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Complexity And Contradiction In Florida Constitutional Law

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Complexity and Contradiction in Florida Constitutional Law

PATRICK O. GUDRIDGE*

I. THE ENIGMA OF <i>GRAY v. BRYANT</i>	881
II. <i>ARMSTRONG'S UNCERTAIN DOMAIN</i>	885
A. <i>After Armstrong</i>	887
B. <i>Before Armstrong</i>	889
III. "BRASS, IRON, AND CLAY"—AMENDMENTS AND CONSTITUTIONAL FORM	894
A. <i>Straightforward Organization</i>	897
B. <i>Fear of Chaotic Organization</i>	900
C. <i>Complex Organization</i>	907
IV. CONTRA BABEL	910
A. <i>Self-Executing Terms and Constitutional Complexity</i>	912
1. INTELLECTUAL ORIGINS OF "SUFFICIENT RULE"	912
2. "SUFFICIENT RULE" GIVEN COMPLEXITY	914
a. Access to courts	915
b. Florida due process of law	916
c. The interpretive expectation	919
d. Some examples	920
B. <i>Canonical Indexes and Ballot Summary Accuracy</i>	924
1. THE LEGISLATIVE SINGLE SUBJECT ANALOGY	924
2. BALLOT SUMMARY ACCURACY	928
a. As applied	929
b. <i>Buster</i> revisited	931
3. OVERLAPS	934
V. PREMISES	938
A. <i>Associating Voters, Judges, Administrators, and Legislators</i>	939
B. <i>Institutional or Formal Complexity</i>	941
APPENDIX	944

The Florida Constitution of 1968 treats constitutional amendment as a likely regular happening and as a power of government properly widely distributed. Amendment opportunities, however difficult to pursue, are made available to the Florida Legislature and to constitutional conventions, to the public at large through the initiative process, and (at designated intervals) to two sorts of commissions to be assembled in more or less nonpartisan ways charged with addressing either fiscal matters or all other aspects of the constitutional scheme.¹ Sometimes drawing on particular constitutional terms and sometimes not, the Florida Supreme Court has propounded three lines of thought further organizing the Constitution's amendment processes. I have discussed elsewhere, at much length, one of these efforts—the remarkable single subject

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1. FLA. CONST. art. XI, §§ 1 (legislative proposal), 4 (constitutional convention), 3 (initiative), 6 (taxation and budget reform commission), 2 (revision commission).

sequence monitoring the content of initiative-proposed amendments.² In this article I consider the other two judicial elaborations—distinguishing between self-executing and not self-executing constitutional provisions, and requiring that ballot summaries of proposed amendments pass substantial accuracy tests.

Critics sometimes disparage these bodies of (mostly) judge-made law.³ I argue, in contrast, that the three lines of thought fit well together. Their substance and purpose is well-explained not as an effort to address vagaries of legislative and electoral decision-making, but as instead responding to the underlying complexities of constitutional organization confronting all interpreters.⁴ In this regard, I develop a line of thinking that diverges considerably from much writing concerned with problems posed by initiatives and other forms of direct democracy. Many commentators analyze constitutional amendment processes originating in initiative petitions by making a comparison with legislative processes. Robert Williams states succinctly the conclusion that usually follows: “[T]he initiative lacks the possibility of *deliberation*.”⁵ Judicial intervention or other forms of regulation or reform are depicted and assessed as possible ways of bringing more of the virtues of representative democracy into the mechanics of direct democracy. But there is an immediate difficulty. Legislatures and the election regimes that select representatives suffer from their own disorders, we all know, and are themselves subject to familiar and persuasive critiques. The comparison—if set up as between flawed initiative processes and flawed legislative processes—not surprisingly loses much of its grip. For this reason, in this article I generally sidestep the “deliberative democracy” difficulty. I

2. Patrick O. Gudridge, *Florida Constitutional Theory (For Clifford Alloway)*, 48 U. MIAMI L. REV. 809 (1994).

3. See, e.g., Eric S. Matthew, *A New Prescription: How a Thorough Diagnosis of the “Medical Malpractice” Amendments Reveals Potential Cures for Florida’s Ailing Citizen Initiative Process*, 14 U. MIAMI BUS. L. REV. 331, 342–46 (2006); Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS L. REV. 61 (2002); Thomas C. Marks, Jr., *Constitutional Change Initiated by the People: One State’s Unhappy Experience*, 68 TEMP. L. REV. 1241 (1995). The overall constitutional structure itself is also criticized. In this regard, Professor Little’s explorations are particularly pointed and challenging. See, e.g., Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA L. REV. 475, 475–81 (2000) [hereinafter cited as Little, *Need to Revise*]; Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393, 398–405 (1995) [hereinafter cited as Little, *Direct Democracy*].

4. I do not discuss initiative single subject law at any length. But I do summarize my approach to the topic in the appendix to this article. See *infra* Appendix.

5. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 389 (2009). For an excellent recent articulation and application of the idea of deliberation in the direct democracy setting, see Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959 (2010).

focus on the results of initiatives—constitutional provisions—and take up the problems posed by these provisions as constitutional law, as problems of installation and interpretation within the larger body of constitutional provisions and understandings. This change in perspective is in one sense radical. I need to proceed on the assumption that we can equate (in some useful way) all readers of constitutional provisions—voters, judges, legislators, etc. I wager, however, that this equation opens up analysis to resources not so readily available within the usual perspective.

In the first two parts of this article, I summarize the efforts of Florida judges to identify self-executing constitutional provisions, and to ascertain the accuracy of ballot summaries. I work mostly with formulations that the opinions themselves use—considered as useful explanations, these efforts call attention to difficulties as much or more as they persuade. The third part of the article sketches beginnings of an alternate approach. I outline three states of constitutional organization—straightforward, chaotic, and complex. In the fourth part of the article, I put to work the idea of complex constitutional organization as a point of departure for reconsidering the “self-executing” inquiry and the misleading language problem. Finally, in part five I discuss two important premises underlying the preceding analysis.

This is not a short article. Florida constitutional law, across its long duration, is quite thick, a rich, agglomerative medium manifestly inviting intense investigations of alternative approaches. I try to take advantage of some of this available wealth in the course of the discussions here.

I. THE ENIGMA OF *GRAY V. BRYANT*

Amendments, some worry, are constitutional equivalents of graffiti. They are mostly the work of legislators or initiative-sponsoring volunteers from the public at large,⁶ both groups that may too often resemble too closely randomly selected exponents of points of view changing from amendment to amendment. Sometimes quixotic, overly simple, or conspicuously special interest-motivated constitutional changes result—or so the worry runs.⁷ Constitutional amendments, in any event, risk creating conflicts with provisions already part of the constitution that

6. The revision and the taxation and budget commissions are ad hoc in the sense that commissioners are appointed and meet only for the purpose of proposing amendments at a particular point in time, but the appointment procedures are constitutionally structured and the commissions are required to follow procedures constitutionally outlined. *See* FLA. CONST. art. XI, §§ 2, 6.

7. Criticisms like these are not specific to Florida constitutional revision procedures. *See, e.g.,* DENNIS F. THOMPSON, *JUST ELECTIONS* 138–39 (2002); Glen Staszewski, *The Bait-and-*

were not directly enough removed by amendment terms.⁸ It is not only the Florida constitution that proposed amendments might alter or otherwise complicate. If they are understood to be self-executing, and thus directly revise public or private rights and duties, constitutional amendments may substantially change statutory or common law liability rules or property regimes.

Amendments that are not self-executing are obviously safer. Constitutional changes that do not take effect until after legislative enactment of implementing measures offer a chance for any necessary clean-up work or other adjustments, or (what might sometimes seem to be best) benign neglect.⁹ But the need for legislative enactment may also stall worthwhile constitutional reforms if legislators are recalcitrant.¹⁰ Whether or not amendments are self-executing is thus a question of real moment.¹¹ Some constitutional provisions—whether original or additions—are plainly written in terms that suppose that constitutional terms are directly applicable. They can be taken into account immediately by legislators, judges, and administrators without need for any intervening explanatory gloss. The constitutional homestead exemption protecting debtors and the constitutionally imposed obligation of government officials to make public most government meetings and records are important examples.¹² But there are also hard cases. Unfortunately, the Florida Supreme Court's long-time test for identifying self-executing constitutional language, declared in *Gray v. Bryant*,¹³ is notably enigmatic (or so it seems)—“whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.”¹⁴ What makes a rule “sufficient?” The Supreme

Switch in Direct Democracy, 2006 WIS. L. REV. 17, 32–39; Sherman J. Clark, Commentary, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 448–50 (1998).

8. See Gudridge, *supra* note 2, at 818–29, 899–901.

9. Concerning legislative “second looks,” see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

10. See *Dade County Classroom Teachers Ass’n v. Legislature*, 269 So. 2d 684, 688 (Fla. 1972) (legislative failure to implement article I, § 6 (right of public employees to bargain collectively)).

11. Of course, if drafters of constitutional amendments can resolve the question of self-execution simply by labeling amendments, the significance of the question would diminish. The Florida Supreme Court, it appears, does not treat declarations of direct effect as definitive—rather, as one element in an independent judicial analysis, as confirming rather than decisive. See *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 485–86 (Fla. 2008).

12. See FLA. CONST. art. X, § 4 (homestead); *id.* at art. I, § 24 (public access). The public access provision declares itself to be self-executing, but also authorizes legislative exceptions and administrative measures. See *id.*

13. 125 So. 2d 846 (Fla. 1960) (per curiam).

14. *Id.* at 851.

Court has appeared not to want—at least in so many words—to answer this question.

The Court's analysis of the 1996 "polluter pays" amendment—an initiative effort—is illustrative.¹⁵ The amendment declared that individuals or entities that "cause water pollution" within the Everglades area "shall be primarily responsible for paying the costs of the abatement of that pollution."¹⁶ A Supreme Court advisory opinion, requested by Governor Chiles, concluded that the amendment was not self-executing.¹⁷ It "raises a number of questions," too many to be understood as stating "a sufficient rule for accomplishing its purpose."¹⁸ This was not to say, the Court also observed, that the amendment was entirely judicially incomprehensible. It could not be read as effectuated in advance, as it were, by the already-in-place Everglades Forever Act.¹⁹ Future implementing legislation would have to respect the amendment's assignment of primary responsibility. Governor Chiles appears to have thought that the definition of "primary responsibility" was one of the amendment's great open questions.²⁰ But the Supreme Court saw no special difficulty in defining this seemingly question-begging phrase. After a quick march through the dictionaries,²¹ the Court concluded that "individual polluters, while not bearing the total burden, would bear their share of the costs of abating the pollution found to be attributable to them."²²

15. *In re* 1996 Amendment 5 (Everglades), 706 So. 2d 278, 280–82 (Fla. 1997).

16. The amendment added part (b) to article II, section 7, of the Florida Constitution:

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise

(b) Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution. For purposes of this subsection, the terms "Everglades Protection Area" and "Everglades Agricultural Area" shall have the meanings as defined in statutes in effect on January 1, 1996.

FLA. CONST. art. II, §7.

17. *Amendment 5 (Everglades)*, 706 So. 2d at 283.

18. *Id.* at 281.

19. *See id.* at 281–82.

20. *See id.* at 279–80.

21. *See id.* at 282–83. The court found content for "primarily responsible" in ordinary dictionary definitions of the words "responsible" and "primarily." *See id.* Dictionary definitions are relevant, it was said, because initiative terms are to be read from the perspective of the voters, and therefore in light of "the natural and popular meaning in which the words are usually understood by the people who have adopted them." *Id.* at 282 (quoting *City of Jacksonville v. Cont'l Can Co.*, 151 So. 488, 489–90 (Fla. 1933)).

22. *Id.* at 283. This definition was not, in fact, the only possible reading of the constitutional language. The word "primarily" was made out to mean, given the dictionary study, that individual polluters "bear their share" but not "the total burden." *Id.* Legally familiar uses of the term might suggest that polluters are responsible "first," up to the limits of their assets, or "more than half," again insofar as their assets allow. *Id.* at 282. These latter readings would have treated the

Why couldn't the Justices also assign meanings to other amendment terms?²³ This question seems to call for some effort to elaborate the *Bryant* notion of "sufficient rule." But the *Everglades* court took a different tack. The Justices called attention to the placement of the amendment within the Florida Constitution. It is subsection (b) of section 7 of article II. Subsection (a) of this section states: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."²⁴ The court, plausibly enough, concluded that the new amendment should be read in *pari materia* with subsection (a), but also asserted that subsection (a) "directs the legislature to provide by statute for the 'abatement of air and water pollution.'"²⁵ It therefore made sense textually—supposedly—to read the new amendment as not self-executing. This argument, however, plainly doesn't work. The literal wording of subsection (a) is "provision shall be made by law."²⁶ "Law" in principle might be either legislative or judicial in origin—common law, in this instance "constitutional common law."²⁷ Section 7 is part of article II, the constitution's general provisions, and not article III, specifically discussing the Florida Legislature. The constitutional context thus does not demand an equation of "law" and "legislation." The amendment might, as a matter of textual mechanics, be properly treated as addressing judi-

amendment itself as having resolved the question of responsibility in both the senses of liability and remedy and to have therefore put polluters at immediate risk. The Florida Supreme Court's gloss, however, presented the questions of responsibility and "share" as functions of causation and therefore as factual questions somehow still to be resolved. Perhaps especially because the court also holds that this resolution first supposes legislative action, the legal risk for polluters occasioned by the amendment is put (far) off.

23. If dictionary definitions can do so much substantive work, why not use this same resource to resolve the amendment's other questions? The advisory opinion notes that the open issues include "what constitutes 'water pollution'; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted." *Id.* at 281. These questions do not seem to be obviously different in kind from the question the court answers. The third item in the list, we might think, was indeed already resolved by the court's own construction of "primarily responsible." The most important word in the list is almost surely "adjudged." A self-executing amendment is evidently one ready-made for judicial use. Dictionary definitions presumably do not meet courtroom needs—do not supply intermediate premises with which judges might fashion rules about elements of complaints and answers, and, therefore, rules of standing and burdens of proof. But judges, we all know, have access to common law norms, which do provide raw materials for gap-filling. Especially given the particular content the Supreme Court attributed to "primarily responsible," obviously evocative of familiar presuppositions of corrective justice, we might think that the *Everglades* amendment would not require unusual efforts on the part of enforcing judges.

