supra note 39, at 30.
64. Mills & McLendon, supra note 39, at 30. [T]he [c]ourt decided that the issue of adequacy was a nonjusticiable, political question committed by the constitution to the legislature. The members of the court stated that the constitution gives the legislature enormous discretion to appropriate funds for education and other matters. Absent definable standards to provide guidance, the court decided that intrusion into this area would transgress the separation of powers doctrine by usurping legislative powers.
65. Id.; see also Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 407–08.
66. HARRIS, supra note 36, at 4.5–6.
68. HARRIS, supra note 36, at 4.5–6.
69. Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 409; HARRIS, supra note 36, at 4.5.

For example, were a complaint to assert that a county in this state has a [30%] illiteracy rate, I would suggest that such a complaint has at least stated a cause of action under our education provision. To say otherwise would have the effect of eliminating the education provision from our constitution and relegating it to the position occupied by statutes. As noted, however, I agree with the majority that a proper showing of inadequacy has not been made in this case.

Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 409.
69. See HARRIS, supra note 36, at 4.5–6, 4.16; Escue et al., supra note 2, at 606–09; Mills & McLendon, supra note 39, at 30.
education reform entered the electoral process. These supporters entered the political fray in hopes of having the people of Florida vote to rewrite the Florida Constitution, so that a manageable standard of the meaning of adequate could be provided. “The proposal required that ‘[a]dequate provision for funding public education shall be required in each fiscal year.’” The reformer’s initiative proposal defined adequate as appropriating at least 40% of all Florida state appropriations, excluding lottery proceeds, towards education.

Although the Attorney General of Florida found the proposal did not violate the constitution, “the [Supreme Court of Florida] disagreed and [erased] the proposal from the statewide ballot.” The court held that a mandatory percentage violated the single subject requirement of the Florida

70. See Gordon, supra note 8, at 273, 283.
71. Id. at 284.
72. Id. at 285.

[T]he educational reformers’ initiative petition proposed to amend the education article by adding a section. The proposal required that “[a]dequate provision for funding public education shall be required in each fiscal year.” The proposal also defined adequacy since the courts had not. The proposal defined adequacy as a set minimum percentage of total appropriations by the Florida Legislature, not including lottery proceeds and federal funds. That minimum percentage represented [40%] of legislative state appropriations. [This meaning] a minimum of 40% of all Florida state appropriations made by the Florida [l]egislature in a fiscal year had to be devoted to public education, excluding lottery proceeds.

73. Gordon, supra note 8, at 285.
74. Id. at 286.

The [Supreme Court of Florida] disagreed and struck the proposal from the statewide ballot. . . . [B]y employing a government functions analysis, the court decided that the proposal would have impacted numerous government branches . . . . [T]he court conceptualized “government function” very broadly, finding that the proposed amendment would have altered the [l]egislature’s discretion in deciding priorities among many vital functions of state government; consequently, the amendment would have directly affected executive branch agencies, local government, and special districts.

Id. at 286–87.
Constitution.\textsuperscript{75} Once again, educational reformers had failed to effectuate change.\textsuperscript{76} While the previous constitutional litigation had failed because the court ruled that the issue was for the legislature, the proposed petition failed because the constitution limited the scope of initiative petitions on revisions to the constitution.\textsuperscript{77} Educational reformers needed to once again find an alternative avenue to accomplish their goal, and luckily an opportunity presented itself in 1997.\textsuperscript{78}

A. \textit{Article IX Section 1(a)}

Every twenty years, the Florida Constitution Revision Commission (“Revision Commission”) meets to examine the Florida Constitution and explore the possibility of revisions.\textsuperscript{79} In the summer of 1997, the Revision Commission “held thirteen public hearings throughout Florida” calling for any recommendations that citizens of Florida wanted to see made to the Florida Constitution.\textsuperscript{80} Many of the public’s proposals focused on the issue of education.\textsuperscript{81}

Of the 187 proposals submitted to the Revision Commission, two substantive proposals emerged that aimed to address the issue of adequacy raised in \textit{Coalition for Adequacy}.\textsuperscript{82} One proposal, Proposal 157, sought to

\begin{itemize}
\item \textsuperscript{75} Id. at 286; see also Fla. Const. of 1968, art. XI, § 3.
\item The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith.
\item Fla. Const. of 1968, art. XI, § 3.
\item Gordon, supra note 8, at 287.
\item Id. at 286–87.
\item Id. at 288.
\item Fla. Const. of 1968, art. XI, § 2(a), (c); Gordon, supra note 8, at 288.
\item Mills & McLendon, supra note 7, at 359; see also Fla. Const. of 1968 art. XI, § 2(a) (setting up the creation of the Revision Commission).
\item See Mills & McLendon, supra note 7, at 359–60. “Public proposals submitted to the [Revision] Commission included requests both for more education funding and to limit education funding, matters of education vouchers and school choice, a return to the 1868 Florida Constitution’s paramount duty language, and a plea for free community college . . . .” Mills & McLendon, supra note 39, at 32. The Revision Commission also “considered other public proposals, including a proposal to make education a fundamental right . . . .” Mills & McLendon, supra note 7, at 360.
\item Mills & McLendon, supra note 7, at 360–61; Mills & McLendon, supra note 39, at 32; see also Coal for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 404–06 (Fla. 1996) (per curiam); Fla. CRC24-244-pr (1998) (proposed Fla. Const. art. IX, § 1(a)-(b)); Fla. CRC6-261-pr (1998) (proposed Fla. Const. art. IX, § 1). “Both Proposal 157 and Proposal 181 sought to amend Art. IX, § 1 to provide not just aspirational language, but also meaningful standards whereby educational adequacy could be measured.”
\end{itemize}
define adequate as “the provision of financial resources to achieve a thorough, efficient, high-quality, safe, and secure system of public education for all public schools and access to public institutions of higher learning or education.”

The other proposal, Proposal 181, looked back to the 1868 Florida Constitution, as discussed previously, in order to make education the “paramount duty of the state,” as well as to make “ample provision . . . for . . . public education.”

Each proposal received a negative response from the members of the Revision Commission. The Revision Commission members felt that the proposals would invite a large amount of litigation, because the proposals could be interpreted as creating a cause of action for a failure to meet the educational standard it would create. The Revision Commission further commented that putting the Supreme Court of Florida, an unelected body, in the position of being required to raise educational funding was not a desired outcome. The Revision Commission found educational reform to be a duty for the legislature, which allows the people of Florida to effectuate change through the electoral process.

As a result of the Revision Commission’s feelings towards these proposals, they were changed and effectively diluted. The fundamental right language was ripped out of both proposals. The words, provision of financial resources were erased out of Proposal 157, which removed any meaning, in terms of financing, from the term adequate provision. The Revision Commission also made it abundantly clear that the intent of Proposal 157 was not to allow students and parents to sue for defects in a local school. In order to be successful in litigation, the party would have to prove “the whole system [had] failed to be uniform and adequate.”

Mills & McLendon, supra note 39, at 32; see also Fla. CRC6-244-pr (1998); Fla. CRC6-261-pr (1998).

83. Fla. CRC6-244-pr (1998).
84. Fla. CRC6-261-pr (1998). “The proposal proponents, by using the court’s discussion in Coalition for Adequacy, advocated a return to the language of the 1868 constitution which would once again make education a paramount duty in Florida.” Gordon, supra note 8, at 294; see also Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 405.
85. Gordon, supra note 8, at 297.
86. Id.; Mills & McLendon, supra note 39, at 32.
87. Gordon, supra note 8, at 297.
88. See id.
89. Id. at 297–98.
90. Mills & McLendon, supra note 39, at 32.
91. Gordon, supra note 8, at 298; see also Fla. CRC6-244-pr (1998) (proposed Fla. Const. art. IX, § 1(a)–(b)).
92. Gordon, supra note 8, at 299; see also Fla. CRC6-244-pr (1998).
93. Gordon, supra note 8, at 299; see also Fla. CRC6-244-pr (1998).
Proposal 181 was radically rewritten as well.\textsuperscript{94} The phrase \textit{the fundamental right} was changed to \textit{a fundamental value} in Proposal 181.\textsuperscript{95} The \textit{fundamental right} language, which had been initially called for by the people of Florida, had been downgraded.\textsuperscript{96} For good measure, \textit{the} was substituted for \textit{a} because the Revision Commission wanted to make it clear that education was no more important than any other state function.\textsuperscript{97}

\textbf{B. A Major Victory for Education Reformers}

After undergoing these material changes, “both proposals were adopted by the [Revision] [C]ommission” in March of 1998.\textsuperscript{98} The Florida Constitution, as it pertains to education, would now read:

\begin{quote}
The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a \textit{paramount duty} of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and . . . high quality education . . . .\textsuperscript{99}
\end{quote}

The passing of this amendment was another mixed result for education reformers in Florida.\textsuperscript{100} Some argued that the legislature once again decided to not define the meaning of adequate, despite the fact that this is precisely what the citizens of Florida had called for.\textsuperscript{101} This left a feeling of uncertainty as to what would happen in future litigation, despite the Supreme Court of Florida leaving the door slightly open for future litigation in \textit{Coalition for Adequacy}.\textsuperscript{102} The silver lining in the passing of the amendment is that it reflected the will of the people when it reincorporated the words, “[i]t is the paramount duty of the State to make ample provision

\begin{itemize}
\item \textsuperscript{94} Gordon, \textit{supra} note 8, at 298; \textit{see also} Fla. CRC6-261-pr (1998) (proposed FLA. CONST. art. IX, § 1).
\item \textsuperscript{95} Mills & McLendon, \textit{supra} note 39, at 32; \textit{see also} Fla. CRC6-261-pr (1998).
\item \textsuperscript{96} See Fla. CRC6-261-pr (1998); Mills & McLendon, \textit{supra} note 39, at 32.
\item \textsuperscript{97} Gordon, \textit{supra} note 8, at 298; \textit{see also} Fla. CRC6-261-pr (1998).
\item \textsuperscript{98} Mills & McLendon, \textit{supra} note 39, at 32; \textit{see also} Fla. CRC6-261-pr (1998); Fla. CRC24-244-pr (1998).
\item \textsuperscript{99} FLA. CONST. of 1968, art. IX, § 1(a) (emphasis added).
\item \textsuperscript{100} \textit{See id.;} Gordon, \textit{supra} note 8, at 298–99.
\item \textsuperscript{101} \textit{See Gordon, supra} note 8 at 299–300.
\item \textsuperscript{102} \textit{See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam); Gordon, supra} note 8 at 300; Mills & McLendon, \textit{supra} note 39, at 32, 34.
\end{itemize}
for the education of all the children residing within its borders.”

This language returned the State of Florida to a Category IV, as it previously was under the 1868 Florida Constitution.

In *Bush*, the Supreme Court of Florida revisited the education provision after the 1998 amendment. The court took note of the 1998 amendment and the new duty it imposed on the state. The court held that where it is possible to reasonably construe the constitution, the court should do so. The decision highlights that the reason for the 1998 amendment was to give meaning and standards by which to measure the adequacy of Florida schools, in response to the *Coalition for Adequacy* decision. The court indicated that adequate provision was defined as providing an “efficient, safe, secure, and high quality . . . education.” The court indicated that the meaning of adequate had finally been provided by the amendment, and it would be able to decide a case challenging the adequacy of Florida’s schools.

**IV. CITIZENS FOR STRONG SCHOOLS**

Citizens for Strong Schools, a small non-profit organization, was formed in 2008 with the hope of improving education in Alachua County, Florida. The organization filed the latest lawsuit challenging the constitutionality of the level of education provided by the state of Florida in *Citizens for Strong Schools v. Florida State Board of Education* in 2009. In its second amended complaint, Citizens for Strong Schools laid out several factual allegations invoking the language from the 1998 amendment to the education provision in the Florida Constitution.

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103. FLA. CONST. of 1868, art. VIII, § 1; Mills & McLendon, *supra* note 39, at 34.
104. See FLA. CONST. of 1868, art. VIII, § 1; Mills & McLendon, *supra* note 39, at 33.
105. See Bush v. Holmes, 919 So. 2d 392, 397 (Fla. 2006).
106. *Id.* at 403–04.
107. *Id.* at 405.
108. *Id.* at 403; Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406–08 (Fla. 1996) (per curiam).
109. *Bush*, 919 So. 2d at 403 (emphasis added).
110. *Id.*
112. No. 09-CA-4534, slip op. (Fla. 2d Cir. Ct. May 24, 2016).
113. *Citizens for Strong Sch., Inc.*, slip op. at 1–2.
114. FLA. CONST. of 1968, art. IX; *Citizens for Strong Sch., Inc.*, slip op. at 5–6; Escue et al., *supra* note 2, at 607. Citizens for Strong Schools’ factual allegations were
The case was heard and decided by Judge George S. Reynolds of the Second Circuit Court of Florida,115 who has since resigned from his position.116 But before the case began, the defendants filed a motion to dismiss.117

A. The Initial Hurdle

Despite the Supreme Court of Florida’s past ruling that school finance was a non-justiciable question, Citizens for Strong Schools sought to distinguish its own case from Coalition for Adequacy by focusing on Justice Overton’s concurring opinion.118 Citizens for Strong Schools argued that because it had made specific factual allegations, as Justice Overton had suggested, its claim was valid.119 The State moved to dismiss the case because it argued Citizens for Strong Schools lacked standing and the claims were not justiciable.120

Separated into the following six major subdivisions: “The State Has a Constitutional Duty to Provide a Uniform, Efficient, Secure and High Quality System of Free Public Schools”; “The State Has Breached Its Paramount Duty to Make ‘Adequate Provision’ For a System of Free Public Schools”; “The State Has Failed to Provide a ‘Uniform’ System of Free Public Schools”; “The State Has Failed to Provide an ‘Efficient’ System of Free Public Schools”; “The State Has Failed to Provide a ‘High Quality’ System of Free Public Schools”; and “The Public School System Does Not Allow Students to Obtain a High Quality Education.” Citizens for Strong Sch., Inc., slip op. at 5–6; see also Escue et al., supra note 2, at 606 (stating “[p]laintiffs sought a declaratory judgment declaring the legislature had breached its constitutionally paramount duty of providing a high quality system of free public schools that allows a student to obtain a high quality education.”).

115. Citizens for Strong Sch., Inc., slip op. at 29.
117. See Escue et al., supra note 2, at 607.
119. Escue et al., supra note 2, at 607.
120. Order Denying Dismissal at 2, Citizens for Strong Sch., Inc. v. State Bd. of Educ., No. 09-CA-4534 (Fla. 2d Cir. Ct. Aug. 20, 2010); Escue et al., supra note 2, at 607–09.

First, the State argued that the plaintiffs lacked standing. Specifically, “plaintiffs allege no facts peculiar to their individual circumstances” and they do not allege a complaint “regarding a particular law or appropriations; instead, they allege a general dissatisfaction and a long list of grievance[s] with Florida’s entire state education system.”

. . . In Coalition for Adequacy, the Supreme Court of Florida, relying on the United States Supreme Court’s decision in Baker v. Carr, adopted a six-factor test to determine justiciability of state constitutional questions. The State argued that under Coalition the standard was not judicially discoverable [or] manageable . . . . Escue et al., supra note 2, at 607–08.
On August 20, 2010, the court issued its order denying the States’ petition for dismissal. With respect to standing, the court determined that the “[p]laintiffs [had made] comprehensive [factual] allegations.” The court would also distinguish Coalition for Adequacy, because it addressed the old version of the Florida Education Clause, when it declared:

The most critical case is [Bush], in which the [Supreme Court of Florida] addressed the current constitutional language and stated that the specific language was drafted “to provide standards by which to measure the adequacy of the public school education provided by the state.” The Court interpreted the Florida Constitution as providing a mandate that it is the state’s paramount duty to make adequate provision for education. . . .

The court noted that it was only deciding a motion to dismiss and found the plaintiffs had “raised a justiciable question over which this [c]ourt has subject matter jurisdiction, and . . . the . . . Complaint states a [course] of action.” For these reasons the court would deny the motion to dismiss.

After the circuit court denied the motion to dismiss, the defendants filed a petition for a writ of prohibition, seeking to require the circuit court to dismiss the complaint. The First District Court of Appeal cited, just as the circuit court had, the critical language from Bush, which stated that there are standards to determine and measure the adequacy of the Florida schooling

121. Order Denying Dismissal, supra note 120, at 6; Escue et al., supra note 2, at 608; see also Haridopolos v. Citizens for Strong Sch., Inc., 81 So. 3d 465, 466, 473 (Fla. 1st Dist. Ct. App. 2011) (en banc) (denying defendant’s petition for writ of prohibition and holding that the circuit court had subject matter jurisdiction over the matter).

122. Order Denying Dismissal, supra note 120, at 3; Escue et al., supra note 2, at 608.

123. See Coal. for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 407; Order Denying Dismissal, supra note 120, at 3; Escue et al., supra note 2, at 609.

124. Escue et al., supra note 2, at 609 (quoting Bush v. Holmes, 919 So. 2d 392, 403 (Fla. 2006)).

125. Order Denying Dismissal, supra note 120, at 5; Escue et al, supra note 2, at 609.

126. Order Denying Dismissal, supra note 120, at 6.


After the trial judge denied their motion to dismiss respondents’ amended complaint for declaratory and supplemental relief, the President of the Florida Senate, the Speaker of the Florida House of Representatives, the Commissioner of Education, and the State Board of Education filed a petition for writ of prohibition, initiating original proceedings here in an effort to bring further proceedings in the circuit court to a halt.

Id.
system. The court also noted that “analogous questions have arisen under the constitutions of other states, and the majority rule is that educational adequacy provisions in state constitutions are judicially enforceable.” The First District Court of Appeal denied the defendants’ petition and held that the circuit court had subject matter jurisdiction over the case. The court certified the following question to the Supreme Court of Florida:

Does [a]rticle IX, [s]ection 1(a) [of the] Florida Constitution, set forth judicially ascertainable standards that can be used to determine the adequacy, efficiency, safety, security, and high quality of public education on a state-wide basis, so as to permit a court to decide claims for declaratory judgment—and supplemental relief—alleging noncompliance with [a]rticle IX, [s]ection 1(a) of the Florida Constitution?

The Supreme Court of Florida declined to answer the question on petition for review. Citizens for Strong Schools had overcome this initial hurdle and would have its case heard.

B. Opening Statements

Opening statements by the parties took place on March 14, 2016. The lead attorney for Citizens for Strong Schools, Neil Chonin, berated Florida’s high-stakes accountability system, which looks at “the results of students’ standardized exam[]” results, evaluations of teachers, and school grades. Chonin started by stating that Florida is one of only two states with the paramount duty language in its constitution, and the only state to

128. Id. at 472; see also Janet D. McDonald et al., School Finance Litigation and Adequacy Studies, 27 U. ARK. LITTLE ROCK L. REV. 69, 81 (2004) (stating the 1998 amendment to the education provision on the Florida Constitution “contain[s] one of the . . . most explicit education clauses” in the nation).
129. Haridopolos, 81 So. 3d at 469; see also Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (holding that the notion that educational provisions in state constitutions are non-justiciable is the minority view).
130. Id.
133. Id.
134. See id.
135. Id.
have the term *high quality* twice in its education provision.\(^{136}\) He stated that “education is the cornerstone of democracy,” and highlighted that the Supreme Court of the United States held that “[education] is the very foundation of good citizenship” in *Brown v. Board of Education*.\(^{137}\)

Chonin illustrated achievement gaps between Whites, African Americans, Hispanics, and students who receive free or reduced lunch by showing data from the 2014 Florida Comprehensive Assessment Test (“FCAT”) 2.0.\(^{138}\) Statistics from that test showed that while 69% of White students were proficient in reading, 38% of African American students had failed, and 53% of students considered as poverty students—determined by whether or not a student qualifies for free or reduced lunch—scored below satisfactory.\(^{139}\) Chonin stated that there was not only a downward trend in test scores for reading, but a downward trend for math scores as well.\(^{140}\)

Chonin also argued the Florida funding model created in the 1970s had never been updated to analyze what resources and funds would be necessary to guarantee a high quality education.\(^{141}\) Chonin went on to discuss how some school districts have had to resort to drastic measures, such as local bonds or local sales tax, to fund their schools.\(^{142}\) He stated:

> You have the state not looking at how much is needed, you have a political battle every year of how much money and how much did we raise . . . and everything is determined by whatever revenue is raised, without any thought to what really is needed in order for, once and for all, to turn this system around and get all of our kids educated and give them all an opportunity to succeed in life.\(^{143}\)

Chonin explained that effective teachers are the key to improving education.\(^{144}\) The problem with effective teachers is that they are all located


\(^{137}\) 347 U.S. 483, 493 (1954); Video clip: Opening Statement for Plaintiff, supra note 136, at 6:00–6:25.

\(^{138}\) Clark, supra note 133.

\(^{139}\) Video clip: Opening Statement for Plaintiff, supra note 136, at 13:00–14:20.

\(^{140}\) Id. at 16:22–16:50.

\(^{141}\) Clark, supra note 133.

\(^{142}\) Id.

\(^{143}\) Id.

\(^{144}\) Video clip: Opening Statement for Plaintiff, supra note 136, at 18:35–18:46.
within schools graded as A schools—on an A-F rating system created by the state to evaluate schools—as opposed to F schools.145 Chonin argued that these same standards used to assess students, teachers, and schools should be applied when determining if the state has failed its constitutional duty to provide a high level of education.146 He also explained how students living in poverty start school at a disadvantage, and in order to fix the problem the state needs to provide effective teachers, behavioral specialists, mental health specialists, nurses, guidance counselors, parent and community liaisons, class aids, and multicultural and multilingual staff.147

In the defense’s opening argument, Rocco Testani, lead defense attorney for the Florida Department of Education, claimed that the plaintiffs wanted to destroy all of the progress the State of Florida had made.148 He argued that the defense would “conclusively demonstrate that the [S]tate of Florida has not only established a high-quality system of public schools that allows students to obtain a high-quality education but that the state has become a leader . . . in successfully implementing education reform.”149

Testani pointed to the National Assessment of Educational Progress (“NAEP”), as opposed to the statewide exam—FCAT 2.0—Chonin had used.150 He explained that in 1998, Florida’s fourth graders had ranked in the bottom ten of the fifty states in reading, according to the NAEP, and by 2015, they ranked in the top ten.151 He displayed several charts explaining how Florida had improved its NAEP scores consistently.152 Testani argued it was obvious that the claim that Florida had not improved in education was false.153

Testani conceded there were achievement gaps between the different classes of students but noted that these gaps exist all over the country.154 He

145. Id. at 19:00–19:35.
146. Id. at 21:20–21:40.
147. Id. at 25:50–26:30.
149. Clark, supra note 133.
150. Id.
152. Id. Testani explained that in 2013, Florida’s Hispanic students were ranked first in the nation compared to other states’ Hispanic students, and Florida’s African American students were ranked fifth in the nation compared to other states’ African American students in NAEP testing. Id. at 37:05–37:50.
153. Clark, supra note 133.
stressed the importance of the improvements Florida had made while promising that Florida would try to continue to improve. 155 Decreasing achievement gaps, more students taking and doing well in Advanced Placement exams, and more students being ready for college were all recurring themes throughout Testani’s remarks. 156

Testani also stated that the plaintiffs should have directed their complaints towards the school districts as opposed to the Department of Education. 157 This is because the school districts educate students, evaluate teachers, decide curriculum, and develop and manage their own budgets. 158 He further argued that if school board members exercised their full capacity to raise local taxes and raise funding for education, there would have been an additional 3.8 billion dollars available in the last school year. 159 Testani even claimed that students who are disadvantaged receive more funding than other students under the current Florida system. 160

C. Judge Reynold’s Opinion

On May 24, 2016, Judge Reynolds issued a twenty-nine page opinion. 161 Judge Reynolds explained that Florida’s education system is structurally complicated. 162 This is because each county has its own school board, which sets its own policies and standards. 163 Thus, even among schools with substantially similar levels of funding, it is easy to see how there are variations in how districts allocate resources and see different results. 164

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155. See id. at 35:55. Between the year of 1992 and 2013, Florida had the second highest gains on the NAEP of any of the fifty states. Id. at 38:00. In 1998, only 52% of Florida’s high school students passed high school in four years, while the latest results show that over 75% of high school students graduate in four years. Id. at 38:16.

156. See id.

157. Clark, supra note 133.


159. Clark, supra note 133.

160. Video clip: Opening Statement for Defendant, supra note 148, at 55:35. Testani claimed that only $6800 is spent per student in schools with less than 30% of student living in poverty and $7600 is spent per student in schools with 92% of students living in poverty. Id. at 55:45.