24. FLA. CONST. art. II, § 7.

25. *Amendment 5 (Everglades)*, 706 So. 2d at 281.

26. FLA. CONST. art. II, § 7.

27. See generally Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (concept within federal constitutional law).

cial enforcers—as therefore self-executing. The Court’s analysis begs the question.

The recent Florida Supreme Court decision in *Florida Hospital Waterman, Inc. v. Buster*²⁸ treated self-execution as a straightforward matter. 2004 Amendment 7, codified as article X, section 25 of the Florida Constitution, granted medical patients “a right to have access to any records made or received . . . by a health care facility . . . relating to any adverse medical incident.”²⁹ The constitutional amendment stated a “sufficient rule” and thus met the *Bryant* test: “[A]ll key terms are defined within the amendment,” and “the amendment expressly declare[d] that it is to be effective on passage, indicating that its effectiveness in overriding prior statutory law was not to be dependent upon the enactment of implementing legislation.”³⁰ Amendment 7, as the Court understood it, was tantamount to a statutory repeal—removing legislatively-created barriers blocking individuals seeking access to records created for purposes of hospital peer review and staffing decisions.³¹ But the Court was notably not interested in characterizing the state of the law as it would stand after the constitutional repeal of peer review shields.³² In *Buster*, as in the *Everglades* opinion, the Florida Supreme Court opted for quick work rather than extended analyses. We learn little about the underpinnings of the “self execution” idea.

II. ARMSTRONG’S UNCERTAIN DOMAIN

It should be easy, we might think, to defend the proposition that ballot summaries misleadingly describing proposed constitutional amendments are no good and cast a cloud over voter choices made while working with ballots incorporating the false summaries. There is nothing

28. 984 So. 2d 478 (Fla. 2008).

29. FLA. CONST. art. X, § 25.

30. *Fla. Hosp. Waterman, Inc.*, 984 So. 2d. at 486.

31. Passages in the Supreme Court’s discussion of the application of amendment 7 to pre-existing records are especially clear in this regard—for example: “The summary indicates that, with the passage of the amendment, there would no longer be any legal barrier to obtaining this information Because the statutory restrictions constituted the only barrier to production . . . doing away with the restrictions by constitutional amendment effectively removed the lone obstacle to access.” *Id.* at 489; *see also id.* at 488 (several similar statements).

32. The opinion spends much more time addressing the question of whether the amendment applies to records created prior to the amendment’s passage. The court rules in favor of applicability, but only after a complicated and not entirely persuasive effort to show that the statutory confidentiality rules were not in some sense vested—provided no basis for reliance, etc. Why did the court have to do this? Why not rule that the previous regime mattered but the amendment replaced it? Due process? But why not read the amendment as implicitly altering ordinary due process understandings? Or rather, if the amendment’s consequences were acknowledged as difficult—real losses as well as gains—wouldn’t that have served as an argument for leaving the legislature room to manage the impact—at least with regard to already-created records?

so esoteric here as the notions of “self-executing provisions” and “sufficient rule.” But that’s not in fact the case. The Florida Supreme Court’s efforts to work out the implications of problematic amendment ballot summaries, across a long line of decisions, are—in the aggregate, anyway—notably unresolved.³³

The leading case at present is *Armstrong v. Harris*.³⁴ There, the Florida Supreme Court held that the ballot title and summary of a legislatively proposed constitutional amendment were inaccurate, accordingly inconsistent with constitutional and statutory requirements, thus marking the proposed amendment as wrongly presented to general election voters—even though the election had already been held and the voters had approved the amendment. The proposal addressed article I, section 17, of the Florida Constitution, changed (inter alia) the phrase “cruel or unusual punishment” to “cruel and unusual punishment,” and also obligated Florida courts to construe the revised formula “in conformity with decisions of the United States Supreme Court” interpreting “cruel and unusual punishment” for purposes of the Eighth Amendment.³⁵ The ballot summary and title, *Armstrong* decreed, gave “no hint of the radical change in state constitutional law that the text actually foments.”³⁶ Changing “or” to “and” and, more importantly, adopting federal constitutional understandings as decisive not only removed an independent Florida constitutional protection over and above the federal Eighth Amendment, but likely weakened punishment restraints hitherto enforced. “When Florida citizens are being called upon to nullify an original act of the Founding Fathers, each citizen is entitled—indeed, each is duty-bound—to cast a ballot with eyes wide open.”³⁷

The Florida Legislature, after amending statutory language to take ballot summaries describing legislatively-proposed amendments outside the reach of word limits regulating initiative or commission proposed amendments, reenacted the amendment proposal, substituting a new ballot summary that reproduced the language of the proposed amendment in its entirety, prefaced by a careful summary calling attention to the implications of the proposal that *Armstrong* had noted as missing or misrepresented. Notwithstanding election supervisors, who thought that the summary was “too long,” the First District Court of Appeal upheld the new ballot language, concluding that it indeed “accurately describes the

33. For a useful introduction to the (sometimes complicated) procedural aspects of ballot summary litigation, see Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 FLA. COASTAL L. REV. 15, 21–27 (2004).

34. 773 So. 2d 7 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001).

35. *See id.* at 16 n.25.

36. *Id.* at 21.

37. *Id.* at 22.

amendment.”³⁸ Florida voters again approved the amendment, now (as a result) part of the Florida Constitution.³⁹

A tempest in a teapot? One of “the boldest ventures in judicial activism” in recent years?⁴⁰ Neither, maybe: *Armstrong* is, in fact, one in a sequence of Florida court decisions addressing ballot language accuracy and related problems. This long line of cases is—we shall see—not straightforward. The most recent opinions, speedily accumulating since *Armstrong*, underscore complexity seemingly despite themselves.

A. After *Armstrong*

Subsequent Florida court decisions take *Armstrong* as a point of departure.⁴¹ Opinions testing the accuracy of ballot titles and summaries pretty much rely on a common collection of formulas for purposes of characterizing their inquiries. “A ballot title and summary cannot either ‘fly under false colors’ or ‘hide the ball’ as to the amendment’s true effect.”⁴² “[T]he wording of the title and summary” must be “sufficient to communicate the chief purpose of the measure”—need not “explain every detail or ramification,” but rather “accurately describe the scope of the text of the amendment,” so as to afford “fair notice of the content”

38. *Sancho v. Smith*, 830 So. 2d 856, 859–60, 863, 861 (Fla. 1st Dist. Ct. App. 2002).

39. See FLA. CONST. art. I, § 17.

40. Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 Miss. C. L. REV. 253, 253 (2002).

41. For decisions concerning legislatively proposed amendments, see, e.g., *Kainen v. Harris*, 769 So. 2d 1029, 1031–32, 1035 (Fla. 2000) (Anstead & Pariente, JJ., concurring); *Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 671 (Fla. 1st Dist. Ct. App. 2007); *Sancho*, 830 So. 2d at 861; *Fla. Ass’n of Realtors v. Smith*, 825 So. 2d 532, 536 (Fla. 1st Dist. Ct. App. 2002). See also *City of Miami v. Staats*, 919 So. 2d 485, 486 (Fla. 3d Dist. Ct. App. 2005) (municipal straw ballot resolution). *Armstrong* figures hardly at all in some rulings in which initiative-proposed amendments are at issue, even though the Supreme Court treats accurate ballot titles and summaries as obligatory in this context also. See, e.g., *In re Med. Liab. Claimant’s Comp. Amendment*, 880 So. 2d 675 (Fla. 2004); *In re Pub. Prot. from Repeated Med. Malpractice*, 880 So. 2d 667, 671–73 (Fla. 2004); *In re Same Fee for Same Health Care Serv.*, 880 So. 2d 659, 665 (Fla. 2004). But see *Repeated Med. Malpractice*, 880 So. 2d at 674 (Pariente, C.J., concurring); *Med. Liab. Claimant’s Comp. Amendment*, 880 So. 2d at 681 (Lewis, J., dissenting). In these cases, notably, the Court relies on the same statute invoked in *Armstrong* but pretty much ignores *Armstrong*’s parallel constitutional norm. Constitutionally, it seems, initiative-proposed amendments and legislatively proposed amendments are different. Or maybe not: In both lines of cases, proposed amendments are sometimes struck down. See, e.g., *In re Referenda for Local Land Use Plans*, 902 So. 2d 763 (Fla. 2005); *Fla. Ass’n of Realtors*, 825 So. 2d at 533. And references to *Armstrong* have begun to appear more often in the most recent initiative cases, see, e.g., *In re 1.35% Property Tax Cap*, 2 So. 3d 968, 974 (Fla. 2009); *In re Nonpartisan Comm’n to Apportion Legislative Dists*, 926 So. 2d 1218, 1227 (Fla. 2006); *Floridians Against Expanded Gambling v. Floridians for Level Playing Field*, 945 So. 2d 553, 559 (Fla. 1st Dist. Ct. App. 2006).

42. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000), cert. denied, 532 U.S. 958 (2001); see *Med. Liab. Claimant’s Comp.*, 880 So. 2d at 681 (Lewis, J., dissenting); *Floridians Against Expanded Gambling*, 945 So. 2d at 559.

enabling the voter to “cast an intelligent and informed ballot.”⁴³ Summary language cannot substitute “editorial comment” for “accurate summary.”⁴⁴ A ballot title and summary cannot “make false promises of benefits when they really take away and restrict existing rights.”⁴⁵ Nor can “they suggest[] that the proposed amendments would result in new limitations or impose stricter limitations with regard to certain activities than had prior law, when in fact, the chief purposes of the proposed amendments were to create exceptions to preexisting limitations on those activities.”⁴⁶ A ballot title and summary cannot “conceal[] what appears to be the most significant component of the proposed amendment.”⁴⁷ An “exhaustive explanation” is not necessary, but there must be “no hidden meanings or deceptive phrases.”⁴⁸ “Perfection is not required, and common sense suggests that no matter how the ballot language is worded there will always be those who fear the wording itself favors passage or defeat.”⁴⁹ But “no voter” should “be confused about what is at stake.”⁵⁰

This common approach is especially notable given the manifest weakness of the foundations that constitutional and statutory language offer. Article XI, section 5(a), of the Florida Constitution provides:

A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of revision commission, constitutional convention or taxation and budget reform commission 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 single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

There is no discussion whatsoever of ballot summaries in this constitutional text. In *Armstrong*, Justice Shaw insisted that “the requirement that the proposed amendment be accurately represented on the ballot” is nonetheless “[i]mplicit in this provision.”⁵¹ “[O]therwise, voter

43. *Med. Liab. Claimant's Comp.*, 880 So. 2d at 679 (interior quotation marks and citations omitted); see, e.g., *In re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195, 201 (Fla. 2007); *Nonpartisan Comm'n to Apportion Legislative Distrs*, 926 So. 2d at 1228; *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986).

44. *Local Land Use Plans*, 902 So. 2d at 771–72; see *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984).

45. *Med. Liab. Claimant's Comp.*, 880 So. 2d at 682 (Lewis, J., dissenting).

46. *Repeated Med. Malpractice*, 880 So. 2d at 673.

47. *Fla. Ass'n of Realtors v. Smith*, 825 So. 2d 532, 538 (Fla. 1st Dist. Ct. App. 2002).

48. *In re Same Fee for Same Health Care Serv.*, 880 So. 2d 659, 666 (Fla. 2004).

49. *Kainen v. Harris*, 769 So. 2d 1029, 1033 (Fla. 2000) (Anstead, J., concurring).

50. *Sancho v. Smith*, 830 So. 2d 856, 862 (Fla. 1st Dist. Ct. App. 2002).

51. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000), cert. denied, 532 U.S. 958 (2001).

approval would be a nullity.”⁵² This conclusion is in a sense obvious: It is the “proposed amendment” that must be “submitted,” and if a ballot summary diverges enough from the text of the proposed amendment it could fairly be said that the proposal was not actually “submitted.”⁵³ But this chain of reasoning (even if it captures Shaw’s underlying thought process) does not appear to point towards the elaborate gloss that Florida courts have given the accuracy requirement—or indeed any other particular reading.

Shaw also characterized Florida Statutes section 101.161(1) as having “codified . . . [t]his accuracy requirement.”⁵⁴ The statute declares:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word “yes” and also by the word “no,” and shall be styled in such a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal or enabling resolution or ordinance [T]he substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.⁵⁵

“[C]lear and unambiguous language” seems to be—within the sentence in which it appears—a reference to typeface or other printing concerns and not a requirement of substantive accuracy. If so, it is not easy to see why “chief purpose of the measure” is necessarily a strongly regulatory phrase rather than a loose definition of “explanatory statement” instructing but otherwise not limiting drafters.

Pretty plainly, Florida judging drives the development of the ballot summary accuracy requirement.

B. *Before Armstrong*

Armstrong and the other recent decisions are not innovative. Justice

52. *Id.*

53. *Id.*

54. *Id.*

55. FLA. STAT. § 101.161(a) (2007). During the course of the *Armstrong* litigation, the Florida Legislature acted to exempt legislature-proposed amendments from the summary word limit. *See Sancho*, 830 So. 2d at 859.

Shaw noted a sequence of Florida Supreme Court decisions ranging across the twentieth century enforcing accuracy requirements or cognate restraints.⁵⁶ This is, we are led to see, long-time judicial work. The older cases, though, complicate matters—unsettle rather than reassure.