163. Id.

164. Id.
Judge Reynolds held that the plaintiffs had failed to establish that Florida had breached any duty under article IX, section 1(a) of the Florida Constitution.165 Judge Reynolds found for the defendants for several reasons.166 He wrote that education funding had received the largest percentage of the state budget,167 “there is not a constitutional level lack of resources,”168 high\textit{ly qualified} teachers are in schools across every district,169 “Florida students have substantially improved their performance on the . . . NAEP,”170 and that Florida cannot possibly guarantee that every student will be successful.171

Interestingly, Judge Reynolds noted all of these factors to rule in favor of the defendants, but goes on to say that there are no \textit{judicially manageable standards} under the constitution to determine the adequacy claim by the plaintiffs.172 Judge Reynolds wrote that the 1998 amendment to article IX, section 1(a) provides no standards that clarify the meaning of adequate.173 By applying the terms \textit{efficient and high quality} to Florida’s system, it would necessarily involve a political question outside of the court’s jurisdiction.174 His decision states:

\begin{quote}
Article IX, [s]ection 1(a) lacks “judicially discoverable and manageable standards for resolving” the political questions raised by [p]laiffis’ adequacy claim. The new adjectives introduced by the 1998 amendment—\textit{efficient and high quality}—do not give judicially manageable content to the adequacy standard that was held non-justiciable in the \textit{Coalition [for Adequacy]} case. Use of these types of terms has led courts in several other states to conclude that their judiciaries are ill-equipped to address adequacy challenges similar to the one that [p]laiffis assert here.175
\end{quote}

165. \textit{Id.} at 15; \textit{see also} Fla. Const. of 1968, art. IX, § 1(a).
166. \textit{Citizens for Strong Sch., Inc.}, slip op. at 15.
167. \textit{Id.} at 7.
168. \textit{Id.}
170. \textit{Id.} at 11.
171. \textit{Citizens for Strong Sch., Inc.}, slip op. at 10 (quoting Fla. Stat. § 1000.03(5)(f) (2015)). “The goals of Florida’s K-20 education system are not guarantees that each individual student will succeed or that each individual school will perform at the level indicated in the goals.” \textit{Fla. Stat.} § 1000.03(5)(f) (2015).
172. \textit{Citizens for Strong Sch., Inc.}, slip op. at 18–19.
173. \textit{Id.} at 18; \textit{see also} Fla. Const. of 1968, art. IX, § 1(a); \textit{Mills \& McLendon, supra} note 39, at 30.
174. \textit{Citizens for Strong Sch., Inc.}, slip op. at 17–18.
175. \textit{Id.} at 18 (citing Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam)); \textit{see also} Fla. Const. of 1968 art. IX, § 1(a).
Surprisingly, Judge Reynolds found that the State had provided an adequate education, while also finding that there was no standard for the court to determine what adequacy means. In a dark twist of déjà vu, despite the findings of the First District Court of Appeal and the Supreme Court of Florida holding in Bush, Judge Reynolds ruled that there was no justiciable standard to determine the meaning of adequacy.

D. **Motion for Certification**

Citizens for Strong Schools appealed the decision by Judge Reynolds. On June 28, 2016, Citizens for Strong Schools filed a motion with the First District Court of Appeal to have the case sent directly to the Supreme Court of Florida. In its motion, Citizens for Strong Schools argued that the court’s decision effectively voids the education provision in the Florida Constitution. Citizens for Strong Schools hopes that the Supreme Court of Florida will take the case because it is of public importance and in need of an immediate resolution.

The attorneys for the State have filed a response in opposition to Citizens for Strong Schools’ motion for certification. The State argued that the normal appeals process should run its course. The State further argued that the appellants have not shown a risk of imminent harm and that

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176. *Citizens for Strong Sch., Inc.*, slip op. at 17–19.
179. *Citizens for Strong Sch., Inc.*, slip op. at 18–19.
182. *See Appellants’ Suggestion for Certification, supra* note 181, at 3–5.
183. *Id.* at 3–4; *see also* Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What’s So Important?*, FLA. B. J., May 2002, at 40, 44 (discussing how important issues with far-reaching consequences, cases of first impression, issues that arise frequently, unclear case law, public policy issues, old precedent, and intervening law are all issues that the Supreme Court of Florida is likely to hear on certification).
none of the issues raised by Citizens for Strong Schools requires an immediate resolution by the Supreme Court of Florida.\footnote{186}  

V. \textbf{SCHOOL FINANCE IN THE STATE OF WASHINGTON} 

As discussed previously, a state will look to other states’ decisions when deciding its own school finance suits.\footnote{187} Should the Supreme Court of Florida take the case, it will almost invariably look to states with similar levels of requirements in their education provisions.\footnote{188} The court should narrow its view to states that are considered Category IV.\footnote{189} Looking even beyond the Category IV states, one state in particular would be more important than any other.\footnote{190} That state is Washington because it is the only state, besides Florida, that contains the language \textit{paramount duty} in its education provision.\footnote{191} The Washington education provision reads: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”\footnote{192}  

A. \textit{Seattle School District No. 1 of King County}  

The Supreme Court of Washington reviewed its education provision in \textit{Seattle School District No. 1 of King County v. State}.\footnote{193} This case raised many of the same issues raised in \textit{Citizens for Strong Schools}.\footnote{194}

The State in this case disputed whether interpretation of the education provision was a justiciable issue for the court.\footnote{195} The court held that where the matter is “one of great public interest,” that has been adequately argued before the court, and the court’s opinion “will be beneficial to the public,” the court may exercise its jurisdiction.\footnote{196} The court also held that the legislature, school districts, and people of Washington were uncertain as to the meaning of the education provision of the Washington

\begin{footnotes}
\item[186] \textit{Id.} at 2–3.  
\item[187] See Escue et al., \textit{supra} note 2, at 605.  
\item[188] \textit{See id.}  
\item[189] See FLA. CONST. of 1968, art. IX; Escue et al., \textit{supra} note 2, at 605; Staros, \textit{supra} note 42, at 501.  
\item[190] See FLA. CONST. of 1968, art. IX; WASH. CONST. art IX; Escue et al., \textit{supra} note 2, at 605.  
\item[191] WASH. CONST. art IX; see also FLA. CONST. of 1968, art. IX.  
\item[192] WASH. CONST. art IX.  
\item[193] 585 P.2d 71, 76 (Wash. 1978) (en banc).  
\item[194] \textit{See id.} at 80; Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., No. 09-CA-4534, slip op. at 2–3 (Fla. 2d Cir. Ct. May 24, 2016).  
\item[195] \textit{Seattle Sch. Dist. No. 1 of King Cty.}, 585 P.2d at 80.  
\item[196] \textit{Id.}
\end{footnotes}
Constitution. It was the opinion of the court that a clarification of the provision would not only benefit these parties, but also the students in Washington. Therefore, the court held that it had jurisdiction because the issue of the education provision was a justiciable question.

The State argued that the issue pertaining to any ambiguity in the provision was for the legislature to determine. The court disagreed, holding that it had the "ultimate power and the duty to interpret, construe, and give meaning to words, sections, and articles of the constitution." The State also made the argument, as was made in *Citizens for Strong Schools*, that if the court decided the case, it would be violating the separation of powers. The court held that, although separation of powers is a sensitive topic, construction and interpretation of the constitution are functions exclusively held by the judiciary.

Once the court held that the issue of the education provision was a justiciable question, it looked to determine the meaning of paramount duty. The decision stated:

By imposing upon the [s]tate a *paramount duty* to make ample provision for the education of all children residing within the [s]tate’s borders, the constitution has created a *duty* that is supreme, preeminent, or dominant. Flowing from this constitutionally imposed *duty* is its jural correlative, a correspondent *right* permitting control of another’s conduct. Therefore, all children residing within the borders of the [s]tate possess a *right*, arising from the constitutionally imposed *duty* of the [s]tate, to have the [s]tate make ample provision for their education. Further, since the *duty* is characterized as *paramount* the correlative *right* has equal stature.

The court held that it had the power and duty to interpret the constitution and affirmed the trial court’s judgment finding.

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197. Id.
198. Id.
199. See id. at 80, 83, 87.
200. *Seattle Sch. Dist. No. 1 of King Cty.*, 585 P.2d at 87.
201. Id.
202. Id. at 87–88; see also *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, No. 09-CA-4534, slip op. at 20 (Fla. 2d Cir. Ct. May 24, 2016).
204. See id. at 88, 91.
205. Id. at 91.
206. Id. at 83, 99.
VI. **The Future of Citizens for Strong Schools and Florida's System**

Despite the major wins for education reformers in the past—the 1998 amendment and the decision in *Bush*—the Circuit Court for the Second Judicial Circuit of Florida held that it could not decide the adequacy of Florida's schools because it did not have a justiciability standard.\(^{207}\) Once again, Florida's poorer students were denied the opportunity to challenge the level of schooling the state had provided to them.\(^{208}\) Should this case reach the Supreme Court of Florida, there are several reasons why the court should decide on the issue of whether the state has provided an adequate education to its students.\(^{209}\) If the court does not wish to rule on the issue of adequacy, education reformers have another fortunate opportunity in the near future.\(^{210}\)

A. **The Supreme Court of Florida**

In *Bush*, the Supreme Court of Florida clearly indicated that the 1998 amendment provided standards to determine the meaning of adequate.\(^{211}\) The decision also stated that the court should interpret the language of the Florida Constitution when it can.\(^{212}\) As previously discussed, states look at how other states have ruled when deciding their own school financial suits.\(^{213}\) Therefore, the State of Florida should now look to how the State of Washington decided its own school finance case.\(^{214}\) This is because Washington is also a Category IV state, and is the only other state to contain the *paramount duty* language.\(^{215}\) In a case that examined issues strikingly similar to the issues in *Citizens for Strong Schools*, the Supreme Court of Washington determined that it could decide the case without infringing on the separation of powers.\(^{216}\) For these reasons, the Supreme Court of Florida could and should decide that it does have the power to interpret the education

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207. *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006); *Citizens for Strong Sch., Inc.*, slip op. at 18–19; see also Fl.A. CONST. of 1968, art. XI, § 2.
210. *Coal. for Adequacy & Fairness in Sch. Funding, Inc.*, 680 So. 2d at 408; see also Fl.A. CONST. of 1968 art. XI, § 2; Gordon, *supra* note 8, at 288; infra Section VI.B.
211. *See Bush*, 919 So. 2d at 403.
212. *Id.* at 400, 405.
213. *Escue et al., supra* note 2, at 605.
214. *See id.*
215. *See WASH. CONST. art. IX § 1; Staros, supra* note 42, at 498.
provision and assess the level of education provided by the state.\textsuperscript{217} This is not to say that the court will find the level of education unconstitutional as the Supreme Court of Washington did.\textsuperscript{218} It merely means the court will get to the question of whether the education provided to its students is indeed adequate.\textsuperscript{219}

B. \textit{2017-2018 Florida Constitution Revision Commission}

Education reformers in Florida will have a rare opportunity to effectuate change as of 2017.\textsuperscript{220} Just as the Revision Commission met in 1997, it will meet again in 2017.\textsuperscript{221} Many changes that education reformers called for in 1997 were written out of the 1998 amendment.\textsuperscript{222} The 1998 amendment received huge support from the public.\textsuperscript{223} The citizens of Florida would once again have an opportunity to have education be declared a fundamental right, further define the term adequate, and allow for students to be able to sue independent school districts.\textsuperscript{224} These changes would give a voice to students who unfortunately attend underperforming schools.\textsuperscript{225} Declaring education as a fundamental right could compel the Supreme Court of Florida to weigh in on the issue.\textsuperscript{226}

VII. \textbf{CONCLUSION}

For far too long, the State of Florida has decided to dodge the question of how its schools perform.\textsuperscript{227} Whether the courts defer to the legislature, or the legislature intentionally dilutes the citizens' wants and needs, the time has come for the Supreme Court of Florida to decide.\textsuperscript{228} The state holds school districts accountable for how its teachers and students perform, and it is now time for the court to hold the Department of Education

\textsuperscript{217} See \textit{Bush}, 919 So. 2d at 405; \textit{Seattle Sch. Dist. No. 1 of King Cty.}, 585 P.2d at 76; \textit{Citizens for Strong Sch., Inc.}, slip op. at 19–20; Escue et al., \textit{supra} note 2, at 605; Staros, \textit{supra} note 42, at 498.

\textsuperscript{218} See \textit{Seattle Sch. Dist. No. 1 of King Cty.}, 585 P.2d at 99.

\textsuperscript{219} \textit{Bush}, 919 So. 2d at 398.

\textsuperscript{220} See \textit{Gordon}, \textit{supra} note 8, at 288.

\textsuperscript{221} See \textit{id}.

\textsuperscript{222} \textit{Id}. at 294–95, 300.

\textsuperscript{223} See \textit{id}. at 302.

\textsuperscript{224} See \textit{id}. at 280, 296, 298.

\textsuperscript{225} See \textit{Gordon}, \textit{supra} note 8, at 279.

\textsuperscript{226} See \textit{id}. at 280–82.

\textsuperscript{227} See \textit{id}. at 273, 283; \textit{supra} Part II–III.

\textsuperscript{228} See \textit{Gordon}, \textit{supra} note 8, at 288; \textit{supra} Parts II–III.
accountable. The state and legislature want to avoid flooding the judicial system with lawsuits challenging Florida’s educational system. If the state truly believes that it has made leaps and bounds in test scores and is a national leader in education, then it should not fear the court ruling on this issue.

If the Supreme Court of Florida decides that it cannot adjudicate the issue of adequacy, educational reformers need to be successful during the 2017 to 2018 Revision Commission. It would be difficult for the court to ignore claims concerning the infringement of a constitutional right.

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229. See Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ., No. 09-CA-4534, slip op. at 2, 27 ( Fla. 2d Cir. Ct. May 24, 2016); supra Part IV.
230. See Order Denying Dismissal, supra note 120, at 2; supra Part IV.
231. See Citizens for Strong Sch., Inc., slip op. at 18–19; supra Part IV.
232. See Gordon, supra note 8, at 288; supra Part VI.
233. See Gordon, supra note 8, at 280, 296, 298; supra Part VI.
THROWING SHADE ON THE SUNSHINE STATE: THE PARIS AGREEMENT AND HOW FLORIDA UTILITY COMPANIES ARE FIGHTING TO CONTROL SOLAR ENERGY

BRANDON FERNÁNDEZ*

I. INTRODUCTION ................................................................. 106
II. THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE ................................................................. 109
   A. Conference of the Parties 17: Durban Platform for Enhanced Action ................................................................. 111
   B. Conference of the Parties 21: The Paris Agreement ...... 112
      1. Adoption ............................................................... 113
      2. Ratification ......................................................... 114
         a. Signature Ceremony ........................................... 114
         b. Instruments of Ratification, Acceptance, or Approval ................................................................. 114
         c. Entry into Force .................................................. 115
      3. Commitments ........................................................ 116
         a. Intended Nationally Determined Contributions ................................................................. 117
         b. Climate Finance .................................................. 118
      4. Compliance ............................................................ 119
      5. Withdrawal ............................................................. 120
   C. Climate Ambitions: The Clean Power Plan .............. 120
      1. Intended Nationally Determined Contribution ....... 121
      2. Clean Power Plan ................................................. 122
      3. The Suit Against the Clean Power Plan ................. 123
   D. The United States and the Paris Agreement .............. 125
III. THROWING SHADE: FLORIDA UTILITIES BLOCKING THE SUN ON SOLAR ................................................................. 126
   B. Florida Law and the Public Service Commission ...... 128

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I. INTRODUCTION

In December 2015, leaders from 195 countries around the world gathered in Paris, France for the twenty-first session of the Conference of the Parties (“COP21”). In response to the growing concerns regarding the effects of climate change, leaders adopted the text of an international agreement in an effort to curb global warming caused by the release of greenhouse gas and carbon dioxide emissions into the atmosphere. The disastrous effects of global warming include rising sea levels, intense storm patterns, severe droughts, and food shortages. In order to combat this threat to humanity, countries at the COP21 in Paris adopted an international agreement now known to the world as the Paris Agreement. The Paris Agreement calls for a global reduction in greenhouse gas emissions in order to hold the increase in global temperatures to a maximum of 2 degrees Celsius—3.6 degrees Fahrenheit—above pre-industrial levels. The United States submitted its Intended Nationally Determined Contributions (“INDC”) to the United Nations to communicate its goal to reduce greenhouse gas emissions. The Clean Power Plan is a key component of the United States’

4. Adoption of the Paris Agreement 2, FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015); Northrop & Ross, supra note 2.
5. Adoption of the Paris Agreement, supra note 4, at 22; see also Michelle Nichols & Valerie Volcovici, China, U.S. Pledge to Ratify Paris Climate Deal This Year, REUTERS (Apr. 22, 2016, 8:07 PM), http://www.reuters.com/article/us-climatechange-pact-idUSKCN0XJ0B1.
6. U.S. Cover Note, INDC and Accompanying Information, UNFCCC, (Mar. 31, 2015, 4:03 PM),
ability to achieve its reduced greenhouse gas emissions goal and for the first time sets limits on carbon emissions from power plants. 7 Under the Clean Power Plan, “the United States intends to [reduce] . . . its greenhouse gas emissions by 26-28[\%] below its 2005 level . . . [by the year] 2025,” with solar energy comprising 28% of the United States’ power generation by 2025. 8

The amount of solar panels installed in the United States during the first quarter of 2016 alone is expected to generate enough renewable energy to power 5.7 million American homes. 9 The rise of Third-Party Ownership ("TPO") finance models, such as Power Purchase Agreements ("PPA"), have helped lead the way for homeowners to install solar panels on their property. 10 However, Florida is one of seven states that currently bans TPO finance models, while an additional twenty states have unclear laws regarding TPOs, causing solar companies to keep their distance. 11 Under Florida law, electricity may only be sold by public utilities regulated by Florida’s Public Service Commission (“PSC”), a regulation that has kept Florida’s Investor-Owned Utilities with a monopoly over the sale of electricity for decades. 12 Over the last two years, advocacy groups such as Floridians for Solar Choice, and the utility-backed Consumers for Smart Solar have drafted constitutional amendments on solar energy for Florida

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10. See Greer Ryan, CTR. FOR BIOLOGICAL DIVERSITY, THROWING SHADE: 10 SUNNY STATES BLOCKING DISTRIBUTED SOLAR DEVELOPMENT 11 (2016); Kerry Sheridan, Unlikely Allies Fight for Solar Energy in Florida, PHYS.ORG (Mar. 11, 2015), http://phys.org/news/2015-03-allies-solar-energy-florida.html (For example, the PPA allows a homeowner to install solar panels at no upfront cost, and is billed only for the power the solar panels produce while simultaneously offsetting a homeowner’s electric utility bill.).


citizens to vote on. If passed, the two amendments, (1) Limits or Prevents Barriers to Local Solar Electricity Supply (“Limits or Prevents Barriers”); and (2) Rights of Electricity Consumers Regarding Solar Energy Choice (“Solar Energy Choice”), will have substantially different impacts, not only on Florida’s solar energy policy, but on the emissions goals under both the Clean Power Plan and the Paris Agreement. This Comment will expand on this discussion by examining the Paris Agreement and its effects on United States’ policy, the status of the Clean Power Plan, Florida’s policy on solar PPA, and how both of Florida’s proposed solar amendments will affect Florida’s ability to meet the emission goals of the Clean Power Plan and Paris Agreement. Part II of this Comment will provide a general overview of the United Nations’ policy on climate change, the Clean Power Plan, and the legal options for the United States to ratify the Paris Agreement. Part III will outline solar panel ownership options, current Florida law and regulation of solar energy, and discuss how Florida’s utility companies are fighting a proposed pro-solar constitutional amendment with an amendment proposal of their own. Part IV will conclude and explain how the Limits or Prevent Barriers amendment will allow Florida to help lead the country to meet the emission goals of the Clean Power Plan and Paris Agreement, and how the Solar Energy Choice amendment backed by Florida’s utility companies will cement their control over solar energy, while preventing the United States from complying with the emission goals under the Clean Power Plan and Paris Agreement.

15. See Dickinson, supra note 12.
17. See infra Sections II.B, II.D.
18. See infra Section II.C.
19. See infra Section III.B.
20. See infra Section III.C.
21. See infra Part II.
22. See infra Section III.A.
23. See infra Section III.B.
24. See infra Section III.C.
25. See infra Part IV.
26. See infra Part IV.
II. THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

In May of 1992, the United Nations adopted an international environmental treaty titled the United Nations Framework Convention on Climate Change (“UNFCCC”). The UNFCCC entered into force on March 21, 1994, after 197 countries ratified the treaty, officially becoming Parties to the UNFCCC. The UNFCCC provides “the basic structure of governance of the [United Nations’] climate change regime, including [the UNFCCC’s] objective[s] and principles, . . . obligations, . . . and the . . . governing institutions.” The UNFCCC has a total of twenty-six articles that govern the Parties. The objective of the UNFCCC is described in Article II and states:

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

President George H.W. Bush submitted the UNFCCC Treaty to “[t]he Senate, [which] gave its advice and consent to the UNFCCC . . . less than five months after” its adoption on October 7, 1992. Thereafter, President Bush deposited the instrument of ratification to the United Nations

31. Id. at 169.
32. BODANSKY, supra note 29, at 9.
on October 15, 1992, becoming one of the first countries to ratify the UNFCCC Treaty.\textsuperscript{33}

Article 4, Commitments, provides the commitments of the Parties to the UNFCCC.\textsuperscript{34} As Daniel Bodansky explains, the Parties to the UNFCCC committed to:

\begin{itemize}
  \item [1] [d]evelop, periodically update, and publish national inventories of greenhouse gas emissions . . . ;
  \item [2] [f]ormulate, implement, publish, and regularly update national programs containing measures to mitigate and adapt to climate change . . . ;
  \item [3] [p]romote and cooperate in technology transfer . . . , scientific and technological research . . . , exchange of information . . . , and education, training, and public awareness . . . ;
  \item [4] [r]eport to the [Conference of the Parties (“COP”)] on its national greenhouse gas inventories and the steps it has taken to implement the convention.\textsuperscript{35}
\end{itemize}

Additionally, Annex II Parties, comprised of twenty-four countries including the United States, committed to providing developing countries with: (1) financial resources, (2) adaptation costs, and (3) “promot[ion], facilitat[ion] and financ[ing for] the transfer of technology.”\textsuperscript{36}

Article 7 established the COP and designated it as the supreme body of the UNFCCC.\textsuperscript{37} Article 7 grants the COP the authority to review the implementation progress of the UNFCCC, including “any related legal instruments that the COP may adopt,” pursuant to the UNFCCC, and to make the decisions necessary to effectively apply the UNFCCC to its Parties.\textsuperscript{38}

\textsuperscript{33} Id.; Status of Ratification of the Convention, supra note 28.

\textsuperscript{34} See United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 170–74.

\textsuperscript{35} Bodansky, supra note 29, at 9 (citations omitted); see also United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 170–74, 180–81.

\textsuperscript{36} United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 190; Bodansky, supra note 29, at 9.

\textsuperscript{37} United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 176.

\textsuperscript{38} Id.; Bodansky, supra note 29, at 9.
A. **Conference of the Parties 17: Durban Platform for Enhanced Action**

In 2011, the seventeenth session of the Conference of the Parties (“COP17”) took place in Durban, South Africa.\(^39\) During COP17, the Parties adopted the Durban Platform for Enhanced Action (“Durban Platform”), after “[r]ecognizing that climate change represents an urgent and [possibly] irreversible threat to human societies and the planet.”\(^40\) Realizing an international commitment is required to reduce the effects of climate change, the decision adopted by the Parties called for the “widest possible cooperation by all countries and their participation . . . to accelerate[e] the reduction of global greenhouse gas emissions.”\(^41\) The decision came in response to the Parties’ *grave concern* [about] the significant gap between” the pledges to reduce greenhouse gas emissions by 2020 at the time of COP17, and the *likely chance* the pledges had in holding the “global average temperature below 2 [degrees Celsius] or 1.5 [degrees Celsius].”\(^42\) Understanding “that fulfilling the ultimate objective of the [UNFCCC] would require strengthening of the multilateral, rules-based regime,” the Parties at COP17 decided to develop another protocol, legal instrument, or agreement with legal force under the UNFCCC.\(^43\) Consistent with the sense of urgency in accelerating the reduction of greenhouse gas emissions to slow the increase in global temperatures, the Parties had until COP21 in 2015 to adopt a new legal instrument under the UNFCCC.\(^44\)

In 2013, the nineteenth session of the Conference of the Parties (“COP19”) “invited all Parties to initiate or intensify domestic preparations for their INDCs towards achieving the objective of the [UNFCCC],” and to do so in advance of COP21.\(^45\) On March 31, 2015, the United States submitted its INDC to the United Nations, and “intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28[%] below its 2005 level in 2025.”\(^46\)

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40. *Id.* at 2.
41. *Id.*
42. *Id.*
43. *Id.*
B.  