*Askew v. Firestone*⁵⁷—the opinion first cited in the *Armstrong* footnote and put to use repeatedly throughout Justice Shaw's opinion—was not only the source of the "false colors" phrase,⁵⁸ but also supplied *Armstrong* with the canonical formulation of the fair notice explanation of the accuracy requirement. The language that Justice Shaw quotes in *Armstrong* appears in the *Askew* opinion as itself a quotation (Shaw makes this clear in *Armstrong*⁵⁹) of a passage from the Supreme Court's much earlier decision in *Hill v. Milander*: "All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot."⁶⁰ Justice McDonald, in quoting from the *Hill* opinion in *Askew*, omitted (marked with ellipses) what were—in 1954—arguably the most important sentences. Justice Drew's original opinion in *Hill* read as follows:

All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and the many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. It is a matter of common knowledge that one does not wait until he enters the election booth to decide how he is going to cast his ballot. What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.⁶¹

Hill was a very different case, on its facts, from *Armstrong* and *Askew*. Both of the latter decisions addressed disputes focused on the accuracy of ballot summaries of constitutional amendments. *Hill* dealt

56. See *Armstrong*, 773 So. 2d at 12 n.15.

57. 421 So. 2d 151 (Fla. 1982).

58. *Id.* at 156; see *Armstrong*, 773 So. 2d at 16.

59. See *Armstrong*, 773 So. 2d at 12 n.15.

60. *Askew*, 421 So. 2d at 155 (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)) (emphasis omitted); see *Armstrong*, 773 So. 2d at 12. At another point in the opinion, *Armstrong* straightforwardly condenses *Askew*'s quotation: "[T]he Constitution requires . . . that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Id.* at 12 n.15.

61. *Hill*, 72 So. 2d at 798.

with an argument that, as a matter of statutory construction, a special law conditioned on a referendum required that the entirety of the bill to be presented to the voters be printed on the ballot. As Drew noted, this reading created a practical problem. “In the first place, we take judicial knowledge of the limitations inherent in the use of voting machines so far as the amount of printed material thereon is concerned.”⁶² Fair notice was therefore the relevant concern. “In numerous instances we have held that the only requirements in an election of this kind are that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.”⁶³ *Hill* starts, it appears, from an assumption that is distinctly subversive for present purposes: ballot language implicates fair notice concerns, but fair notice does not entail voter education in the voting booth as such; education occurs earlier and outside the voting process per se. If Justice Drew writes persuasively in *Hill* (he certainly writes forcefully), the relatively rigorous accuracy requirement of *Askew* and *Armstrong*—regardless of whether it is statutory or constitutional in origin—is superfluous, simply unnecessary given what we know as “a matter of common knowledge.”⁶⁴

62. *Id.*

63. *Id.*

64. *Hill v. Milander* does not stand alone. Drew invoked the decade-earlier decision in *Sylvester v. Tindall*, 18 So. 2d 892 (Fla. 1944); see *Hill*, 72 So. 2d at 798. *Sylvester* addressed a very short summary of a complex legislatively proposed constitutional amendment establishing a Game and Fresh Water Fish Commission. See *Sylvester*, 18 So. 2d at 894–95, 896. It included language of a piece with *Hill*'s view that voter education occurs in advance of election day.

We are inclined to the opinion that the form of the ballot pertaining to this particular amendment was sufficient to put the electorate on notice as to the amendment they were voting upon, especially in view of the three months publication of the amendment and the posting of a complete copy of it in each voting place.

Id. at 895. But this was advertised as dictum. The court instead relied on an ostensibly different conclusion:

[O]nce an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission.

Id. This “almost universal rule,” was applicable in the case at hand since “any irregularity in the form of the ballot . . . was not a serious one” *Id.* at 895–96. (Perhaps the fair notice discussion was not dictum after all.)

Sylvester itself echoed earlier opinions. In *Collier v. Gray* in 1934 Justice Ellis had already stated at some length a similar set of propositions:

Constitutional provisions derive their force not from the Legislature but from the people in whom, under our theory of government, the power is inherent Even in case some required form of procedure has been omitted by the Legislature in submitting a proposal to amend the Constitution but the same has been advertised or the notices published and the people have approved it at an election, the amendment becomes a valid part of the Constitution. . . .

An approach not at all like *Hill's*, however, governed in 1912 in *Crawford v. Gilchrist*, which, along with *Askew*, was also prominently quoted in *Armstrong*.⁶⁵ *Crawford* arose because the Florida Senate, having approved a proposed amendment by the required three-fifths vote, agreed to a motion to reconsider, but thereafter failed to address the question of the amendment again. A closely split Florida Supreme Court held that the amendment could not be submitted to the voters. Chief Justice Whitfield reasoned:

The people of the state have a right to amend their Constitution, and they also have a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution, which is the fundamental law. If essential mandatory provisions of the organic law are ignored in amending the Constitution of the state, and vital elements of a valid amendment are omitted, it violates the right of all the people of the state to government regulated by law.⁶⁶

The reconsideration procedure was not itself constitutional; but it was governed by a Senate rule covered by a constitutional authorization to the legislative houses to "determine the rules of . . . proceedings."⁶⁷ Legislative consideration of a proposed constitutional amendment was, it seemed to Whitfield, supposed to be undertaken in accord with "regular" legislative process. "The proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation."⁶⁸

Armstrong cannot be understood, it is plain, as a direct elaboration of a particular constitutional provision. It is also not a straightforward restatement of some well-established judicial understanding of constitutional requirements. There are decisions prior to *Armstrong* that point in the same direction. But there are many other opinions resting on what

The difficulties which lie in the way of the people to amend the Constitution seem to emphasize the reasonableness of the rule that too strict a construction of the modes of procedure prescribed by legislative regulations and forms for the exercise of the power to submit a proposal to amend is not advisable or consistent with our institutions where the Constitution itself has provided a complete system for that purpose. . . . The opportunity should be afforded the people, with the least amount of technical departmental obstructions consistent with the letter and spirit of the constitutional provisions on the subject, to express their desire as to a supposedly needed change in the Constitution.

157 So. 40, 45 (Fla. 1934). *West v. State*, the first in this line of cases, was succinct: "in constitutional changes the popular voice is the paramount act . . ." 39 So. 412, 414 (Fla. 1905) (*West* did not deal with a ballot summary issue, but a constitutional legislative journaling requirement).

65. *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912); see *Armstrong*, 773 So. 2d at 13.

66. *Crawford*, 59 So. at 967-68.

67. *Id.* at 968.

68. *Id.*

seems to be contrary thinking. The divided case law puts into question the good sense of the *Armstrong* rule. Why must drafters of a ballot summary identify the principal “ramifications” of a proposed amendment? Justice Drew wrote quite convincingly in *Hill v. Milander*: it is the institutions and practices of public debate in advance of election day that carry the burden (and should carry the burden) of voter education.⁶⁹ Ballot summaries, even after *Armstrong*, cannot convey much information—they are at best aids to memory.⁷⁰ We probably do not want voters to think about amendments for the first time during the process of voting itself (although many no doubt do). There is also the matter of popular sovereignty: what follows if we suppose elections to possess the “capacity to represent democratic will.”⁷¹ It would not seem to be the business of government, past some very minimal threshold, to identify the relevant issues for voters. Elections are, after all, in important part processes through which what matters and what does not matter come to be identified. Even minimal scrutiny, of course, might reveal that a given ballot summary is grossly misleading. But that was not the case in *Armstrong* itself. The amendment there did not “fly under false colors” at the most general level—its summary made clear that the amendment was pro-death penalty even if it did not dwell on what would be lost in achieving this tilt.⁷²

In *Crawford v. Gilchrist*, Chief Justice Whitfield appears to have

69. *Hill*, 72 So. 2d at 798. Professor Lowenstein makes the point especially emphatically:

The notion that members of Congress or state legislatures sit down and read, much less reread the text of the bills on which they vote is plainly erroneous, and extending that notion to voters on a ballot proposition is absurd. Of course most voters do not read the text of propositions and of course they are entirely rational not to do so. The text of an initiative is carefully studied by the news media, interest groups, and academic and other policy specialists. The expert opinions thus generated are put into analyses of varying detail and sophistication. Voters who are so inclined can find as much information as they wish, presented at whatever level of complexity they can manage, in the news media, from various organizations, and nowadays, on the internet. Most voters do not go to the trouble of seeking out such information. But it does not follow that even the majority of voters cast their votes ignorantly or randomly. Rather, in the course of their daily lives, such voters pick up bits and pieces of information about the measure, especially information about who is in favor and who is opposed, and they use that information as a short cut to form a judgment that is certainly not foolproof but is not at all irrational.

Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 46 (2002). For thorough summary of studies of media influence on initiative voters, see Jane S. Schacter, *The Pursuit of “Popular Intent:” Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 131–38 (1995).

70. *But see* *Sancho v. Smith*, 830 So. 2d 856, 860 (Fla. 1st Dist. Ct. App. 2002) (post *Armstrong* reprint of entirety of amendment).

71. Jonathan Simon, *Why Do You Think They Call It Capital Punishment? Reading the Killing State*, 36 LAW & SOC’Y REV. 783, 803 (2002).

72. For extended, thoughtful discussion, see *id.* at 800–05.

appreciated the difficulties created by focusing on the “right to amend” held by “the people of the State”—he elegantly shifted judicial attention to a second “right of . . . the people”—to “government regulated by law.”⁷³ *Armstrong*, not surprisingly, made much of his opinion. But what “law” requires, of course, was precisely the question in *Crawford* (and in *Armstrong* and *Askew*). Whitfield confronted an easier task than his successors would face. Because the question concerned the initial legislative vote—whether that vote had indeed occurred—and not the subsequent referendum, he could work with ordinary rules of legislative procedure codified in Jefferson’s famous Manual, demonstrate their status as “law,” show the manifest departure in the case at hand, and reach his conclusion that there had been no “vote” in a lawful and therefore constitutional sense.⁷⁴ In *Armstrong* and *Askew*, Justices Shaw and McDonald proceeded without any similar recourse.⁷⁵

III. “BRASS, IRON, AND CLAY”—AMENDMENTS AND CONSTITUTIONAL FORM

It is possible to develop another, hopefully more useful, approach to dealing with the *Bryant* and *Armstrong* sequences by taking a step back conceptually. I begin by considering problems that constitutional

73. *Crawford v. Gilchrist*, 59 So. 963, 966, 967–68 (Fla. 1912).

74. See *Crawford*, 59 So. at 968–69 (Fla. 1912).

75. A recent en banc decision of the First District Court of Appeal relies in important part on *Crawford* (and in part on *Armstrong* as well). *Floridians Against Expanded Gambling v. Floridians for Level Playing Field*, 945 So. 2d 553 (Fla. 1st Dist. Ct. App. 2006) (en banc). The plaintiffs in *Floridians Against Expanded Gambling* challenged a proposed constitutional amendment placed on the 2004 ballot—subsequently approved by the voters—that authorized referenda in Miami-Dade and Broward Counties concerning installation of slot machines in pari-mutual facilities. *Id.* at 555–56. Allegedly, proponents of the measure “committed massive fraud to create the illusion of compliance” with the constitutional condition that a specified number of petition signatures be obtained before a proposed amendment could be presented to voters. *Id.* at 556 n.2, 557; see generally FLA. CONST. art. XI, § 3. Notwithstanding intervening voter approval of the amendment, the First District ruled, the fraud allegations—if proved—would nullify the amendment:

It is clear that a favorable popular vote cannot cure deception. . . . Essential constitutional prerequisites to the publication and submission of a proposed amendment to the Constitution are not immaterial, technical forms, but vital elements in the adoption of constitutional amendments. . . . [F]raud is substantial, and not minor, to the extent that, but for the fraudulent actions, the constitutional amendment would not have been presented to the public in the general election.

Floridians Against Expanded Gambling, 945 So. 2d at 559–61. The *Floridians Against Expanded Gambling* opinion cites *Armstrong* almost as often as *Crawford*. It is clear, though, that *Crawford* is the model: legality is the overriding theme, and although the fraud alleged threatens constitutional processes, familiar elements of common law fraud—independently of the immediate constitutional context—ultimately organize judicial specification of the wrongfulness of the challenged conduct. It is the wrongfulness of fraud—in general—that establishes the wrongfulness of the challenged acts. For further discussion, see text *infra* Part IV. B. 3.

amendments create for constitutional organization overall—for constitutions considered as working (and therefore workable) legal documents. These explorations, I will ultimately argue, reveal a vocabulary within which the self-execution and ballot accuracy questions can be addressed that may be plausibly thought to fix parameters for considering particular cases.

The project is not new. The first extended discussion of constitutional amendments occurred, it appears, in the course of congressional deliberation over proposals—managed in the House of Representatives by James Madison—that would ultimately become the Bill of Rights, the first ten amendments to the United States Constitution.⁷⁶ *Inter alia*, the House addressed a basic formal question (raised by Roger Sherman): whether the Bill of Rights amendments would, as Madison’s drafting suggested, be presented as inserts at particular points in the original constitutional text, or rather, as Sherman contended, be better placed at the end of the Constitution without cross-references.

MR. SHERMAN: We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles; the one contradictory to the other. . . . Beside this, sir, it is questionable, whether we have the right to propose amendments in this way. The constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the state governments; again all the authority we possess, is derived from that instrument; if we mean to destroy the whole and establish a new constitution, we remove the basis on which we mean to build.⁷⁷

MR. MADISON: Now it appears to me, that there is a neatness and propriety in incorporating the amendments into the constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong, than it will if they consist of separate and distinct parts; we shall then be able to determine its meaning without references or comparison; whereas, if they are supplementary, its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment, it will be difficult to ascertain to what parts of the instrument the amendments particularly refer; they will create unfavorable comparisons, whereas if they are placed upon the footing here proposed,

76. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 87–109 (1996).

77. 1 *ANNALS OF CONG.* 734–35 (Joseph Gales, ed., 1834), reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 117 (Helen E. Veit et al. eds., 1991). There were several efforts to report debates in the House of Representatives—none is a transcript as such, but the Congressional Register published the most complete attempts. See *id.* at 55–56.

they will stand upon as good foundation as the original work.⁷⁸

MR. GERRY: If we proceed in the way proposed by the honorable gentleman from Connecticut, I presume the title of our first amendment will be, a supplement to the constitution of the United States; the next a supplement to the supplement, and so on, until we have supplements annexed five times in five years, wrapping up the constitution in a maze of perplexity; and as great an adept as that honorable gentlemen is at finding out the truth, it will take him, I apprehend, a week or a fortnight's study to ascertain the true meaning of the constitution. [Roger Sherman was a Yale professor of divinity.] . . . [I]f they are to be received as equal in authority, we shall have five or six constitutions, perhaps differing in material points from each other, but all equally valid; so that they require a man of science to determine what is or is not the constitution⁷⁹

The arguments of Madison, Gerry, and their supporters initially prevailed in the House of Representatives.⁸⁰ But the House subsequently opted for Sherman's approach, with the Senate ultimately concurring.⁸¹ Both amendment forms persist in contemporary practice (Florida, for example, follows Madison.⁸²) The debate—encompassing more than these passages⁸³—was thus in one sense close to inconclusive. There was also, nonetheless, a notable underlying agreement. The Constitution should not become “heterogeneous” (Sherman) or “a maze of perplexity” (Gerry)—both Madison and Sherman said that it should “remain entire,” a “whole fabric” (Sherman) or “system” (Madison) would otherwise be put at risk. We may think that neither formal solution would squarely fix constitutional order. It is as easy to imagine either inserts or supplements in some instances “differing in material points” (Gerry) from original text, suggesting “unfavorable comparisons” (Madison), “the one contradictory to the other” (Sherman). The problem, really, is as much a matter of substance as of form.

If so, we ought to treat the problem of constitutional organization as chronic, as recurring, as raised to greater or lesser degree by every amendment, not always entirely resolvable. Constitutional organization

78. *Id.* at 118. Representative Vining added:

If the mode proposed . . . was adopted, the system would be distorted, and like a careless written letter, have more matter attached to it in a postscript than was contained in the original composition. The constitution being a great and important work, ought all to be brought into one view, and made as intelligible as possible.

Id. at 120.

79. *Id.* at 122.

80. See KYVIG, *supra* note 76, at 102.

81. See *id.* at 102, 104. The Senate debated secretly.

82. See, e.g., *In re Extending Existing Sales Tax*, 953 So. 2d 471, 480, 486–87, 489–90 (Fla. 2000) (quoting three proposed amendments).

83. For full reports, collected from several sources, see VEIT ET AL., *supra* note 77, at 197–98.

becomes part of the ordinary problem set of constitutional analysis. This is my point of departure. In this section I sketch some models of how constitutions might be put together. In section IV I draw on these models in order to reconsider the Florida approaches to “self-executing” status and ballot accuracy.

A. *Straightforward Organization*

In the fall of 1875 the Florida Supreme Court issued two advisory opinions addressing implications of then-recent amendments to the Constitution of 1868.⁸⁴ These are, it appears, the first occasions on which the Court explored in any detail the legal concomitants of constitutional amendments.

Article VI, section 15, of the 1868 constitution originally declared: The Governor shall appoint as many Justices of the Peace as he may deem necessary. Justices of the Peace shall have criminal jurisdiction and civil jurisdiction not to exceed fifty dollars; but this shall not extend to the trial of any person for misdemeanor or crime. The duties of the Justices of the Peace shall be fixed by law. Justices of the Peace shall hold their offices during good behavior, subject to removal by the Governor at his own discretion.⁸⁵

An amendment adopted in 1875 changed that section to read:

The Governor shall appoint as many Justices of the Peace as he may deem necessary. Justices of the Peace shall have jurisdiction in civil actions at law in cases in which the amount or value involved does not exceed one hundred dollars; and in criminal cases their powers shall be fixed by law. Their powers, duties and responsibilities shall be regulated by law. They may hold their offices for the term of four years, subject to removal by the Governor for reasons satisfactory to him.⁸⁶

Governor Stearns asked the Justices whether the amendment itself vacated the terms of all justices of the peace holding office at the time the amendment was adopted, how (if this was not the case), the four year term was to be calculated for sitting justices of the peace, and finally, if the term ran from the date of their appointment, whether the amendment itself therefore removed those justices of the peace who had held office for more than four years.⁸⁷ Justice Westcott, writing on behalf of the Supreme Court, found the key to answering these questions in article IV, section 14, of the constitution: “[N]o law shall be amended or revised by

84. *In re Executive Commc’n of Oct. 5, 1875*, 15 Fla. 735 (1875); *In re Executive Commc’n of Nov. 8, 1875*, 15 Fla. 739 (1875).

85. *Commc’n of Oct. 5, 1875*, 15 Fla. at 736 (quoting FLA. CONST. art. VI, § 15 (1868)).

86. *Id.* at 737 (quoting FLA. CONST., art. VI § 15 (amended 1875)).

87. *See id.* at 735–36.

reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length.”⁸⁸ Westcott observed:

This section, as amended, we . . . find as a whole. The power making the amendment, following the rule prescribed for amending an ordinary act of the Legislature, instead of ordaining in exact language the change desired, states the whole law as it is to be in the future[,] giving so much as was embraced in the old section, which was then in force, and which was still to be in force, as well as omitting that which was to be no longer in force, and inserting that which was to be of force instead of that omitted.⁸⁹

As a result, he concluded, “Justices of the Peace holding commissions from the Governor, issued under that portion of the old section which was and still is the law, derive their authority and power as justices from the proper constitutional authority, and hence their appointments are still valid”⁹⁰ But a second corollary also held:

There cannot be a Justice of the Peace holding office for the time prescribed by the old Constitution . . . because that provision has ceased to have any effect. There is now no law for any other tenure than that of four years . . . The Constitution makes no exception. The same rule must be applied to all Justices of the Peace.⁹¹

That rule, Westcott was sure, included the rule applied in *Marbury v. Madison* (which he quoted without attribution) and in other cases: the date of signing and sealing a commission is the date from which time in office begins.⁹² Justices in office more than four years, according to that rule, therefore “ceased to be such justices,” given the amendment, “the time for which the law authorized them to hold their offices having . . . expired.”⁹³

A few weeks later, the Governor inquired again. This time, the subject was article IV, section 2, of the Constitution of 1868, which initially provided that “[t]he session of the Legislature shall be annual . . . The Governor may, in the interim, convene the same in extra session by his proclamation.”⁹⁴ Another 1875 amendment declared instead:

From and after the first Tuesday after the first Monday in January, A.D. one thousand eight hundred and seventy-seven, the regular session of the Legislature shall be held biennially, commencing on said

88. *Id.* at 736 (quoting FLA. CONST. art. IV, § 14 (1868)).

89. *Id.* at 737.

90. *Id.* at 738.

91. *Id.*

92. *See id.* at 739; *Marbury v. Madison*, 5 U.S. 137, 157–59 (1803).

93. *See Commc’n of Oct. 5*, 15 Fla. at 739.

94. *See In re Executive Commc’n of Nov. 8, 1875*, 15 Fla. 739, 740 (1875) (quoting FLA. CONST. art. IV, § 2 (1868)).

day and on the corresponding day of every second year thereafter; but the Governor may convene the same in extra session by his proclamation.⁹⁵

Did the amendment bar a regular legislative session beginning in January, 1876? Or must the governor proclaim an extra session?

Chief Justice Randall concluded tersely that “the original section 2 . . . having been abrogated by the amendment, and there remaining no provision anywhere for a regular session in January . . . 1876,” there could be no regular session.⁹⁶ But because the “original . . . provision” regarding a special session “is not changed,” the governor retained the option of convening such a session.⁹⁷ Justice Westcott, in a separate communication, was a little more elaborate:

In all of the States in which the method of amendment here followed has been adopted, the unvarying rule is that nothing of the old section which is omitted from the new section as enacted, is, in the future, operative as law.

The very purpose of requiring the section, as amended, to be published entire, is to give certainty, by declaring the *whole law*, leaving nothing open for construction.

The Legislature and people, by *expressly omitting* all authority for a session in January, 1876, from the new section, and nothing but the new section being now operative as law, it follows, necessarily, that there is no constitutional sanction for any regular session until . . . 1877.⁹⁸

Why didn't Westcott and Randall regard the first phrase of the 1875 amendment as setting an effective date, thereby leaving the original 1868 provision in force until 1877? Westcott noted that he was, “as a matter of fact, ignorant of the purposes . . . ” of the drafters of the amendment.⁹⁹ But that was an aside. What mattered was that the amendment (as Randall wrote) “abrogated” its predecessor; as a result (in Westcott's words) “nothing but the new section” was “now operative as law.” Within the terms of the new section, read alone, there was literally (“expressly”) “no constitutional sanction” for an 1876 regular session. But then why did justices of peace appointed pursuant to the original constitutional provision, and not yet in office for four years, keep their jobs even after constitutional amendment? A “portion of the old section . . . was and still is the law”¹⁰⁰ The amendment included relevant

95. *Id.* (quoting FLA. CONST. art. IV, § 2 (amended 1875)).

96. *Id.* at 741.

97. *Id.*

98. *Id.* at 742 (emphases in original). Justice Westcott agreed that the governor could, as a matter of “your Executive discretion,” convene a special session. *Id.*

99. *Id.*

100. See *In re Executive Comm'n of Oct. 5, 1875*, 15 Fla. 735, 738 (1875).

language copied from its predecessor. "As to this portion reinserted, at no time did it cease to be law."¹⁰¹

Justice Westcott, I think, was neither inconsistent nor confused (Chief Justice Randall did not address the justices of the peace amendment.) His analysis was instead altogether thoroughgoing in its formality. One document—the amendment—once approved replaces the other—the original provision. Only the new document becomes pertinent thereafter. In the case of the justices of the peace, the amendment itself described a requirement for office that sitting justices of the peace (or some of them) happened to meet—gubernatorial appointment. In the case of the 1876 regular legislative session, nothing in the amendment by its terms addressed the matter, thus leaving no constitutional basis for such a session. But Westcott also draws on a second assumption—in addition to regarding amendments as substituting for prior constitutional texts, he supposes that amendments contain all pertinent language governing the subjects they address. This assumption—call it "straightforward organization"—has its root, he argues, in legislative practice conforming, in the case of amendments as well as statutes, to the constitutional requirement stated in article IV, section 14, of the 1868 constitution: legislative revisions must take the form of redrafts of entire "sections" and not just insertions of particular phrases.¹⁰² It is easy to see, however, that straightforward organization is also an expectation capable of encompassing constitutional layout as a whole.¹⁰³

B. *Fear of Chaotic Organization*

Roughly a century later, the idea of straightforward organization—applied to both amendments and the constitution as a whole—figures prominently in the early years after adoption of the 1968 Constitution. This time, though, the pertinent Florida Supreme Court opinions are not at all laconic, are indeed markedly melodramatic. Straightforward organization, it appears, is under attack. The defense proceeds chiefly by characterizing the alternative—as the Justices see it, constitutional chaos.

101. *Id.* at 737.

102. *See id.* at 736. In his first opinion—the October 5 case—Westcott depicts the legislative practice as a kind of constitutional improvisation: "The power making the amendment, following the rule prescribed for amending an ordinary act of the Legislature . . ." *Id.* at 737. But, in his November 8 opinion, he treats legislative practice as the general custom (general constitutional law, his contemporaries may have thought): "In all of the States in which the method of amendment here followed has been adopted, the unvarying rule is that nothing of the old section which is omitted from the new section as enacted, is, in the future, operative as law." *Comm'n of Nov. 8*, 15 Fla. at 742.

103. *See, e.g.,* *Holland v. State*, 15 Fla. 455, 461–67 (1876); *Cheney v. Jones*, 14 Fla. 587 (1874).

The first case—*Adams v. Gunter*¹⁰⁴—addressed an initiative-proposed amendment that would have added a new first section to article II of the constitution providing for a unicameral legislature, its basic procedure for enacting laws, and a clean-up subsection obliging the new legislature to propose any additional constitutional amendments and pass any laws necessary for full implementation of the unicameral amendment.¹⁰⁵ At the time, article XI, section 3, characterized “[t]he power to propose amendments . . . by initiative” as extending “to any section of this constitution.” “[A]ny section” was—in context, anyway—restrictive language.¹⁰⁶ On its face, the amendment proposing a unicameral legislature appeared to respect the constitutional limitation—in form it consisted of a single section (encompassing three short subsections). The supreme court concluded that the proposal was unconstitutional nonetheless.

Justice Drew’s majority opinion read the section limitation as enforcing the straightforward organization norm:

[T]he power reserved to the people to amend any section of the Constitution includes only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose.¹⁰⁷

Drew noted that the “cataclysmic change[]”¹⁰⁸ proposed by the amendment, if adopted, would make it “immediately necessary to amend numerous other provisions of the Constitution”—a fact “recognized in the proposal itself.”¹⁰⁹

[I]f such proposed amendment were adopted by the people . . . and if the Legislature at its next session should fail to submit further amendments to revise and clarify the numerous inconsistencies and conflicts

104. 238 So. 2d 824 (Fla. 1970).

105. *Id.* at 825–28.

106. Article XI, section 1 described legislature-proposed amendments and revisions as addressing either “a section or . . . one or more articles, or the whole, of this constitution.” FLA. CONST. art. XI, §1. Article XI, section 2, authorized constitutional revision commissions to put to place before voters proposals for “revision of this constitution or any part of it.” FLA. CONST. art. XI, §2. Article XI, section 4, provided for constitutional conventions to draft proposals for “revision of the entire constitution.” FLA. CONST. art. XI, §4.

107. *See Adams*, 238 So. 2d at 831.

It is . . . clear from Article XI that where more than one section of the Constitution is to be amended it is called a revision, and such revision contemplates deliberative action of either the Legislature or a convention duly assembled in order to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies.

Id. at 829.

108. *Id.* at 831.