Conference of the Parties 21: The Paris Agreement

In December of 2015, the Parties convened at the COP21 to the UNFCCC in Paris, France.\textsuperscript{47} Pursuant to the Durban Platform, the Parties assembled in Paris with the purpose of adopting a new “protocol, another legal instrument, or an agreed outcome with legal force” to meet the objectives of the UNFCCC to “accelerat[e] the reduction of global greenhouse gas emissions.”\textsuperscript{48} However, the Paris Agreement requires the Parties involved to complete a two-step ratification process before its provisions come into force.\textsuperscript{49} Although the Parties hope to implement the Paris Agreement by the year 2020, the Paris Agreement must first clear some ratification hurdles of its own that may cause it to come into effect, if ever, beyond the year 2020.\textsuperscript{50}

Prior to COP21, President Obama announced the Clean Power Plan to assure the international community of the United States’ credibility in leading the international negotiations and its commitment to reducing its greenhouse gas emissions.\textsuperscript{51} During the negotiations of the Paris Agreement, led by President Obama and Secretary of State John Kerry, the drafters of the Paris Agreement carefully crafted the text of the deal to adhere to United States’ specifications in order to insulate President Obama from submitting the Paris Agreement to the Senate for its advice and consent.\textsuperscript{52} As Oklahoma Senator Jim Inhofe stated, “[t]he United States is not legally bound to any agreement setting emissions targets or any financial commitment to it without approval by Congress,” in reference to the Treaty Clause of the United States Constitution, which requires the advice and consent of two thirds of the Senate to ratify the agreement.\textsuperscript{53} Thus, under the United States’ guidance, the Paris Agreement “was explicitly crafted to exclude emissions reduction[] targets and finance from the legally binding parts of the

\begin{itemize}
\item 47. Paris Agreement — Status of Ratification, supra note 1.
\item 48. Adoption of the Paris Agreement, supra note 4, at 1; Framework Convention on Climate Change, supra note 39, at 7.
\item 49. Northrop & Ross, supra note 2.
\item 50. See The Ratification Hurdles of the Paris Climate Agreement, GWPF (June 16, 2016), http://www.thegwpf.com/the-ratification-hurdles-of-the-paris-agreement/.
\item 51. Alman & Marans, supra note 3.
\end{itemize}
This allows the President of the United States to implement the Paris Agreement by executive order under the umbrella of the UNFCCC instead of submitting the agreement to the Senate for approval. For this reason, it would be helpful to discuss the pertinent provisions of the Paris Agreement, including: adoption, ratification, commitments, compliance, and withdrawal.

1. Adoption

As briefly mentioned earlier, pursuant to the Durban Platform the parties to the UNFCCC had until the COP21 in 2015 to adopt a “protocol, another legal instrument, or an agreed outcome with legal force.” At the COP21, the text of the Paris Agreement was negotiated in Paris, France. On December 12, 2015, the parties to the COP21 officially released their decisions, which the COP had adopted, announcing to the world their decision to officially adopt the Paris Agreement under the UNFCCC. The Paris Agreement was adopted unanimously by all 195 parties to the UNFCC.

54. Goldenberg, supra note 52; see also BODANSKY, supra note 29, at 14.
56. See Adoption of the Paris Agreement, supra note 4, at 2–3.
57. See infra Section II.B.1.
58. See infra Section II.B.2.
59. See infra Section II.B.3.
60. See infra Section II.B.4.
61. See infra Section II.B.5.
62. Framework Convention on Climate Change, supra note 39, at 2; see also Northrop & Ross, supra note 2 (“Adoption is the formal act that establish[es] the form and content of an agreement.”).
64. See id. at 4; Paris Agreement — Status of Ratification, supra note 1; Taraska & Lang, supra note 55.
2. **Ratification**

As previously mentioned, the Paris Agreement requires a two-step ratification process by the parties to the UNFCCC before the Paris Agreement enters into force under international law.  

Both the Paris Decision and the Paris Agreement provide that a country that intends to join the agreement must: (1) sign the agreement and (2) indicate its consent to join and be bound by it as parties.

a. **Signature Ceremony**

In accordance with Article 20 of the Paris Agreement, the Secretary-General of the United Nations opened the Paris Agreement up for signatures at the United Nations Headquarters in New York City from April 22, 2016 to April 21, 2017. On April 22, 2016, the Secretary-General convened a high-level signature ceremony for all Parties to the UNFCCC, with 175 Parties signing the Agreement, breaking a 1982 record for opening day signatures to an international agreement.

As provided in Article 20, the Paris Agreement will be open for accession on the date after the agreement is closed for signature. Accession occurs when a “country becomes a Party to an international agreement that other countries have already signed.” Therefore, a country that “[d]eposit[s] an instrument of accession after April 22, 2017 will have the same legal effect as if that country had signed and deposited an instrument of ratification, acceptance, or approval.”

b. **Instruments of Ratification, Acceptance, or Approval**

Under Article 20, a country’s consent to be bound as a Party to the Paris Agreement is “subject to ratification, acceptance, or approval by States . . . that are Parties to the [UNFCCC].” Therefore, when a country signs the Paris Agreement indicating its consent to be bound as a Party, it is “making [its] signature conditional on obtaining the required domestic
approval for joining the [Paris] Agreement,” such as “enact[ing] any national legislation necessary to implement the [Paris] Agreement.” Once a country implements the necessary legislation through its “domestic processes, it will come back and deposit an ‘instrument of ratification, acceptance, or approval’” with the United Nations in accordance with Article 20 of the Paris Agreement. “[A]n instrument of ratification, acceptance, or approval . . . is a formal document indicating that [a country has fulfilled] all necessary [domestic] processes and can now join the [Paris] Agreement.” A country can either deposit its instrument on the same day it signs the Paris Agreement, or at a later date, as there is no deadline for when Parties can submit their instruments. As of June 29, 2016, only nineteen of the 178 signatories to the Paris Agreement have deposited their instruments of ratification, accounting for only 0.18% of the total global greenhouse gas emissions.

c. Entry into Force

Article 21 of the Paris Agreement provides when the Agreement shall enter into force, and states that “[t]his Agreement shall enter into force on the thirtieth day after the date on which at least fifty-five parties to the [UNFCCC] accounting in total for at least an estimated 55[%] of the total . . . greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval, or accession.” The rate individual countries can complete their domestic approval process varies from country to country, so it is difficult to predict when the fifty-five Parties accounting for at least 55% of global greenhouse gas emissions will deposit their instruments of ratification. According to the United Nations, both “the [United States] and China accounted for around 38[%] of emissions,” meaning that if they both act quickly it will be much easier to achieve the 55% emissions threshold.

74. Northrop & Ross, supra note 2; Adoption of the Paris Agreement, supra note 4, at 31–32.
75. Northrop & Ross, supra note 2; Adoption of the Paris Agreement, supra note 4, at 31.
76. Northrop & Ross, supra note 2; Adoption of the Paris Agreement, supra note 4, at 31.
77. Northrop & Ross, supra note 2; Adoption of the Paris Agreement, supra note 4, at 31.
78. Paris Agreement — Status of Ratification, supra note 1; Adoption of the Paris Agreement, supra note 4, at 31.
79. Adoption of the Paris Agreement, supra note 4, at 31.
80. See Northrop & Ross, supra note 2.
81. Mooney & Eilperin, supra note 65; Framework Convention on Climate Change, supra note 63, at 30, 33.
In addition to the United States and China, other countries who could significantly help in reaching that 55% include Russia with 7.5%, India with 4.1%, Japan with 3.7%, and Brazil with 2.48%. However, the World Resources Institute predicts that the “55[%] threshold cannot be achieved without the acceptance of at least one of the top four emitting Parties: [1] China, [2] the United States, [3] the European Union, or [4] Russia.”

3. Commitments

In accordance with the Durban Platform’s commitment to reducing greenhouse gas emissions to slow the increase in global temperatures, the Paris Agreement set forth its greenhouse gas emission goals in Article 2. Article 2 provides the global temperature goals of the UNFCCC, and calls for “[h]olding the increase in the global average temperature . . . [to] below 2 [degrees Celsius] above pre-industrial levels,” and pursues avenues to further limit the increase to 1.5 degrees Celsius. The drafters of the Paris Agreement, during negotiations, set the 2-1.5 degrees Celsius mark as the temperature goal with the understanding reaching this goal would significantly reduce the risks and impacts of climate change.

Although the temperature goals set forth in the Paris Agreement are what the drafters deemed necessary to prevent the irreversible and disastrous effects of global warming, there are some who doubt the accuracy and ability to meet the temperature target. The argument against the ability to reach the temperature goals begins with the notion that, even if the Paris Agreement is implemented around the world immediately, it is far from clear that the world’s governments “actually know how to limit warming to 2 or 1.5 degrees Celsius.” The second problem is “knowing when the world is actually 1.5 degrees or 2 degrees C[elsius] above a pre-industrial baseline temperature, often taken . . . between the years of 1850 and 1900.”

82. Mooney & Eilperin, supra note 65; see also Framework Convention on Climate Change, supra note 63, at 30–33.
83. Northrop & Ross, supra note 2.
84. Adoption of the Paris Agreement, supra note 4, at 22; see also Framework Convention on Climate Change, supra note 39, at 2.
85. Adoption of the Paris Agreement, supra note 4, at 22; see also Nichols & Volcovici, supra note 5 (two degrees Celsius is 3.6 degrees Fahrenheit).
86. Adoption of the Paris Agreement, supra note 4, at 22.
88. Mooney, supra note 87.
89. Id. (“[S]ome have noted that we breached the 1.5 degree threshold in February of 2016 . . . .”) (emphasis added).
summary, the concerns about the target temperature stem from the difficulty in defining where the threshold actually lies and when it is crossed.\textsuperscript{90}

\begin{itemize}
\item \textbf{Intended Nationally Determined Contributions}
\end{itemize}

A key component of the Paris Agreement is an “associated set of nationally determined” contributions that the Parties intend to achieve in order “to reduce greenhouse gas emissions” to at least 1.5 degrees Celsius.\textsuperscript{91} Since the adoption of the Paris Agreement in December, “more than 180 countries representing approximately 95\% of global emissions have now submitted [their] national[ly] [determined contribution] targets to the UNFCCC.”\textsuperscript{92} Although the combined nationally determined contribution targets are likely “inadequate to limit [global] warming to well below 2 degrees Celsius above preindustrial levels, . . . the [Paris Agreement] has three elements that allow it to narrow the so-called ambition gap over time.”\textsuperscript{93}

First, the Paris Agreement “establish[ed] a framework in which countries are obligated to submit new national climate goals every five years,” with the expectation that each successive goal is “stronger than its predecessor and represent[s] the country’s greatest effort.”\textsuperscript{94} Second, Article 14 establishes an \textit{effectiveness review}, requiring “stock-taking sessions every five years” in order to review and “assess the collective progress towards achieving the purpose of [the] Agreement and its long-term goals.”\textsuperscript{95} The purpose of the stock-taking sessions is to inform each round of their nationally determined contribution targets.\textsuperscript{96} Third, Article 13 of the Agreement establishes an \textit{implementation review}, providing “a legally binding accountability framework to facilitate clarity with respect to each” Parties’ progress toward implementing and achieving its INDC under Article 4.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} Adoption of the Paris Agreement, \textit{supra} note 4, at 22–23, 27; Taraska & Lang, \textit{supra} note 55.
\item \textsuperscript{92} Taraska & Lang, \textit{supra} note 55.
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} \textit{Id.}; see also Adoption of the Paris Agreement, \textit{supra} note 4, at 22–23.
\item \textsuperscript{95} HARRO VAN ASSELT & THOMAS HALE, ARIZ. ST. U., REVIEWING IMPLEMENTATION AND COMPLIANCE UNDER THE PARIS AGREEMENT 1 (2016); Taraska & Lang, \textit{supra} note 55; see also Adoption of the Paris Agreement, \textit{supra} note 4, at 29.
\item \textsuperscript{96} Taraska & Lang, \textit{supra} note 55.
\item \textsuperscript{97} \textit{Id.}; Adoption of the Paris Agreement, \textit{supra} note 4, at 28; ASSELT & HALE, \textit{supra} note 95, at 1.
\end{itemize}
b. **Climate Finance**

At the sixteenth session of the Conference of the Parties (“COP16”) in December 2010, the Parties decided to adopt and establish the Green Climate Fund (“GCF”), to serve as the “financial mechanism of the [UNFCCC] under Article 11.”98 Under the GCF, “developed countries Parties commit . . . to [mobilizing] a goal of . . . 100 billion [dollars] per year by 2020 to [help] address the needs of developing countries” with mitigation and transparency in the implementation of their goals.99 A year later, in 2011, the Parties adopted the governing instrument of the GCF at COP17, and officially designated the GCF as an “operating entity of the financial mechanism of the [UNFCCC], in accordance with Article 11.”100 The purpose of the GCF is to “make a significant and ambitious contribution to the global efforts towards attaining the goals set by the international community to combat climate change.”101 Additionally, the GCF will contribute to the achievement of the ultimate objective of the [UNFCCC] . . . [and] promote the paradigm shift towards low-emission and climate-resilient development pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change.102

As previously mentioned, President Obama and United States negotiators insisted on explicitly excluding target climate finance goals in the Paris Agreement.103 As such, the “Paris Agreement does not explicitly refer to the GCF and the amount of funding that it is to mobilize.”104 However, Article 9 of the Paris Agreement provides for “[d]eveloped countr[i]es . . . to assist developing country Parties” with climate finance to help them reach their mitigation and adaptation goals under the UNFCCC.105 Moreover, under Article 9, “[t]he [f]inancial [m]echanism of the [UNFCCC], including