109. *Id.* at 829. Justice Drew listed fifteen changes that he thought would be required. *See id.* at 830.

which would result, or if . . . the people should refuse to adopt them, simple chaos would prevail in the government of this State.¹¹⁰

Initiative proposals of this sort, it seemed, threatened the very point of the Constitution:

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 State a workable, accordant, homogenous and up-to-date document. All of this could disappear very quickly . . .¹¹¹

*Smathers v. Smith*¹¹² addressed a legislatively-proposed amendment that would have changed article I, section 18—as originally written, a prohibition of administrative penalties—to add authorization for the Legislature to suspend any administrative rule it deemed to be in excess of delegated authority.¹¹³ Justice England, writing for six of the seven Justices,¹¹⁴ understood the decisive issue in the case to be whether the proposed language could indeed be treated as a section amendment, or whether the proposal was instead tantamount to an article revision. The legislature could propose either sort of change under article XI, section 1. But failure to place a proposal at its proper level in the constitutional structure, it seemed, rendered the proposal invalid. England ultimately concluded that the proposal at hand had enough in common with the underlying aim of the existing section 18 prohibition to justify the proposal's claim to be a section amendment. Given an overarching concern "to shield individuals from the abuses of governmental tyranny[,] [t]he limitation on administrative agency penalties has some connection, albeit tenuous, with the sentence now added to allow the Legislature to protect the citizenry from executive branch over-reaching."¹¹⁵ But the large part of the majority opinion was taken up with explaining and justifying its concern to distinguish true section changes from disguised article revisions in the first place. This is the most worked-out of the several efforts:

110. *Id.* at 832. Justice Thornal, writing separately, explained why legislative delay would be likely. *See id.* at 833 (Thornal, J., concurring).

111. *Id.* at 832.

112. 338 So. 2d 825 (Fla. 1976).

113. *See id.* at 826. The proposal also declared that the governor and cabinet could, by majority vote, defer a suspension pending subsequent legislative action. Subsequent legislative failure to act on a suspension (at the next regular session) would automatically reinstate the administrative rule. *Id.* For a careful, extended, contemporary account of the *Smathers v. Smith* litigation, see James Bacchus, Note, *Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith*, 5 FLA. ST. U. L. REV. 747 (1977).

114. Justice Boyd concurred "in all aspects with the majority opinion . . ." except its approving discussion of *Adams v. Gunter*. *See Smathers*, 338 So. 2d at 832 (Boyd, J., concurring specially).

115. *Id.* at 829.

The function of a section amendment is to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law. . . . The function of an article revision is to restructure an entire class of governmental powers or rights. . . . The serious business of amending a constitution by lawmakers demands that the functional unity of sections and articles be preserved to the fullest extent possible, so that, first, ambiguities and contradictions be avoided and, second, cumulative confusion be prevented. . . . [L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be.¹¹⁶

Justices Drew and England worry about “chaos,” “inconsistencies and conflicts,” about “ambiguities and contradictions,” “cumulative confusions,” “a hodgepodge of disharmonious provisions.” Concurring in *Smith*, Justice Boyd countered, noting that “[t]he inherent right of the people to adopt amendments . . . permit[s] them to adopt vague and ambiguous amendments, as well as those which are easily understood.”¹¹⁷ And Chief Justice Ervin, dissenting in *Adams*, put a similar point more sharply:

Because a proposal may be radical, chaotic or revolutionary in the minds of some is no justification for its rejection ab initio as unconstitutional. After all, a great degree of confidence must necessarily be reposed in the good judgment of the people . . . to weed out the chaotic, the radical, and the revolutionary.¹¹⁸

Drew might have responded that there was nothing (or at least not much) for “the good judgment of the people” to engage—only the prospect of more work later. The proposal at issue in *Adams* was troubling precisely because it postponed to subsequent amendments or to legislation the job of identifying and resolving whatever confusions the proposal (if adopted) would occasion. England’s opinion in *Smith* is more puzzling—indeed, on its face down right dissonant. Why stress the

116. *Id.* Variations include:

No persuasive reason has been suggested for permitting wholly random placements of constitutional provisions by legislative amendment. It is not neatness with which the subject of germaneness is concerned; it is respect for the people’s declaration that our organic law shall be free from the confusion and uncertainty in operation which inevitably attend constitutional inconsistencies and ambiguities.

Our much-amended 1885 Constitution was fully revised in 1968 principally because a hodgepodge of disharmonious provisions which had been added over the years had made governance complex, expensive and uncertain.

Id. at 830, 829 n.14.

117. *Id.* at 832 (Boyd, J., concurring specially).

118. *Adams v. Gunter*, 238 So. 2d 824, 834 (Fla. 1970) (Ervin, C.J., dissenting).

importance of a well-ordered constitutional text and—at the same time—accede to an only “tenuous” explanation of the proposal’s place?

This question has an answer: *Weber v. Smathers*.¹¹⁹

Decided the same day as *Smith*, *Weber* addressed the constitutionality of Governor Askew’s “Ethics in Government” initiative proposal. The amendment added a new article II, section 8.¹²⁰ Its eight subsections required elected officials and candidates to disclose publicly financial interests and campaign finances, framed liability and forfeiture rules for officials and employees breaching public trust, and barred legislators or statewide elected officials for two years after leaving office from paid representation of individuals or entities dealing with the government bodies in which the legislators or officials had participated.¹²¹ The amendment also prohibited sitting legislators from undertaking paid representation of individuals or entities before state agencies other than judicial tribunals, provided for an independent commission to investigate and report with respect to breaches of public trust, and established a default scheme for implementation in the event that the Florida Legislature did not pass needed supplemental legislation.¹²² The ethics amendment—from proposal through campaign and ultimate adoption—defined an especially dramatic moment in Florida political and constitutional history, a remarkable use of the initiative by a sitting governor challenging and seeking to reform the prevailing political culture.¹²³

But in the Florida Supreme Court, it seemed, Askew’s initiative was a nonevent. After *Adams v. Gunter*, article XI, section 3 had been changed—in 1972 the single section limitation gave way to a single subject requirement.¹²⁴ In *Weber*, Chief Justice Overton declined the opportunity to explore implications of the “single subject” idea, barely discussed *Adams* (even though the single subject theme plainly figured in Justice Drew’s opinion there), instead approving the ethics amendment in a single conclusory paragraph.¹²⁵ Only Justice Roberts dis-

119. 338 So. 2d 819 (Fla. 1976).

120. *Id.* at 820.

121. *Id.* at 820–21.

122. *Id.*

123. See John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 233–34 (1998). See generally Jon Nordheimer, *Florida’s “Supersquare”—A Man to Watch*, N.Y. TIMES MAGAZINE, Mar. 5, 1972, at 11.

124. “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 . . . shall embrace but one subject and matter directly connected therewith.” FLA. CONST. art. XI, § 3.

125. See *Weber*, 338 So. 2d at 822. Justice England, concurring, attempted to fill the gap, exploring understandings of the legislative single subject requirement, part of Florida constitutional law since 1868, as a guide to interpreting the initiative single subject rule. See *id.* at

sented, decrying the “rapid abandonment” of *Adams*.¹²⁶

The taciturn *Weber* opinion cannot hide the constitutional richness of the Askew initiative. The idea of trusteeship was put to work not only to police conflicts of interest as between public responsibilities and personal financial interests of elected officials. The notion of disinterestedness was also deployed to define a new, sharper separation of legislators and administrators, to declare administration off-limits to legislator-lobbyists. Administration thus acquired space to develop its own, presumably public-interested, judicially-supervised bureaucratic ethos. The ethics in government amendment, it might be argued, emphatically underscored the modernizing reform impulse evident elsewhere in the 1968 constitution.¹²⁷

We can also see, however, that the delegation-policing amendment at issue in *Smith* proceeded precisely contrarily (and we understand—now—why the plaintiff in the case was 1968 constitutional impresario Chesterfield Smith.) This proposed amendment emphatically reinserted administrators within the maelstrom of legislative processes and politics. Bureaucratic government would not become the well-bounded preserve of administrators and judges. The proposal at issue in *Smith*, thus, may seem to have posed a real risk indeed of constitutional “hodgepodge,” of “disharmonious provisions.” But that risk could only materialize if *both* the Askew initiative and the anti-delegation amendment received voter approval. As of the time that the Florida Supreme Court heard and decided *Weber* and *Smith*, neither proposal had been put to popular vote. In theory, the court might have resolved the prospective risk by invalidating either one of the proposals. Which one? The only sensible tack—the one that the Justices actually took, however ambivalently—was to allow both proposals to remain on the November ballot and run the risk. As it turned out, the electorate passed the Askew initiative and defeated the anti-delegation proposal.

What if the voters had approved both amendments? Would that result have threatened anything like the “chaos” that Justice Drew foresaw in *Adams v. Gunter*? Chaos is a vivid, evocative term. Concretely, Drew has two fears: (1) that an amendment will presuppose changes in other constitutional provisions but will not make the changes itself; and (2) that an amendment purporting to be minor will (even if incom-

823 (England, J., concurring). This analogy, we know, would not hold—within a few years, Justice Overton, ironically, would develop a distinctive, demanding reading of the single subject notion within the initiative context. See *Fine v. Firestone*, 448 So. 2d 984, 989–92 (Fla. 1984); Gudridge, *supra* note 2, at 822–25.

126. *Weber*, 338 So. 2d at 824 (Roberts, J., dissenting).

127. Professor Little discerns no large theme in the substance of the Askew initiative. See Little, *Direct Democracy*, *supra* note 3, at 400.

pletely) make major changes. The idea of straightforward organization—and the “section” limitation understood within its terms—addresses both fears. Justice England’s fear is only slightly different: that an amendment will be inconsistent with another constitutional provision, preventing complete implementation of *both* the amendment and the other provision, *or either* the amendment *or* the other provision. A rigorous article/section distinction implementing the idea of straightforward organization addresses this fear. (England, of course, weakens the organizational norm in applying it in *Smith v. Smathers* itself.¹²⁸)

A legal regime is chaotic if, within its workings, close starting points too often result in outcomes or processes of elaboration that appear to be too widely divergent to assimilate.¹²⁹ The large number of adjustments that the unicameral proposal at issue in *Adams* left open raised this risk, it seemed, because some adjustments could be delayed or not undertaken at all. Co-existing but deeply conflicting notions of unicameral and bicameral legislatures might then utterly disrupt each other—presuppose different answers to the same ensemble of implementing questions. Neither legislative structure would be able to establish itself in any meaningful sense. The anti-delegation proposal judged in *Smith* carried with it the possibility that legislative interventions would be ad hoc, singling out administrative rulings on no coherent basis, generating hodgepodge. This prospect, in and of itself, did not present a problem for constitutional organization as such. But because (or to the extent that) the Askew amendment, if ratified, implemented a particular idea of administrative order, constitutional conflict loomed if the amendment at issue in *Smith* were also ratified. But it was just as

128. At least with respect to initiative-proposed amendments, the single subject requirement, as ultimately understood, addresses Drew’s first fear, but not his second. It would also address (were it applicable) England’s fear. See Gudridge, *supra* note 2, at 899–901; Appendix, *infra*.

129. This definition of chaos treats the underlying concern as hermeneutic, a worry about relationships between interpretations and results given a set of constitutional starting points. Another approach—stressed in Joseph Little’s criticism—begins by distinguishing issues as either constitutional or nonconstitutional and proceeds to evaluate amendments (or other constitutional provisions) on the basis of whether they are therefore constitutional in substance or rather corrupt or confuse or jumble the overall constitutional text. See, e.g., Little, *Need to Revise*, *supra* note 3, at 478–80; Little, *Direct Democracy*, *supra* note 3, at 408–10. See also Daniel R. Gordon, *Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida*, 20 NOVA L. REV. 413 (1995). Distinguishing constitutional and nonconstitutional topics can be a tricky project, however, whatever the precise formula that might be put to use: it would seem to call into question not just the recent run of strikingly narrow substantive constitutional amendments (addressing, famously, a bullet train running from Tampa through Orlando to Miami and the well-being of fish and pregnant pigs), but also, for example, an important aspect of the organizing framework of the 1868 Florida Constitution (thus seeming to side with the Florida Supreme Court’s subsequent controversial editing) notwithstanding Professor Little’s own appreciation of the 1868 accomplishment. See Little, *Need to Revise*, *supra* note 3, at 475. See generally Gudridge, *supra* note 2, at 866–77.

true, of course, that the Askew amendment undercut the implicit norm—something very much like parliamentary government—informing the anti-delegation proposal. We might wonder whether this conflict would have been chaotic (had it come to pass).¹³⁰

C. *Complex Organization*

Constitutional organization need not be straightforward. Individual provisions might evoke or presuppose or elaborate or even counter others.¹³¹ These reverberations need not be chaotic. They might disclose themes emergent across accumulated constitutional parts. It is sometimes thought that these themes describe a deep structure of sorts.¹³² This characterization often carries with it notions of unity or consistency or continuity—a strong sense that the themes, because they are assumed to be integral to the constitutional text itself, fix its form well enough to give it distinctive shape. But there is also this risk: if the themes available to be picked out diverge substantially, the idea of deep structure loses (in the very process of elaboration) something of its claim, shows constitutional order to be more like a jumble, an unresolved plurality, disorder really. Emergent consonances can also be conceived otherwise however: as indexes, orienting efforts of readers “reading across words” (Professor Tribe’s wonderful phrase¹³³), responding to complex constitutional texts. These indexes would be identifiably responses to the texts as such (in some way or another). But they might also borrow from other legal vocabularies and presuppositions, or, indeed, show traces of political culture at large. Indexes may be idiosyncratic. Judges or legislators or commentators or any other readers could frame organizing vocabularies that were entirely their own. Or recurring indexes might emerge, cutting across individual constitutional readings, each reiteration increasing their attraction. Use of particular recurring indexes might wane as well as wax, of course. But to the extent of their general appeal, they figure within constitutional law as literal “rules of recognition,” sources of contingent, but nonetheless real, stability.

130. Neither administrative autonomy nor legislative supremacy would have been fully realized. Arguably, constitutions often evoke conflicting ideals or models of government without entirely frustrating realization of either or both of the ideals (*Adams* was, perhaps, an unusual case). The two proposals at issue in *Smith* and *Weber*, we may think, might have coexisted—some legislative intervention, but also some space for administrative government. But “some” would have needed to be delimited somehow in order to maintain uncertainty at tolerable levels—and “somehow” would not have been (whatever its source) contributed by the Florida Constitution.

131. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–91 (1999).

132. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 40–47, 70–78 (3rd ed. 2000); See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3–32 (1969).

133. TRIBE, *supra* note 132, at 40.

The idea that indexing terms are the work of constitutional readers supposes that constitutional law—overall—is an effort or enterprise, a work in progress, an accumulation of sometimes overlapping, sometimes conflicting, sometimes gapped texts pulled together, however provisionally, by reader efforts that in the aggregate may themselves either coalesce or diverge. Within this picture, criticism singling out indexing efforts, however harsh, does not put into question the enterprise as a whole: constitutional texts as such are only occasionally denounced.¹³⁴ Index criticism is commonplace. Marking terms may be too far removed from textual provisions. Or they may be too narrow, too incomplete. “Truth is understood as a matter of evidence, rather than a function of logic.”¹³⁵ Perhaps especially in the case of judicial readers (who address constitutional texts especially closely and especially often), the question of whether their efforts result in a right proportion of idiosyncratic and recurring indexes frames a familiar long-standing debate. “Doctrine,” “principles,” “neutral principles,” “precedent”—the worries encoded in labels like these seek to regulate the frequency or impact of heroic or virtuoso readings (work themselves, therefore, as second-order indexes).¹³⁶ Within the analyses of judges and commentators, legislative or executive glosses sometimes seem to warrant deference.¹³⁷ Commonly, however, deference is limited by indexing terms judges or commentators themselves ordinarily bring to bear to highlight constitutional emphases, terms which (if perceived to be pertinent) trigger close scrutiny of legislative understandings, scrutiny itself organized by sets of indexing terms.¹³⁸ Whatever else might be concluded, it should be evi-

134. There are, at present, very few (widely known) critiques (within either federal or state constitutional law) of a piece with, for example, the abolitionist argument that the Constitution “is a covenant with death.” For discussion of the 1854 Fourth of July rally sponsored by the Massachusetts Anti-Slavery Society at which William Lloyd Garrison burned a copy of the Constitution, declaring it to be “a covenant with death, and an agreement with hell,” see Donald Yacovone, “A Covenant with Death and an Agreement with Hell,” Massachusetts Historical Society, Online: Object of the Month (2005), <http://www.masshist.org/objects/2005july.cfm>. For recent criticisms of the U.S. Constitution as such, see, e.g., Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

135. Rosalind Krauss, *Notes on the Index: Seventies Art in America, Part 2*, 4 OCTOBER 58, 66 (1977). “Th[e] condition of . . . having-been-there satisfies questions of verifiability at the level of the document.” *Id.*

136. See, e.g., CHARLES FRIED, *SAYING WHAT THE LAW IS* 1–12 (2004); RONALD DWORIN, *FREEDOM’S LAW* 10–11, 104–10 (1996) (“Textual Homes”).

137. For the classic argument, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143–53 (1893).

138. Compare, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (congressional view of constitutional emphases inconsistent with Supreme Court’s—statute unconstitutional), with, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (congressional and Supreme Court identifications of constitutional emphases overlap—statute constitutional). Obvious examples of such highlighting and scrutiny-fixing indexes in United States constitutional law include, for

dent that index-work comprises much of the ordinary business of constitutional law.

Some constitutional provisions, within their own wording, set out indexing terms, and thus themselves organize subsequent reader interpretations. Article II, section 3, of the Florida Constitution declares: “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The separation of powers idea—in federal law, for example, an index term propounded by readers reacting to the larger set of constitutional provisions—becomes a conception that itself organizes (“indexes”) constitutional interpretation, obligating constitutional interpreters to match officials with “branches” and branches with “powers” in order to determine whether official action authorized by a given statute, for example, in fact fits within the constitutional arrangements. Legislative alterations of common law rights of action, whether exercises in revision or outright abolition, could quite plausibly be understood within constitutional law as a matter to be judged under the heading of separation of powers priority rules—for example, the familiar rule proclaiming “legislative supremacy.”¹³⁹ But article I, section 21, includes the requirement that “[t]he courts shall be open to every person for redress of any injury” in the Florida Constitution’s “Declaration of Rights.” Taking this constitutional classification seriously, Florida courts have treated common law actions as individual rights.¹⁴⁰ Constitutional texts identifying constitutional indexes can also proceed by cross-reference (or *renvoi*). Thus, the proposed amendment at issue in *Armstrong v. Harris*, subsequently approved by voters, changed article I, section 17, to tie Florida constitu-

example, Justice Stone’s formulas in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), and Professor Ely’s gloss on *United States v. O’Brien*, 391 U.S. 367 (1968) see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). In Florida constitutional law, one especially clear illustration may be found in the efforts of Florida judges to develop an “equal protection” gloss mimicking United States Supreme Court readings of the Fourteenth Amendment for purposes of enforcing the equality guarantee of the Florida Constitution’s article I, section 2. See, e.g., *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67–68 (Fla. 1990); *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567, 569–70 (Fla. 1983).

139.

The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law.

Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 565 (1911). See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 402–07 (1908).

140. See, e.g., *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55, 57–59 (Fla. 2000); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

tional prohibitions of excessive punishments to United States Supreme Court understandings of the federal Eighth Amendment. Article I, section 12, as amended, identifies United States Supreme Court readings of the Fourth Amendment as fixing the interpretive matrix applicable in cases addressing the Florida constitutional prohibition of unreasonable searches and seizures.¹⁴¹

Constitutional amendments may pose problems for the larger enterprise. Individual amendments might, to varying degrees, alter the mix for indexing purposes—appear to change emphases evident across accumulations of constitutional propositions, and thus revise existing balances of congruences and conflicts. In some cases, amendments could introduce altogether new elements into constitutional texts, perhaps prompting reader recognition of new indexes of greater or lesser import. Ordinarily, changes like these will not disrupt the overall constitutional enterprise. Particular amendments could pose real difficulties, of course—the initiative proposal at issue in *Adams v. Gunter*, is perhaps illustrative—but the larger problem may lie in aggregation—in the accumulation of amendments. Too many changes, especially if they introduce too many new constitutional topics or possible thematic variations suggested by constitutional language, might effectively fragment the underlying text to the point that indexing efforts become exercises in futility. Possible starting points could proliferate and also almost immediately run into each other as well. Constitutional Babel—a fear evocative of the end result, it may plausibly seem, of the huge number of amendments added to the 1885 Constitution.¹⁴²

IV. CONTRA BABEL

Constitutional organization is not necessarily—one or the other—straightforward or complex (or chaotic, for that matter.) For example, the article II, section 3, separation of powers mandate is, on its face, a clear commitment to straightforward organization (every power in its proper place only.)¹⁴³ Still, the Florida Supreme Court recently constructed a notably complex index in the course of cataloging its cases addressing the judicial/legislative separation of powers:

Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that

141. For critical discussion, see Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-inflicted Wounds of Thrown-away Independence From the Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701 (2003).

142. See *Smathers v. Smith*, 338 So.2d 825, 829 n.14 (Fla. 1976).

143. “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” FLA. CONST. art. II, § 3.

where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense However, where a statute does *not* basically convey substantive rights, the procedural aspects of the statute cannot be deemed “incidental,” Moreover, where this Court has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. . . . Finally, where a statute has some substantive aspects, but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional.¹⁴⁴

The Court does not preclude the possibility that some separation of powers questions can be treated straightforwardly.¹⁴⁵ But most of its compilation summarizes interplays—quintessentially complex inquiries simultaneously considering several source materials (e.g., rules of procedure and statutory provisions) and judging competing materials as against each other.

We might think that something like this heterogeneous mixture of straightforwardness and complexity describes the working assumptions and index terms of Florida constitutional law generally—at least as it stands now. We might also think that cognizance of the organizational risks posed by increases in complexity, even if not always pressing, nonetheless ought to be evident and indeed sometimes prominent concerns in the constitutional law of constitutional amendments. We should see efforts to constrain the multiplication of interplays, or at least to mark the most pertinent reverberations across constitutional texts as such; we should also see something similar at the second level, efforts to manage the proliferation of indexes. Indeed we do, I argue. The question whether the language of constitutional amendments—indeed, constitutional terms generally—is or is not self-executing makes most sense if it is understood as testing complexity, as gauging whether a given constitutional text, as understood, interacts in well-defined or ill-defined ways with other constitutional provisions (or, in some cases, nonconstitutional legal materials.) The question whether a ballot summary is misleading turns out to organize inquiry helpfully—rather than simply beg general questions—if understood as an effort to establish rudiments (at least) of canonical indices—introductory maps of the principal purposes and

144. *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

145. *See, e.g., Dep’t of Children and Families v. K.R.*, 946 So. 2d 106, 107–08 (Fla. 5th Dist. Ct. App. 2007); *Dep’t of Children and Families v. Soliman*, 947 So. 2d 568, 570 (Fla. 1st Dist. Ct. App. 2006); *State v. Gibson*, 935 So. 2d 611, 613 (Fla. 3rd Dist. Ct. App. 2006).

effects of proposed constitutional changes. Ballot summaries, within this view, suppose that amendment drafters, voters, and judges are all engaged in versions of the same interpretive enterprise, caught up in the common project of making sense of constitutional proposals.

A. *Self-Executing Terms and Constitutional Complexity*

I begin with genealogy.¹⁴⁶

1. INTELLECTUAL ORIGINS OF "SUFFICIENT RULE"

Gray v. Bryant appears as though out of nowhere—at least as a matter of Florida constitutional law.¹⁴⁷ The court's only citations are to one Missouri and one Oklahoma decision.¹⁴⁸ The Missouri Supreme Court was not much concerned with the matter, relying on *American Jurisprudence* and *Corpus Juris Secundum*.¹⁴⁹ But the Oklahoma Supreme Court pointed¹⁵⁰ to a United States Supreme Court decision in 1900 in *Davis v. Burke* addressing the effect of a provision of the Idaho constitution.¹⁵¹ *Burke* helps: the opinion there invoked Thomas Cooley's famous *Constitutional Limitations*,¹⁵² quoting language that first appeared in the 1878 edition of the treatise, in a chapter entitled "Of the Construction of State Constitutions:"¹⁵³

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.¹⁵⁴

Cooley attributes this proposition to no one.¹⁵⁵

146. For a discussion of the self-executing question as considered by state courts generally, see Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?* 17 HARV. ENVTL. L. REV. 333, 341–61 (1993).

147. See *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). The phrase "sufficient rule" had appeared previously, in the context of a discussion of the constitutional division of responsibility as between the governor and the legislature, see *Ex parte White*, 178 So. 876, 879 (Fla. 1938), but *Bryant* does not note the case.

148. See *Gray*, 125 So. 2d at 851 (citing *State ex rel. Fulton v. Smith*, 194 S.W.2d 302 (Mo. 1946); *City of Shawnee v. Williamson*, 338 P.2d 355 (Okla. 1959)).

149. See *Fulton*, 194 S.W. 2d at 304.

150. See *Shawnee*, 338 P.2d at 358.

151. See *Davis v. Burke*, 179 U.S. 399, 403 (1900).

152. *Id.*

153. THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 48–103 (4th ed. 1878).

154. *Id.* at 101. *Ex parte White*, in using the phrase "sufficient rule," quoted another part of the Cooley treatise. See *White*, 178 So. at 879.

155. COOLEY, *supra* note 153, at 48–103. *CONSTITUTIONAL LIMITATIONS* is nonetheless not without predecessors. In a Michigan opinion that Cooley uses as an example, see *id.* at 100 n.1, a constitutional requirement that the legislature "provide an uniform rule of taxation" was declared

At least at first glance, however, it does not appear to be difficult to reconstruct his thinking. In an earlier passage, introducing the discussion of whether constitutional provisions are self-executing, he wrote:

But although all the provisions of a constitution are to be regarded as mandatory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced.¹⁵⁶

“[I]n and of themselves”: Cooley works within the model of straightforward organization. But at other points in his larger discussion of the “construction of state constitutions,”¹⁵⁷ in passages that first appeared in the initial 1868 edition of *Constitutional Limitations*, his formal premise appears to be different:

Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a very proper rule of construction, that *the whole is to be examined with a view of arriving at the true intention of each part.*¹⁵⁸

to be unenforceable absent implementing legislation: “No new rule of taxation had been provided by the Legislature when the assessment was made, and it is not pretended that this provision of the Constitution executes itself.” *Williams v. Mayor of Detroit*, 2 Mich. 560, 565 (1853). Earlier still, in a case of manifest importance, the United States Supreme Court, deciding *Groves v. Slaughter*, 40 U.S. 449 (1841), addressed the question of whether a provision of the 1832 Mississippi constitution (superseding its 1817 predecessor), barring “introduction of slaves into this state as merchandise, or for sale” was itself legally operative, or rather required implementing legislation to take effect. *See id.* at 499–500. The Court’s majority held that the amendment was not self-executing, analyzing the matter in a way that Cooley’s own “sufficient rule” requirement seems to summarize precisely:

But there is nothing in this provision which looks like withdrawing the whole subject from the action of the legislature. On the contrary, there is every reason to believe, from the mere naked prohibition, that it looked to legislative enactments to carry it into full operation. . . . Legislative provision is indispensable to carry into effect the object of this prohibition. It requires the sanction of penalties . . . How is a violation of this prohibition to be punished? . . . What would become of the slaves thus introduced? Will they become free immediately upon their introduction, or do they become forfeited to the state? These are questions not easily answered.

Id. at 500–01. After the *Groves* decision, Mississippi courts made clear their own view that the provision was self-executing. But the federal Supreme Court reasserted its own ruling. *See Rowan v. Runnels*, 46 U.S. 134, 139 (1847). For a properly detailed historical account, see Michael P. Mills, *Slave Law in Mississippi From 1817–1861: Constitutions, Codes and Cases*, 71 *MISS. L.J.* 153, 206–11 (2001). For discussion of other pre-Cooley cases, see Fernandez, *supra* note 146, at 335–38.

156. COOLEY, *supra* note 157, at 99.

157. *Id.* at 48.

158. *Id.* at 70 (emphasis in original). The passage appears at page 57 in the first edition.