101. Framework Convention on Climate Change, supra note 100, at 58.
102. Id.
103. See Goldenberg, supra note 52.
105. Adoption of the Paris Agreement, supra note 4, at 26.
its operating entities, shall serve as the financial mechanism of [the] Agreement.\textsuperscript{106} Therefore, the GCF and the Global Environment Facility (“GEF”), “are the two operating entities of the [f]inancial [m]echanism of the [UNFCCC],” and “represent the main channels through which future sources of international climate finance are expected to flow” to the Paris Agreement.\textsuperscript{107} The Paris Decision made at COP21, “strongly urges developed country Parties to scale up their level of financial support, with a concrete roadmap to achieve the goal of jointly providing . . . 100 billion [dollars] annually by 2020 for mitigation and adaptation.”\textsuperscript{108} Moreover, the Paris Decision provides, prior to the year 2025, the COP “shall set a new ‘collective quantified goal from a floor of . . . 100 billion [dollars] per year.’”\textsuperscript{109} By drafting the Paris Agreement in a way that explicitly excludes both of the previously mentioned quantitative targets in the Paris Decision, the COP has “enabled [the President of the United States] to adopt the [Paris] Agreement as [a] sole-executive agreement under U[nite]d S[ates] law without” the advice and consent from the Senate.\textsuperscript{110}

4. Compliance

A central point of discussion surrounding the Paris Agreement is the extent that it legally binds its Parties.\textsuperscript{111} Article 15 establishes the compliance mechanism of the Paris Agreement, allowing for a compliance review in order “to facilitate [the] implementation of and promote compliance with the provisions of this Agreement.”\textsuperscript{112} The mechanism shall consist of an expert-based committee that is “facilitative in nature and function[s] in a manner that is transparent, non-adversarial, and non-punitive.”\textsuperscript{113}

Essentially, in the spectrum of “purely aspirational [agreements] to legally binding [agreements] with punitive consequences for non-compliance, [t]he Paris Agreement . . . falls . . . somewhere in between.”\textsuperscript{114}

\begin{flushleft}
\textsuperscript{106} Id. at 27.
\textsuperscript{107} \textit{GREEN CLIMATE FUND AND THE PARIS AGREEMENT}, supra note 104, at 2.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.; see also Lewis, Jr., supra note 53.
\textsuperscript{111} See Lewis, Jr., supra note 53.
\textsuperscript{112} Adoption of the Paris Agreement, supra note 4, at 29; see also ASSEL & HALE, supra note 95, at 1.
\textsuperscript{113} Adoption of the Paris Agreement, supra note 4, at 29.
\end{flushleft}
The Paris Agreement is premised on “political pledges and political accountability” as its text has been characterized as largely aspirational and procedural. As Article 13 explicitly states, the compliance mechanism shall be implemented in a non-adversarial and non-punitive manner, implying the Paris Agreement will be enforced by peer pressure from the international community. The consequences for non-compliance are “international criticism [a]nd the need to explain oneself,” because the submission of nationally determined contributions and the implementation review provisions under the Paris Agreement display a Party’s intended goal, and what actual steps that Party took to implement its goals. However, this approach may only work if a country’s failure to make and meet their climate commitments has political consequences.

5. Withdrawal

Article 28 establishes the procedure for a party to withdraw from the Paris Agreement and provides that “[a]t any time after three years from the date on which [the] Agreement has entered into force for a Party, that Party may withdraw from [the] Agreement by giving written notification to the Depository.” Moreover, should a Party deposit its written notification to withdraw from the Paris Agreement, the withdrawal will take effect one year from the date the country deposits its withdrawal notification. Essentially, in order to withdraw from the Paris Agreement after it enters into force, a Party must wait a total of four years, the same length as a presidential term in the United States. As such, should the Paris Agreement enter into force before the next president is inaugurated, the incoming president will likely be bound under the Paris Agreement for at least a single presidential term.

C. Climate Ambitions: The Clean Power Plan

As previously discussed, before the Paris Agreement can enter into force, a country must obtain domestic approval and deposit its instruments of
ratification to officially become a party to the Paris Agreement. As the Senate has been reluctant to consent to international agreements, the President of the United States may look toward utilizing his executive authority under existing law to ratify the Paris Agreement. However, before the President can ratify the agreement, he must successfully implement the necessary laws to help achieve the United States’ INDC. The Clean Power Plan is a significant key to accomplishing the United States’ emission goals under the Paris Agreement, and is described by climate scientists as the “only federal policy capable of enabling the [United States] to uphold its end of the Paris climate agreement and halt [the] catastrophic consequences of global warming.”

1. Intended Nationally Determined Contribution

On March 31, 2015, the United States submitted is INDC to the United Nations, and “intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28[%] below its 2005 level [by] 2025, and to make [its] best efforts to reduce its emissions by 28%.” Moreover, the United States intends to reduce its economy-wide emissions by at least 80% by the year 2050. In order to achieve this target, several laws, including existing and proposed regulations are relevant to the implementation of the United States’ target—including the Clean Air Act, the Energy Policy Act of 1992, and the Energy Independence and Security Act of 2007. “[S]ince 2008, the United States has reduced greenhouse gas emissions from [f]ederal [g]overnment operations by 17[%],” and it intends to “reduce these emissions [to] 40[%] below 2005 levels by 2025.”

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123. See Adoption of the Paris Agreement, supra note 4, at 31; Northrop & Ross, supra note 2.
124. See BODANSKY, supra note 29, at 7, 9.
125. See Adoption of the Paris Agreement, supra note 4, at 22; Northrop & Ross, supra note 2.
126. Magiill, supra note 7.
128. Id.
129. U.S. Cover Note, INDC and Accompanying Information, supra note 6; see also 42 U.S.C. §§ 7401, 13201, 17001 (2012).
130. U.S. Cover Note, INDC and Accompanying Information, supra note 6.
2. Clean Power Plan

On August 3, 2015, President Obama officially announced the Clean Power Plan and described it as the “single most important step America has ever taken in the fight against global climate change.”\(^{131}\)

Currently, “[p]ower plants account for nearly 40% of [United States’] carbon dioxide emissions, . . . more than every car, truck, and plane in the [United States] combined.”\(^ {132}\) The Environmental Protection Agency’s (“EPA”) new rules and standards, finalized under the Clean Power Plan, will, for the first time, reduce carbon emissions from these plants.\(^ {133}\) Prior to the Clean Power Plan’s regulations, “power plants were allowed to dump unlimited amounts of carbon pollution into the atmosphere, [as] no rules were in effect that limited their emissions of carbon dioxide.”\(^ {134}\) In addition, “[c]utting greenhouse gas emissions from coal-fired power plants is critical to any solution to climate change because [they are] the largest single source of emissions driving global warming.”\(^ {135}\) The standards under the Clean Power Plan, which were critical to the United States’ credibility during the Paris climate negotiations, were “developed under the Clean Air Act, an act of Congress that requires the EPA to take steps to reduce air pollution that harms the public’s health.”\(^ {136}\) Moreover, the “Clean Power Plan establishes state-by-state targets for carbon emissions reductions, and it offers a flexible framework under which states may meet those targets.”\(^ {137}\) The options available to states to cut emissions include moving away from coal-fired power and “investing in renewable energy [and] energy efficiency,” while also setting limits to decrease reliance on natural gas.\(^ {138}\)

Under the final version of the Clean Power Plan rule, national emissions are projected to reduce to an estimated 32% below 2005 levels by year 2030.\(^ {139}\) States do not have to begin complying until 2022, but the rule does require them to submit a final plan—or an initial plan with a request for

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133. \textit{Id.}
134. \textit{Id.}
135. Magill, supra note 7.
136. \textit{The Clean Power Plan: A Climate Game Changer}, supra note 7; Magill, \textit{supra} note 7.
138. \textit{Id.}
139. \textit{Id.}
an extension—by September 6, 2016, or by September 6, 2018, if the EPA grants a two-year extension. However, the standards under the Clean Power Plan may be irrelevant unless the Plan overcomes some legal obstacles of its own.

3. The Suit Against the Clean Power Plan

In an effort to kill the Clean Power Plan, twenty-four states, with the support of the coal and utility industries, filed suit against the EPA in West Virginia et al. v. EPA. These states filed suit on October 23, 2015, “the [same] day the [Clean Power Plan] was published in the Federal Register [and] the first day court challenges [could] legally be filed.” The litigants of the suit want to stop the implementation of the Clean Power Plan, “because they believe [it is] an illegal attempt to ‘reorganize the nation’s energy grid.’” Moreover, “[t]he litigants accuse the . . . EPA of going far beyond the authority Congress granted to it by ordering a significant transformation of states’ electricity generation, [by] moving away from fossil fuels like coal and [moving] toward [renewable energy] sources like wind and solar power.”

The litigants “are asking the courts to declare the [Clean Power] Plan unconstitutional partly because they say that the federal government does not have the authority [under the EPA] to regulate a state’s carbon emissions under the Clean Air Act.”

In response to the twenty-four states suing to stop the implementation of the Clean Power Plan, eighteen states, “the District of Columbia, and the cities of New York, Los Angeles, Chicago, Philadelphia, and South Miami,” are supporting the EPA and the Clean Power Plan.


141. See Magill, supra note 7.

142. Petition for Review at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015); Magill, supra note 7 (the case is a “consolidation of [thirty-eight] separate cases”); see also The Clean Power Plan: A Climate Game Changer, supra note 7.


144. Magill, supra note 7.

145. Cama, supra note 143.


147. Magill, supra note 7.
State officials in these areas claim their communities are “already experiencing sea level rise, increasingly severe storms, and prolonged droughts because of climate change, and they fear these events will only get worse . . . [if the EPA is unable] to regulate the carbon emissions that could submerge [their communities] beneath the ocean in the coming decades.”\(^{148}\) This is consistent with the EPA’s position that “carbon emissions from coal-fired power plants [are] a ‘monumental threat to [the American people’s] health and welfare’ by causing climate change, which leads to rising seas, coastal flooding, threatened water supplies, the spread of infectious disease, and more frequent extreme weather.”\(^{149}\) The states supporting the Clean Power Plan say it is critical because emissions cross state lines, and they may be unable to achieve reductions in carbon dioxide emissions in their own state due to emissions from power plants located in other states.\(^{150}\) Essentially, in contrast to the states suing to stop the Clean Power Plan with the notion that the “EPA is coercing states to reduce emissions, the states supporting the [Clean Power Plan] say the EPA’s power to cut carbon pollution from power plants is undisputed and if a state chooses not to comply with the [Clean Power Plan], the EPA will regulate power plants directly.”\(^{151}\)

On February 9, 2016, the Supreme Court granted the application for stay on the Clean Power Plan, “which will stay in place until a lower court rules on the merits and the Supreme Court either refuses to hear the case or rules on the merits.”\(^{152}\) Depending on how quickly the litigants can progress the case through the D.C. Court of Appeals, the stay on the Clean Power Plan could last almost eighteen months.\(^{153}\) However, this stay will not prevent states from implementing the goals of the Clean Power Plan, as more than “[thirty-one] states are . . . on track to be . . . halfway toward [achieving their emissions targets in five years], with [twenty-one] set to surpass it.”\(^{154}\) Only

\(^{148}\) Id.
\(^{149}\) Id.
\(^{150}\) Id.
\(^{151}\) Id.
\(^{152}\) The Clean Power Plan: A Climate Game Changer, supra note 7.
the Supreme Court can decide the constitutionality of the Clean Power Plan and whether the EPA surpassed its authority granted by Congress.\footnote{155}{See Lewis, supra note 153.}

D. The United States and the Paris Agreement

Difference of opinion exists as to whether the Paris Agreement is a treaty that requires approval from two-thirds of the Senate to ratify it.\footnote{156}{U.S. CONST. art. II, § 2, cl. 2; Lewis, Jr., supra note 53; see also Adoption of the Paris Agreement, supra note 4, at 2.}

However, under the current circumstances, it is unlikely the Agreement will be submitted to the Senate, as they have recently “been reluctant [in ratifying] international agreements.”\footnote{157}{BODANSKY, supra note 29, at 13.}

The President of the United States has three potential avenues to ratify the Agreement: “[1] submit . . . to the Senate for . . . ratification as an Article II treaty, [(2)] seek congressional approval of the agreement as an ex post congressional-executive agreement . . ., [or (3)] accept the agreement without [Congress] . . . based on the [P]resident’s [authority under an] existing statutory, treaty, or constitutional authority.”\footnote{158}{Id.}