Something like complex organization now appears to be the assumption:

One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.¹⁵⁹

But here too Cooley also recognizes the possibility of straightforward organization—albeit as exception seemingly, rather than rule:

It is a general rule, in the construction of writings, that, a general intent appearing, it shall control the particular intent; but this rule must sometimes give way, and effect must be given to a particular intent plainly expressed in one part of a constitution, though apparently opposed to a general intent deduced from other parts.¹⁶⁰

Cooley oscillates.

2. “SUFFICIENT RULE” GIVEN COMPLEXITY

What would “sufficient rule” look like if we took seriously ideas of complex organization in some respect after the fashion of at least some of Thomas Cooley’s 1868 formulations? If constitutional organization is understood, often anyway, to be complex (or potentially so), the “sufficient rule” inquiry must encompass more than the provision immediately at hand. The question of whether terms are self-executing may turn in important part on the implications of other constitutional declarations that appear to be conceptually adjacent—in effect, index across these other declarations as well.¹⁶¹ The initially pertinent provision ought to be considered as accommodating the suppositions of its cousins (checked to determine whether this was indeed the case). This inquiry, as one result, may test whether enough added working material therefore accumulates to meet the “sufficient rule” demand.

This does not mean, it is important to note, that the content of the constitutional language whose “sufficiency” is put in issue therefore becomes—taken in isolation—the point of reference for purposes of identifying other, perhaps relevant provisions. The “self-executing” question is, at bottom, the question of whether a constitutional provision

159. *Id.* at 71 (page 58 n.3 in first edition).

160. *Id.* at 71 n.4.

161. “[M]any of the important values that drive . . . interpretation are derived from the Constitution, broadly understood.” Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 499. In some instances a constitutional amendment itself identifies pertinent additional interpretive resources—for example, if the amendment, like the amendment at issue in *Armstrong v. Harris*, directs courts to use federal understandings of cognate federal constitutional provisions. See 773 So. 2d 7 (Fla. 2000).

is capable of use by judges in the absence of legislative gloss. Does the provision afford adequate support for a cause of action, an adequate basis for resolving the issues that judicial action itself treats as the framework within which it proceeds? There are, it turns out, also generally helpful constitutional backdrops: two overlapping provisions of the Florida Constitution work to structure judicial perspective and thus suggest pertinent considerations—interpretive starting points, at least.¹⁶²

a. Access to courts

Article I, section 21, safeguards the ordinary availability of common law rights of action.¹⁶³ But the access to courts right, as the Florida Supreme Court understands it, does not absolutely protect common law actions from statutory change: legislators may replace actions with alternate remedies or abolish actions outright in cases of public need.¹⁶⁴ Moreover, common law actions are, within their own terms, fully capable of enforcing statutory norms—or validating recognition of implicit statutory rights of action sufficiently similar in concept to common law actions.¹⁶⁵ Constitutional provisions can also fall within common law reach.¹⁶⁶ *Vis-à-vis* constitutional provisions—the matter at hand here—the structure of access to courts analysis therefore suggests rules of construction: Whether or not constitutional terms are consistent with judicial enforcement organized along common law lines turns not just on “aptness” analyzed at large (as it were), but on whether constitutional

162. I am supposing, of course, that a provision that is the immediate focus does not declare itself to be constitutionally exclusive—to preempt consideration in any way of any other constitutional provisions.

163. *See* FLA. CONST. art. I, § 21. Section 21 also addresses pre-1968 statutory rights of action. For present purposes, I subsume these statutory actions within the term “common law.”

164. *See, e.g.,* Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1096–97 (Fla. 2005); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

165. *See, e.g.,* Fla. Dep’t. of Envtl. Prot. v. Contractpoint Fla. Parks, 986 So. 2d 1260, 1269 n.9 (Fla. 2008) (contract action); Pan-Am Tobacco Corp. v. Dep’t of Corrs., 471 So. 2d 4, 4 (Fla. 1984) (same); Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372, 1377 (Fla. 2d Dist. Ct. App. 1993) (pollution clean up action); Gatwood v. McGee, 475 So. 2d 720, 723 (Fla. 1st Dist. Ct. App. 1985) (negligence action). Whether statutory schemes are amenable to enforcement through common law actions may also be determined, of course, by considering whether aspects of the schemes themselves are inconsistent with litigative enforcement. *See, e.g.,* Fischer v. Metcalf, 543 So. 2d 785, 788, 790 (Fla. 3d Dist. Ct. App. 1989). Analysis of statutory rights of action—ostensibly entirely independent of common law actions—often draw on common-law actions as models in gauging the significance of statutory complexity. For an especially clear and well worked out example, juxtaposing tort conclusions regarding duty and intricate statutory reading, see Horowitz v. Plantation General Hospital, 959 So. 2d 176 (Fla. 2007).

166. Inverse condemnation actions are illustrative. *See, e.g.,* S. Fla. Water Mgmt. Dist. v. Basore of Fla., Inc., 723 So. 2d 287, 288 (Fla. 4th Dist. Ct. App. 1998), *rev. denied*, 740 So. 2d 527 (Fla. 1999). *See also* Sch. Bd. v. King, 940 So. 2d 593, 601–03 (Fla. 1st Dist. Ct. App. 2006) (delimiting right of action enforcing “adequate provision” requirement of FLA. CONST. art. IX, § 1 (legislative funding of public schools)).

terms point to alternate enforcement means or suggest reasons why common law actions would—within the given setting—be problematic. The same structure of analysis also suggests, obviously, that the mere possibility that the Florida Legislature might fashion alternate enforcement mechanisms, litigative or otherwise, is not in and of itself reason to treat a constitutional provision as not self-executing. This possibility lies in the background with regard to all rights enforced through common law actions.

Article I, section 21, it should be apparent, does not give constitutional status as such to common law rights, but instead fixes a duty of due regard. These seem to be the suppositions: Common law rights of action are understood to identify interests which, at the time the actions were first acknowledged by courts, were thought to be in need of a particular, particularly express form of legal protection—judicial process and remedies. It may be that other, cross-cutting interests will later matter more, defining new legal agendas of concern. Article I, section 21, requires that new legislative arrangements understandably address this conflict.¹⁶⁷ Changes must be capable of defense both within the new terms—as responses to the new concerns—but also within or at least vis-à-vis the former agenda—as either arrangements which continue to take seriously (albeit in different ways) the interests furthered previously, or as express judgments of relative priority.

b. Florida due process of law

Article I, section 9, limits legislative discretion to restrict common law defenses.¹⁶⁸ “Procedural due process . . . requires that a defendant be able to rebut a statutory presumption.”¹⁶⁹ Assertions like this recur

167. See *Kluger*, 281 So. 2d at 4. Common-law recognition of substitutes for common-law actions—e.g., enforcement of contractual agreements to arbitrate claims in lieu of litigation—also entail a “due regard” inquiry: judicial consideration of public policy, bargaining dynamics (unconscionability), and consideration. See *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 398 (Fla. 2005).

168. See FLA. CONST. art. I, § 9. Because article I, section 21, fixes a legislative duty of due regard, it becomes apparent why this constitutional provision narrowly focuses on restrictions of rights of action as such and not affirmative defenses and the like. Defenses are not, we can see, unequivocally “affirmative” (except as a matter of pleading rules). See FLA. CONST. art. I, § 21. They do not necessarily mark judicial or legislative commitments to protect certain interests, perhaps replacing or revising earlier commitments, but may merely fix limits of legal protection for the interests a right of action safeguards. Removing initial limits on a right of action, it appears, is therefore akin to recognizing a new right of action altogether. Judicial or legislative protection is *extended*, not withdrawn. Changes of this latter sort may still be constitutionally problematic. But they must be made to seem so set against a different backdrop, constitutional provisions other than the access to courts guarantee.

169. *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1254 (Fla. 1996). The Florida Supreme Court held, in this case, that Florida government could not bring suit to recoup Medicare benefits from third parties responsible for the illness or injury of Medicare

within Florida constitutional law. “[T]here must be a right to rebut in a fair manner.”¹⁷⁰ This is too terse, of course. The most telling cases, it appears, are assembled in *Campbell v. Skinner Manufacturing Co.*¹⁷¹ *Campbell* and the decisions to which it points—running as far back as Chief Justice Marshall’s opinion in *Tayloe v. Riggs*¹⁷²—are all versions of “lost instruments” cases, in which parties seek to substitute copies or testimony for missing judgments, deeds, contracts, or the like.¹⁷³ The opinions are notable in several respects. None purports to deny—indeed, all emphasize—that the documents allegedly lost are supposed to be, as a matter of law, decisive: absent these documents, plaintiffs have no grounds for proceeding.¹⁷⁴ But in each case—whatever the outcome in view of particular facts—the presumption is understood to be rebuttable.¹⁷⁵ Plaintiffs are afforded the opportunity to aver that needed documents are lost and prove, through witness testimony or the like, the pertinent content of the instruments.¹⁷⁶ “[L]etting the party in to prove the justice of the cause” is “important.”¹⁷⁷

The lost documents cases—generalized—suggest that the theory of “justice” that underpins the due process “right to rebut” is another version of the idea of due regard that also implicitly informs the Florida

recipients unless the government could identify individual recipients—even if recipients were so numerous as to make individual identification impractical, and notwithstanding a statutory provision excusing individual identification in such circumstances. *Id.* The Florida Legislature, moreover, could not authorize the state government to seek recovery from third parties on the basis of market share proof of causation and also seek judgments holding the same third parties jointly and severally liable. *Id.* at 1255–56. See also *Rollins, Inc. v. Butland*, 951 So. 2d 860, 873–75 (Fla. 2d Dist. Ct. App. 2006) (“pattern and practice” proof of statutory violation in class action inconsistent with due process because of denial of opportunity to defend as against individual class members).

170. *Straughn v. K & K Land Mgmt., Inc.*, 326 So. 2d 421, 424 (Fla. 1976), quoted in *Associated Indus.*, 678 So. 2d at 1254. *Straughn* cites two Florida Supreme Court decisions dating from 1911 and 1919: *Goldstein v. Maloney*, 57 So. 342, 344 (Fla. 1911); *Black v. State*, 81 So. 411, 413 (Fla. 1919).

171. 43 So. 874 (Fla. 1907), cited in *Goldstein*, 57 So. at 344.

172. 26 U.S. 591 (1828).

173. *Campbell*, 43 So. at 877 (missing deeds case), cites *Fries v. Griffin*, 17 So. 66, 68 (Fla. 1895) (lost deed), and *Edwards v. Rives*, 17 So. 416, 418 (Fla. 1895) (missing contract), each of which relies upon *Tayloe*, 26 U.S. at 592 (missing contract).

174. “This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract . . .” *Tayloe*, 26 U.S. at 598.

175. “A due regard to individual rights, as well as sound policy, requires that in cases of the establishment of lost instruments the proof as to the contents, or the substance of the contents, of the operative parts of such instruments should be clear and satisfactory.” *Fries*, 17 So. at 68.

176. “All of the instruments sought to be re-established belonged to that class known as ‘ancient instruments or documents,’ and to require the principles of evidence to be applied with technical nicety in such cases would oftentimes not only work great hardship, but would defeat the ends of justice.” *Campbell*, 43 So. at 877.

177. *Tayloe*, 26 U.S. at 597.

constitutional right of access to courts.¹⁷⁸ Changes in legal arrangements

178. In the two decisions cited in *Straughn v. K & K Land Management, Inc.*, 326 So. 2d 421, 424 (Fla. 1976), Justice Whitfield also points to then-recent due process opinions of the United States Supreme Court that underscore, it appears, the message of the lost documents cases. *See* *Goldstein v. Maloney*, 57 So. 342 (Fla. 1911); *Black v. State*, 81 So. 411 (Fla. 1919)

Justice Whitfield's own formulations borrow in compressed fashion from language included in the United States Supreme Court opinion in *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*:

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

219 U.S. 35, 43 (1910). Who determines what is "the main fact" or "all of the facts bearing upon the issue"? In a case like *Turnipseed* itself, in which the statutory presumption addressed an element in the already well-developed common law negligence action, there might not be much difficulty. But how would analysis proceed regarding a presumption inserted into an entirely statutory proceeding? Seemingly cognizant of the question, Whitfield also noted *Luria v. United States*, 231 U.S. 9 (1913), addressing the constitutionality of a congressionally enacted presumption that an individual obtained naturalization without the requisite intention to reside permanently in the United States if that individual thereafter established permanent residence in a foreign country within five years of the date of naturalization. In *Luria* the United States Supreme Court was plainly troubled. "No doubt, the reason for the presumption lessens as the period of time between the two events is lengthened." *Id.* at 27. Before upholding the presumption the Court construed it in terms substantially minimizing its effect. *See id.*

The presumption at issue in *Bailey v. Alabama*, 219 U.S. 219 (1911), *cited in Luria*, 231 U.S. at 26, provoked outright federal invalidation. An Alabama statute declared that an employee who quit work without repaying money owed or performing all services promised would be deemed to have intentionally and fraudulently breached a contract and therefore have committed a criminal act if the employee acted without cause. *See Bailey*, 219 U.S. at 227-28. In addition, Alabama courts had held, as "a rule of evidence," that a defendant could not rebut the statutory presumption by testifying "'as to his uncommunicated motives, purpose, or intention.'" *Id.* at 228 (quoting *Bailey v. State*, 49 So. 886 (Ala. 1909)). Justice Hughes, writing for a majority of the United States Supreme Court, described the resulting legal environment, as "the accused" confronted it:

If, at the outset, nothing took place but the making of the contract and the receipt of the money [given as payment in advance], he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt, there was nothing to be said as to that. The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. He stood, stripped by the statute of the presumption of innocence

Bailey, 219 U.S. at 236. Hughes was, plainly enough, using as his template the *Turnipseed* warning that statutory presumptions should not "preclude" a party from presenting "his defense to the main fact . . . presumed." Indeed, he quoted *Turnipseed* a few paragraphs later. *See id.* at 238-39.