The Paris Agreement explicitly states it is “[i]n pursuit of the objective of the [UNFCCC],” a theme that is reiterated in Article 2.\footnote{159}{Adoption of the Paris Agreement, supra note 4, at 21, 22.}

As Bodansky explains, “an agreement that . . . [only] implement[s] . . . the UNFCCC’s existing commitments . . . [could] be within the scope of the Senate’s . . . advice and consent to the [treaty].”\footnote{160}{BODANSKY, supra note 29, at 14.}

The Paris Agreement could constitute a treaty-executive agreement under the UNFCCC, as the Durban Platform states the new agreement would be “under the [UNFCCC].”\footnote{161}{Framework Convention on Climate Change, supra note 39, at 2; see also BODANSKY, supra note 29, at 14.}

As the Paris Agreement entered into force on November 4, 2016, with 116 Parties, including the United States, ratifying the Paris Agreement. \textit{Paris Agreement — Status of Ratification, supra note 1.} Currently, the earliest date for withdrawal from the Paris Agreement is November 4, 2020. Valerie Volcovici & Alister Doyle, \textit{Trump Looking at Fast Ways to Quit Global Climate Deal; Source, Reuters} (Nov. 14, 2016, 4:49 AM), http://www.reuters.com/article/us-usa-election-climatechange-accord-idUSKBN137OJX. After winning the Presidential election, Donald Trump is exploring avenues to withdraw the United States from the Paris Agreement immediately. \textit{Id.} Potential avenues include: (1) withdrawing the United States from the UNFCCC umbrella Treaty,
Agreement is largely aspirational and procedural, its ratification without Congress could be justified as further implementing the existing objectives under the umbrella of the previously ratified UNFCCC Treaty. The UNFCCC already “requires [its] parties to ‘formulate, implement, publish and regularly update national . . . [programs] containing measures to mitigate climate change, . . . to submit . . . reports on their emissions . . . policies,’” and authorizes the COP to review the implementation of the UNFCCC. Moreover, the statutes that gave the UNFCCC domestic effect, such as the Clean Air Act and Energy Policy Act of 1992, will also implement the Paris Agreement. The provisions in the UNFCCC are similar to the procedural provisions in the Paris Agreement. Therefore, because the provisions of the Paris Agreement strengthen the requirements of the UNFCCC Treaty, the Paris Agreement could be concluded by executive order under the umbrella of the UNFCCC Treaty. However, it is argued that the Paris Agreement is a new, separate treaty and requires the advice and consent of the Senate to ratify the treaty under United States law.

III. THROWING SHADE: FLORIDA UTILITIES BLOCKING THE SUN ON SOLAR

Florida is known as the Sunshine State for being one of America’s sunniest states. Due to Florida’s seemingly endless supply of sunshine, Florida is ranked third in rooftop solar potential in America, behind only

ratified by former Republican President George H.W. Bush in 1992, and approved by the United States Senate; (2) preventing United States involvement in both the UNFCCC and Paris Agreement; or (3) issuing an executive order deleting the United States' signature from the Paris Agreement. Id. However, China and other parties remain committed to the goals of the Paris Agreement in the fight against climate change, as they believe it is necessary to limit rising temperatures in order to slow the increase in heat waves, extinction of animals and plants, downpours, floods, and rising sea levels. Id.

163. McAnsh, supra note 114; see also BODANSKY, supra note 29, at 16; Taraska & Lang, supra note 55.
164. BODANSKY, supra note 29, at 16 (citations omitted); see also United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 169–70.
165. 42 U.S.C. § 7401 (2012); 42 U.S.C. § 13201 (2012); see also U.S. Cover Note, INDC and Accompanying Information, supra note 6; Taraska & Lang, supra note 55.
166. Compare United Nations Framework Convention on Climate Change, supra note 27, 1771 U.N.T.S. at 169, with Adoption of the Paris Agreement, supra note 4, at 22.
167. BODANSKY, supra note 29, at 16; Taraska & Lang, supra note 55.
168. See Lewis, Jr., supra note 53.
California and Texas. Despite the potential to be one of the top three states leading the country in solar energy, Florida ranks just sixteenth in the nation when measured by solar production. For example, northern states such as New Jersey, Massachusetts, and New York are a few of the states that rank above Florida in terms of solar production. The explanation for Florida’s lackluster approach to solar energy is attributed to current Florida law that allows Florida’s Investor-Owned Utilities to have sole control over the distribution of electricity for more than a quarter of a century. Over the last two years, solar advocacy groups have drafted constitutional amendments for Florida citizens to vote on in the upcoming election season. If passed, the two amendments, (1) Limits or Prevents Barriers and (2) Solar Energy Choice, would have substantially different impacts not only on Florida’s solar energy policy, but on its ability to meet the emission goals under the Clean Power Plan and the Paris Agreement.

A. Solar Energy: Solar Panel Ownership Options

“The [United States] installed 1655 megawatts of solar [panels] in [the first quarter of] 2016 to reach 29.3 gigawatts of total installed capacity, enough to power 5.7 million American homes.” This rate of growth is not expected to slow anytime soon, as the solar industry is expected to have doubled in size at the end of 2016. As technology advances, the prices of solar panels continue to drop and have decreased by 70% since 2009. The rise of TPO finance models has helped lead the way for more homeowners to generate electricity through solar panels on their own property.

171. Dickinson, supra note 12.
172. Id.
174. See Dickinson, supra note 12.
175. See McDonnell, supra note 13; The Clean Power Plan: A Climate Game Changer, supra note 7.
177. Id.
179. See Sheridan, supra note 10; RYAN, supra note 10, at 11.
1.3 gigawatts of residential solar [energy] installed in 2014, 72[%]” of the solar panels installed were through TPO agreements.\textsuperscript{180}

A resident who wants to install solar panels through a TPO finance model has two options: (1) PPA or (2) solar leases.\textsuperscript{181} Under the PPA model, a contractor installs solar panels on a homeowner’s property at no upfront cost, and retains ownership of the solar panels.\textsuperscript{182} The solar panels offset the homeowner’s electric bill, and the solar contractor sells the power generated by the solar panels produced at a fixed rate, usually at a rate “lower than the local utility.”\textsuperscript{183} Additionally, a homeowner can sell any excess power to neighbors, tenants, or companies.\textsuperscript{184} Under the solar lease model, a homeowner will sign a contract with a solar panel contractor and pay for the solar panels over a period of time, rather than paying for the power the panels produce.\textsuperscript{185} However, a homeowner can end up paying the full price of the solar panels under a lease regardless if the system produces 100\% of expected electricity or a lesser amount.\textsuperscript{186} Many states have laws and regulations in place that restrict access to solar energy, with some states, including Florida, banning the PPA finance model entirely.\textsuperscript{187}

B. Florida Law and the Public Service Commission

Currently, Florida is one of seven states that ban TPO agreements entirely, with an additional twenty states that have unclear laws regarding TPOs, causing solar companies to keep their distance.\textsuperscript{188} In 1988, the Florida PSC considered a proposed project for which PW Ventures, Inc., would sell all of its electricity generated to Pratt and Whitney under a long-term contract.\textsuperscript{189} Prior to building the power plant, PW Ventures, Inc., sought a declaratory statement from the PSC “to ensure . . . it would not be subject to

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180. Ryan, supra note 10, at 11.  \\
182. See id.; McDonnell, supra note 13.  \\
183. Third-Party Solar Financing, supra note 181; see also McDonnell, supra note 13.  \\
184. Sheridan, supra note 10.  \\
185. Third-Party Solar Financing, supra note 181.  \\
187. See Ryan, supra note 10, at 11, 28–29.  \\
188. See id.  \\
189. Pentland, supra note 173.
\end{flushleft}
regulation as a public utility.” 190 The PSC determined that a person who sells electricity to another person is selling electricity to the public and is a public utility subject to regulation by the PSC. 191 As such, PW Ventures, Inc. was a public utility subject to regulation by the PSC. 192 In PW Ventures, Inc. v. Nichols, 193 the Supreme Court of Florida upheld the PSC’s determination and stated, “[t]he regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest.” 194 Unless there is a change in the statute, the ruling in PW Ventures, Inc. “appears to eliminate the possibility of using . . . [TPOs] in Florida” without regulation by the PSC as a public utility. 195 As a result, the ban of TPOs under Florida law “gives [Florida] utility companies a local monopoly on supplying power.” 196

In the past, granting monopoly electric utilities made sense. 197 The law in Florida “was written to give utilities a regional monopoly on power production, avoiding a tangle of power lines strung up by competing companies.” 198 Dirty power, produced away from populated areas, “was carried over a set of transmission lines to homes and businesses.” 199 However, the “rise of cheap, distributed solar power poses a disruptive . . . threat” to the business models of electric utilities. 200 According to Rolling Stone magazine: (1) “[w]hen homeowners install their own solar panels, . . . utilities build fewer power plants” and lose profit; (2) “[s]olar homes buy less electricity from the grid,” causing utilities to lose out on power sale profits; and (3) net-metering laws require utilities “to pay rooftop solar producers for the excess power they feed onto the grid.” 201 Essentially, “rooftop solar transforms a utility’s traditional consumers into business rivals.” 202

Currently, Florida allows the leasing of solar panels under its net metering rule, “as long as the lease is not based on the output [of electricity]
of the system, which would be a PPA.”203 In 2015, the Florida PSC further hampered the incentives for homeowners to switch to solar energy.204 The Florida PSC set the rate utilities purchase excess power generated from solar panels “at two to three cents per kilowatt hour,” among the lowest rates in the country.205 In other states, utilities are required to pay the same “rate at which they sell power, which in Florida is about [twelve] cents per kilowatt hour.”206 Moreover, since 2015, the PSC voted to cut Florida’s solar rebate program and “slash energy efficiency goals by 90[%].”207 Due to the barriers imposed by Florida law regarding the sale of electricity, amending the Florida Constitution is an avenue available to Floridians who wish to sell their own energy.208 This concept served as the driving force behind the proposed Limits or Prevents Barriers constitutional amendment, sponsored by Floridians for Solar Choice, and caused the utility industry to respond with its own amendment, Solar Energy Choice, sponsored by utility-backed Consumers for Smart Solar.209

C. Reading Between the Lines: Florida’s Proposed Solar Constitutional Amendments

In Florida, “[r]ooftop solar is limited to those who can afford the upfront expense,” resulting in fewer than 9000 Florida homes with solar panels.210 In an attempt to break Florida’s lock on electricity sales, the Southern Alliance for Clean Energy proposed a constitutional amendment, Limits or Prevents Barriers, that would essentially allow “consumers to install leased solar panels on their rooftops at no upfront expense.”211 In response, Florida’s utility-backed group, Consumers for Smart Solar, proposed its own amendment, Solar Energy Choice, which would allow the

204. See Barton, supra note 170.
205. See id.
206. Id.
207. Id.
208. See Pentland, supra note 173.
209. Dickinson, supra note 12; Pentland, supra note 173; see also Limits or Prevents Barriers to Local Solar Electricity Supply, ser. no. 14-02 (Dec. 23, 2014) (proposed FLA. CONST. art. X, § 29); Rights of Electricity Consumers Regarding Solar Energy Choice, ser. no. 15-17 (July 21, 2015) (proposed FLA. CONST. art. X, § 29).
211. Id.; see also Limits or Prevents Barriers to Local Solar Electricity Supply, supra note 209.
Florida PSC to retain its regulatory powers of solar energy.\textsuperscript{212} In order “[t]o get on [Florida’s] ballot as a proposed constitutional amendment, an initiative’s petition must have 683,149 verified voters’ signatures and the language [of the ballot] must be approved by the . . . Supreme Court of Florida]” as not misleading.\textsuperscript{213}

1. Limits or Prevents Barriers

The ballot language for the proposed constitutional amendment, Limits or Prevents Barriers,\textsuperscript{214} sponsored by Floridians for Solar Choice, was approved by the Supreme Court of Florida by a six-to-one majority.\textsuperscript{215} If passed, the amendment would add a new section 29 to article X of the Florida Constitution and appear as “Purchase and Sale of Local Small-Scale Solar Electricity.”\textsuperscript{216} The purpose of the amendment is “to encourage and promote local small-scale solar-generated electricity production and to enhance the availability of solar power to customers.”\textsuperscript{217} The amendment intends to accomplish this “by limiting and preventing regulatory and economic barriers that discourage the supply of electricity generated from solar energy sources to customers who consume the electricity at the same or a contiguous property as the site of the solar electricity production.”\textsuperscript{218} Specifically, these barriers are regulatory barriers such as: (1) “rate, service, and territory regulations imposed by” governments on those supplying solar energy and (2) a utility company’s ability to impose “special rates, fees, charges, tariffs, or terms and conditions of service [solely] on their customers” using third party solar.\textsuperscript{219}

\textsuperscript{212} Dickinson, supra note 12; Trabish, supra note 203; see also Rights of Electricity Consumers Regarding Solar Energy Choice, supra note 209.

\textsuperscript{213} In re Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d 235, 245 (Fla. 2015) (per curiam); Trabish, supra note 203.

\textsuperscript{214} Limits or Prevents Barriers to Local Solar Electricity Supply, supra note 209; see also In re Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d at 239–40.

\textsuperscript{215} In re Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d at 247; see also Limits or Prevents Barriers to Local Solar Electricity Supply, supra note 209.

\textsuperscript{216} Limits or Prevents Barriers to Local Solar Electricity Supply, supra note 209.

\textsuperscript{217} Id.

\textsuperscript{218} Id.

\textsuperscript{219} In re Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d at 240; see also Limits or Prevents Barriers to Local Solar Electricity Supply, supra note 209.
The proposed amendment “ensures that state and local governments retain their authority . . . to exercise their police powers for the protection of the health, safety, and welfare of the public.”\textsuperscript{220} Regulations at the local level, such as electrical standards and zoning standards, would require solar installers to meet the code as long as they are reasonable and do not make it “unreasonably . . . impossible to build renewables.”\textsuperscript{221} Essentially, this amendment would allow Floridians to have the option of entering into a PPA to buy power from a solar contractor.\textsuperscript{222} Under this amendment, Floridians can generate up to two megawatts of energy from their solar panels on their homes or businesses and sell that energy to their neighbors.\textsuperscript{223} However, the amendment failed to obtain the required amount of signatures by February 1, 2016.\textsuperscript{224} As such, the amendment was not on the 2016 ballot, but the sponsor of the ballot will attempt to get the amendment on Florida’s ballot in 2018.\textsuperscript{225}

2. Solar Energy Choice

The ballot language for the constitutional amendment, Solar Energy Choice, sponsored by Consumers for Smart Solar, was approved by the Supreme Court of Florida by a four-to-three majority.\textsuperscript{226} If passed, the amendment would add a new section 29 to article X of the Florida Constitution and appear as “Rights of Electricity Consumers Regarding Solar Energy Choice.”\textsuperscript{227} Subsection (a), Establishment of Constitutional Right, provides for “[e]lectricity consumers [to] have the right to own or lease solar equipment installed on their property to generate electricity for their own

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\textsuperscript{220.} Trabish, \textit{supra} note 203; Limits or Prevents Barriers to Local Solar Electricity Supply, \textit{supra} note 209.

\textsuperscript{221.} Trabish, \textit{supra} note 203; see also Limits or Prevents Barriers to Local Solar Electricity Supply, \textit{supra} note 209.

\textsuperscript{222.} McDonnell, \textit{supra} note 13; see also Limits or Prevents Barriers to Local Solar Electricity Supply, \textit{supra} note 209.


\textsuperscript{224.} Klas, \textit{supra} note 223; see also Dickinson, \textit{supra} note 12.

\textsuperscript{225.} Klas, \textit{supra} note 223; Dickinson, \textit{supra} note 12.


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use." Subsection (b), Retention of State and Local Governmental Abilities, provides that “[s]tate and local governments shall retain their abilities to protect consumer rights and” the general welfare of the public in order “to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do.”

When reviewing the language of a proposed constitutional amendment, the Supreme Court of Florida “applie[s] a deferential standard of review to the validity of a citizen initiative petition and [is] reluctant to interfere with ‘the right of . . . Florida’s citizens’ to formulate ‘their own organic law.’” As such, the Supreme Court of Florida “does ‘not consider or address the merits or wisdom of the proposed amendment’ and must ‘act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.’” In a narrow vote, the Supreme Court of Florida approved the ballot language as satisfying the legal requirements of the Florida Constitution.

In her dissent, Justice Pariente acknowledged the support of the amendment by Florida’s major investor-owned utility companies. Duke Energy Florida, Florida Power & Light Company, Gulf Power Company, and Tampa Electric Company opposed the Limits or Prevents Barriers amendment, admitting that it was the motivation behind their proposed ballot. Justice Pariente warned “pro-solar energy consumers [to] beware,” and stated the amendment is “[m]asquerading as a pro-solar . . . initiative,” when the amendment “actually seeks to constitutionalize the status quo.” Moreover, Justice Pariente found “[t]he ballot title . . . affirmatively misleading by its focus on Solar Energy Choice, when no real choice exists for those [in] favor [of] expansion of solar energy.” In Justice Pariente’s view:

231. Id.
232. Id. at 834.
233. Id. at 836 n.2 (Pariente, J., dissenting).
234. Id.
The ballot’s real purpose, Justice Pariente states, is “to place a critical restriction on” the rights of a consumer’s choice to use solar energy by “elevating state and local governments’ police powers to regulate solar energy to the constitutional level.” Moreover, Justice Pariente points out the lack of a definition for the term subsidize in the amendment, and reasons the omission was intentional as every other substantive term is defined. In Justice Pariente’s interpretation of the term subsidize, the term “suggests that consumers who use solar energy [unavoidably] impose a financial burden on non-solar consumers and” suggests that this undesirable consequence of owning or leasing “solar equipment must be remedied through [this] amendment.” “The impact is that the constitutional right that the amendment purportedly creates in the first section is seriously diminished in the second section,” which allows the government to retain its regulatory powers. In addition, knowing the Limits or Prevents Barriers amendment would not appear on the 2016 ballot, the proposed amendment was the only amendment concerning solar energy to make it onto the ballot, offering no real choice “other than to preserve the status quo.” Justice Pariente characterized the amendment as a “proverbial ‘wolf in sheep’s clothing,’” which “would have the practical effect of maintaining the status quo with the balance of power in the hands of the utility companies.” Had the amendment passed in the 2016 election, “the utilities [would] be entitled, under the constitution, to hit rooftop solar customers with high fees simply to maintain their connection to the grid.”

In January of 2016, Florida Power & Light “submitted a proposal to the PSC, seeking to hike its electric rates by nearly 24%” over the next three years and asking the commission to reward Florida Power & Light investors

237. Id. at 835 (citation omitted).
238. Id.
239. Id. at 836.
240. Id.
242. Id. at 836.
243. Id. at 835, 838.
244. Dickinson, supra note 12.
with a higher guaranteed rate of return.\textsuperscript{245} If the Florida PSC approves their proposal, Florida Power & Light customers should expect to “pay an extra [thirteen dollars] a month” on their electric bill.\textsuperscript{246}

IV. CONCLUSION

Fifty-five countries accounting for 55\% of greenhouse gas emissions must deposit their instruments of ratification before the Paris Agreement enters into force under the UNFCCC Treaty.\textsuperscript{247} In the United States, there is a difference of opinion as to whether the previously ratified UNFCCC Treaty can serve as an \textit{umbrella treaty} to implement the Paris Agreement or if the Paris Agreement is a new separate treaty requiring the Senate’s advice and consent before becoming United States law.\textsuperscript{248} Additionally, the Clean Power Plan is key to the United States’ ability to achieve its emission reduction goals under the Paris Agreement by reducing emissions 30\% by the year 2030.\textsuperscript{249} Should the Supreme Court of the United States uphold the Clean Power Plan as constitutional, the Plan will require states to move away from dirty power and move toward renewable energy sources.\textsuperscript{250} This will cause sunny states like Florida to move away from fossil fuels and tap into their solar power potential.\textsuperscript{251} Last December, “Congress . . . renew[ed] billions in federal support for solar power,” including “a tax credit that offsets up to 30[\%] of solar project costs.”\textsuperscript{252} The impact of this funding is projected to nearly double the nation’s output of solar energy over the next five years.\textsuperscript{253} Investments of this kind are expected to continue and increase the development of renewable energy sources like solar, which is projected to account for “28[\%] of [the United States’] power generation” under the Clean Power Plan.\textsuperscript{254}

Currently, “[m]ost of Florida’s electricity is generated from natural gas, 62[\%], and coal, 21[\%],” with “[a]nother 12[\%] . . . from nuclear [and]

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245. \textit{Id.}
246. \textit{Id.}
247. Adoption of the Paris Agreement, \textit{supra} note 4, at 32; \textit{Paris Agreement — Status of Ratification, supra} note 1.
248. U.S. CONST. art. II, \S 2, cl. 2; \textit{see also} Lewis Jr., \textit{supra} note 53; Taraska \& Lang, \textit{supra} note 55.
250. \textit{See} Cama, \textit{supra} note 143.
253. \textit{Id.}
254. \textit{Id.}
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2.2[%] . . . from solar.”255 Moreover, in 2015, the PSC voted to cut Florida’s solar rebate program and “slash energy efficiency goals by 90[%].”256 Additionally, “[r]esearch shows that Florida is spending 40[%] more on energy than the average American, and energy efficiency is the least expensive way for utilities to decrease bills for ratepayers.”257 The decision by the Florida PSC “comes as Florida is working on how to comply with the [emission goals under the] Clean Power Plan, [and] weaken[ed] efficiency goals for utilities eliminates one of . . . [the] building blocks in the [Clean Power] Plan.”258 According to the EPA, “increasing energy efficiency in Florida, along with improving power plant efficiency and adding more renewable energy [sources], the state could reduce its carbon intensity rate by 38[%] by 2030.”259

Although it is no secret that Florida utility companies are active in the shaping of Florida’s energy policy, some suggest the recent decisions by the Florida PSC to slash incentives for solar consumers were the result of a conflict of interest stemming from campaign donations by Florida utility companies to state officials who appoint the members of Florida’s PSC.260 Although Florida is third in solar potential, if the Solar Energy Choice amendment had passed, Florida’s PSC and utilities would have been entitled to control access to solar energy, and would likely continue to suppress solar energy in Florida.261 As a result, this would prevent Florida from complying with the emission goals under the Clean Power Plan and Paris Agreement.262

However, if the Limits or Prevents Barriers amendment appears on the 2018 ballot and successfully passes, TPO finance models such as PPAs will be legal in Florida.263 Just as PPAs have expanded solar energy production in other states, the same effect is likely to follow in Florida.264 The Limits or Prevents Barriers amendment will bring solar panel

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255. Sheridan, supra note 10.
256. Barton, supra note 170.
258. Id.
259. Id.
260. Dickinson, supra note 12; see also Barton, supra note 170; Kasper, supra note 257.
261. See Barton, supra note 170; Dickinson, supra note 12; Kasper, supra note 257.
262. See Barton, supra note 170; Green Climate Fund and the Paris Agreement, supra note 104, at 1; Kasper, supra note 257.
263. See In re Advisory Op. to the Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply, 177 So. 3d 235, 240 (Fla. 2015) (per curiam); Sheridan, supra note 10.
contractors to Florida, and encourage something Florida utility companies have not had to frequently experience—market competition.\textsuperscript{265} The Limits or Prevents Barriers amendment offers Florida the opportunity to live up to its \textit{Sunshine State} nickname by helping Florida lead the country in solar power generation, and propelling the country toward complying with the emission goals under the Clean Power Plan and Paris Agreement.\textsuperscript{266}

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\item[265.] \textit{See} McDonnell, \textit{supra} note 13.
\item[266.] \textit{See} Dickinson, \textit{supra} note 12; McDonnell, \textit{supra} note 13; Trabish, \textit{supra} note 203. On November 8, 2016, the people of Florida rejected the utility-backed solar amendment, despite Florida utility companies spending more than $20 million to support it. Mary Ellen Klas, \textit{As Rooftop Solar Costs Drop, Utility Attempts to Raise Barriers May Not Work}, \textsc{Miami Herald} (Nov. 12, 2016, 12:00 PM), http://www.miamiherald.com/news/politics-government/election/article114377458.html. Many expect Presidential-elect Trump to repeal the regulations under the EPA’s Clean Power Plan as soon as he takes office. Tim Devaney et al., \textit{14 Obama Regs Trump Could Undo}, \textsc{Hill} (Nov. 12, 2016, 12:04 PM), http://www.thehill.com/regulation/305673-14-obama-regts-trump-could-undo. Although United States’ involvement in the Paris Agreement and future of the Clean Power Plan are—at the moment—uncertain, the cost of installing solar panels continues to drop. Klas, \textit{supra}. As a result, over the next five years, Florida is projected to install and generate nearly nineteen times more solar energy than generated in the previous five years. \textit{Id.} The Florida Public Service Commission and Florida utility companies will eventually have to decide how to proceed with solar energy in Florida. \textit{Id.} The citizens of Florida have made it clear they will not be deceived into throwing shade on their own state, and may pull the palm fronds down from the tree completely by voting on and passing the pro-solar amendment in future elections that they were not afforded the opportunity to vote on in 2016. \textit{See id.}
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