must acknowledge the interests of adversely affected individuals, conceived as either potential plaintiffs or defendants. This does not mean that these interests must be straightforwardly accommodated—there may be overriding concerns. Rearrangements manifesting casual disregard, however, become constitutionally suspect or otherwise interpretively dubious.¹⁷⁹

c. The interpretive expectation

These propositions, it is easy to conclude, extend to define a stricture—itsself constitutionally developed—addressing drafters and interpreters of constitutional amendments, at least if such amendments would have immediate effect and unless the amendments themselves limit the applicability of access to courts and due process norms. Due regard becomes a basic interpretive norm—a default option, as it were—structuring causes of action: itself a commitment sounding in complexity, recognizing (requiring recognition of) interactions of affected interests. Judicial efforts to read amendments as or as not self-executing bring this duty to bear. Amendments framed expressly in terms that supply judicially-obvious intermediate premises—for example, terms plainly making use of common law back-and-forth—would be careful, in the sense in which judges define care: legal acknowledgement of competing considerations.¹⁸⁰ Amendments with terms that do not readily fit this form would require legislative implementation; legislative attention itself, however, would also itself require acknowledgement of access to courts and due process implications. The access to courts *idea*—along with the due process right to rebut *idea*—serve as indexes—as organizing biases structuring reading of a given constitutional provision (or implementing statute.) If modes of action are readily conceivable through considera-

179. See, e.g., *N. Miami Med. Ctr. v. Miller*, 896 So. 2d 886, 890 (Fla. 3d Dist. Ct. App. 2005).

180. Article VII, section 3(a), of the Florida Constitution declares that “All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation.” FLA. CONST. art. VII, § 3(a). In *City of Sarasota v. Mikos*, 374 So. 2d 458, 460 (Fla. 1979), the Florida Supreme Court held that this provision was self-executing and that, contrary to legislative definition, “used” included simply holding property for subsequent municipal undertakings. “[V]acant land held by a municipality is presumed to be in use for a public purpose if it is not actually in use for a private purpose on tax assessment day.” *Id.* Usual notions of property law—emphasizing title, possession, and the like—are plainly put to work. Ownership, is ordinarily consistent with simply “holding”—indeed “holdings” is another word for ownership. The Florida Supreme Court did not therefore rule inconsistently in *Florida Department of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla. 2005), concluding that, on particular facts, constitutional “municipal or public purposes” might not be served by a city’s operation of a fiber-optic network providing service, inter alia, to private customers. *Id.* at 253. This was a different, no longer common-law property question that the court addressed (continuing to treat article VII, section 3(a) as self-executing) through consideration of long-established constitutional law vocabularies evoked in both constitutional texts and prior judicial opinions.

tion of common law actions or analogs, or if responses are suggested by the same analogies, they ought to be understood to be concomitants of the provision, fit within the larger constitutional grouping, at least absent express conflicting language.

d. Some examples

Three cases illustrate how complex analysis of the “self-executing” question might work. The discussions that follow do not pretend to be definitive accounts—but they do try to identify the sorts of questions that attention to complexity might highlight.

*St. John Medical Plans, Inc. v. Gutman*¹⁸¹ addressed parts of article II, section 8—Governor Askew’s “Ethics in Government” amendment at issue in *Weber v. Smathers*.¹⁸² This was the language at issue:

A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.

. . . .

(c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.¹⁸³

The phrase “shall be liable” certainly seems, standing alone, to suppose that the constitutional language is itself legally operative. The initial use of the term “public trust” marks the matter at hand as concerning fiduciary duty and the later references to “private gain” and “financial benefits” further specify the remedial focus in restitutionary terms, evoking the familiar idea of unjust enrichment. *Gutman* addressed a suit brought against a state senator allegedly paid “an inappropriate \$500,000 fee.”¹⁸⁴ If the state had initiated the action against Senator Gutman, a strong case might have been made for invoking the amendment directly, framing the proceeding in familiar common law terms. Even in the face of the failure of the Florida Legislature to address “[t]he manner of recovery,” it certainly seems, common law would have supplied sufficient “law.”¹⁸⁵

But *Gutman* was a private action. The Florida Supreme Court decided—reasoning in largely conclusory terms—that the constitutional language was not self-executing.¹⁸⁶ At first glance, it appears possible to argue otherwise. Perhaps “the right” of the “people . . . to secure and

181. 721 So. 2d 717, 718–19 (Fla. 1998).

182. See discussion *supra* Part II. B.

183. FLA. CONST. art. II § 8.

184. *Gutman*, 721 So. 2d at 718.

185. *Id.* at 719.

186. See *id.* at 719–20.

sustain” “a public trust” implies a right, exercisable by any individual members of “[t]he people” to appear in court as trustees to enforce the trust.¹⁸⁷ Trustees do not recover in their own name; even so, common law courts are well able to fashion remedies assigning recovered funds properly. Common law trusteeship, however, supposes some sort of well-defined way to specify trustees. Trustees are fiduciaries—charged with appreciating competing interests, acting with care, and obliged to neutrality. Trusteeship, we might think, is precisely a legal personification of complexity. Public volunteers in cases like *Gutman* would neither have become trustees through contract negotiation nor through judicial appointment. It would seem therefore that—as the Florida Supreme Court declared—legislative action was indeed necessary—at least to fix a considered process through which individuals could qualify as public trustees.

The *1996 Amendment 5 (Everglades)* advisory opinion,¹⁸⁸ at least in retrospect, may be read from the access to courts perspective as implicating a question akin to that posed in *Gutman*. The central sentence in article II, section 7(b) announces that “[t]hose . . . who cause water pollution . . . shall be primarily responsible for paying the costs of the abatement of that pollution.”¹⁸⁹ Requesting the opinion, Governor Chiles seemed to treat the phrase “primarily responsible” as the “unclear language” chiefly frustrating direct enforcement of the constitutional requirement.¹⁹⁰ As I noted earlier, however, the Florida Supreme Court drafted a definition: “individual polluters, while not bearing the total burden, would bear their share of the costs of abating the pollution found to be attributable to them.”¹⁹¹ It is easy to see, moreover, that the court, in the course of accumulating dictionary readings,¹⁹² fixed its formula in terms plainly of a piece with the Florida common law commitment to comparative fault.¹⁹³ “[W]hile polluters . . . must pay for 100% of the cost to abate the pollution they cause, Amendment 5 does not require them to pay for the abatement of such portion of the pollution they do not cause.”¹⁹⁴ Even so, the Court insisted, section 7(b) was not self-executing: “Amendment 5 raises a number of questions such as what constitutes ‘water pollution’; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might

187. *See id.* at 718.

188. *In re* 1996 Amendment 5 (Everglades), 706 So. 2d 278 (Fla. 1997).

189. FLA. CONST. art. II, § 7(b).

190. *See id.* at 280.

191. *Id.* at 283.

192. *See id.* at 282.

193. *See Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).

194. *Amendment 5 (Everglades)*, 706 So. 2d at 283 n.12.

such a claim be asserted.”¹⁹⁵

The last question—standing—is the crucial one here. (*Everglades* in this respect resembles *Gutman*.) As Governor Chiles had noted, the South Florida Water Management District and the Department of Environmental Protection were “the governmental entities charged with enforcing . . . Everglades pollution abatement initiatives.”¹⁹⁶ The legal instruments establishing these entities provided for administrative enforcement regimes, subject to usual forms of judicial review.¹⁹⁷ Presumably, the appropriate public officials were therefore in position to determine and levy abatement charges and to sue. Does it therefore follow that individuals—charged with fees, for example—could bring independent actions in Florida courts invoking the constitutional formula in order to challenge the fees? In 2002, the Florida Supreme Court concluded that the Everglades amendment precisely failed to address this question. “The lack of guiding principles in [the amendment] concerning this division of responsibility is precisely why we held that legislative action was needed.”¹⁹⁸ Article I, section 21, becomes irrelevant in this setting. The issue was not whether a common law action might be capable of enforcing the amendment—rather, the anterior question whether or not the jurisdiction of pertinent government entities precludes addressing what in substance common law actions might or might not encompass.¹⁹⁹

Due process of law might remain suggestive, however. If individuals refused to pay Everglades related fees at a point when the Florida Legislature had made no effort whatsoever to devise a formula identifying the responsibility of polluters, would they have no chance to defend their refusal by invoking the Everglades amendment simply because the Florida Legislature had not adopted implementing legislation? “We believe the voters adopted Amendment 5 to effect a change,” the Supreme Court asserted—“no change” would “nullify the Amendment, and frustrate the will of the people.”²⁰⁰ Given the “lost documents” cases and the right to rebut they recognize, should not defendants have the opportunity to try to show what “share of the costs of abating the pollu-

195. *Id.* at 281. The Florida Supreme Court also put forward its *in pari materia* argument, *see id.*, that I criticized earlier. *See* discussion *supra* Part I.

196. *Amendment 5 (Everglades)*, 706 So. 2d at 280.

197. *See, e.g., Ass'n of Fla. Cmty. Developers v. Dep't of Env'tl. Prot.*, 943 So. 2d 989 (Fla. 1st Dist. Ct. App. 2006); *Webster v. S. Fla. Water Mgmt. Dist.*, 367 So. 2d 734 (Fla. 4th Dist. Ct. App. 1979).

198. *Barley v. S. Fla. Water Mgmt. Dist.*, 823 So. 2d 73, 83 (Fla. 2002).

199. *See generally* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); Louis L. Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

200. *Amendment 5 (Everglades)*, 706 So. 2d at 282.

tion” Everglades polluters would bear?²⁰¹ The constitutional amendment would be understood as authorizing judicial recognition of a defense in the particular case in no way abridging the legislative authority to fix a general formula—just as the lost documents cases did not deny legislative power to require proper papers in general. Of course, if individuals could raise the defense, it is hard to see why they could not assert their defense preemptively, as it were, in an advance declaratory proceeding.

Buster is also not without difficulties. The Florida Supreme Court’s terse opinion noted that the “[p]atients’ right to know” amendment (article X, section 25) treated the right of access to medical records that it defined and protected as not only substantive but as also “encompass[ing] current document production procedures . . . provided ‘by general law.’”²⁰² The possibility that the amendment’s own definitions might leave open “a number of relevant and unanswered questions” did not preclude concluding that the amendment supplied a “sufficient rule”—rather, merely raised the possibility that “the amendment could be supplemented by legislation.”²⁰³ The court also held, however, that the initial legislative response was unconstitutional in important respects because, in several of its sections, the statute “substantially limited the right of access granted pursuant to the amendment.”²⁰⁴

At least in part, the inconsistency of the implementing statute appeared to be so unambiguous, we may think, because the *Buster* opinion had already concluded that the earlier legislative limits, in place prior to ratification, protected no confidentiality interests rising to the level of “vested rights.”²⁰⁵ There was no due process reason to read the amendment as open to cautious glossing. Does this make sense? The amendment is self-executing, and also open to legislative gloss—albeit not to address questions of fairness? What constraints would article X, section 25 set on judicial interpretations and applications of “current document production procedures”—discovery is, after all, principally judicial business? If the new constitutional language is (as the Florida Supreme Court suggested) simply a statutory repeal, it might be possible to argue that the amendment implicitly acknowledges that the principal limit on judicial innovation lies in the Supreme Court’s usual interpretation of the separation of powers principle declared in article II, section 3, characterizing the judicial/legislative divide through elaboration of a

201. *Id.* at 283.

202. Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 480, 486 (Fla. 2008) (quoting Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960)).

203. *Id.* at 486.

204. *Id.* at 492; *see id.* at 492–93.

205. *See id.* at 490–92.

substance/procedure distinction.²⁰⁶ The amendment might therefore be read as leaving the judiciary alone, at least with respect to the range of issues ordinarily associated with thinking about pre-trial discovery as such.

What if, entirely consistently with judicial separation of powers thinking, the Florida Legislature addressed discovery procedures with regard to medical errors, prompted not by process concerns, but by substantive worries originating, say, in a view that encouraging proper hospital risk management efforts requires confidentiality protections? If the amendment itself is *substanceless*—just a repeal—shouldn't it be read (to the extent textually possible) as consistent with this sort of legislative reaction? The legislature could enact confidentiality entitlements not because of fairness concerns, but as a means to the end of motivating hospital risk management. If so, article X, section 25, ends up as not much more than a constitutional reset switch, putting the burden on the Florida Legislature—once again—to consider the usefulness of confidentiality protections.

B. *Canonical Indexes and Ballot Summary Accuracy*

The ballot accuracy question presented in *Armstrong v. Harris*²⁰⁷, its predecessors, and its successors is best approached obliquely—once more, I will treat the constitution as complexly organized. I begin by considering the meaning, the underlying point, of the single subject requirement limiting the Florida Legislature set out in article III, section 6. The response that I propose turns on an elaboration of the idea of “canonical indexes” (a notion that I will try to give some content below). That idea, it appears, also supplies an opening wedge for reconsidering the ballot accuracy cases.

I. THE LEGISLATIVE SINGLE SUBJECT ANALOGY

“Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.”²⁰⁸ This demand, included in Florida constitutions since 1868,²⁰⁹ is plainly concerned with process in some sense. Litigants may raise the issue only in cases arising before challenged legislative action is codified, within a window therefore always open less than two years.²¹⁰ Reenactment cures the constitutional defect even though codification

206. See discussion *supra* Part II.

207. 773 So. 2d 7 (Fla. 2000).

208. FLA. CONST. art. III, § 6.

209. See *Gibson v. State*, 16 Fla. 291 (1877).

210. See *State v. Johnson*, 616 So. 2d 1, 2 (Fla. 1993).

legislation, we might think, is in substance quintessentially multiple. The process worry, pretty obviously, must be fair notice.²¹¹ Legislation should make clear what it is that it addresses (codification enactments do this). The single subject requirement is instrumental, therefore: it works to make meaningful the accompanying title requirement.

The recent judicial debate about how to give concrete content to the legislative single subject requirement emphasizes precisely the several dimensions of the fair notice objective. In *State v. Franklin*,²¹² Chief Judge Schwartz, writing for a majority of the Third District Court of Appeal sitting en banc, upheld an omnibus enactment concerned mostly with criminal sentences but also—in one instance—the substance of serious crimes. All of the separate parts of the bill were, in light of Florida Supreme Court decisions, “sufficiently related” to the goal of protecting “the public from repeat and serious violent felony offenders.”²¹³ Notably Schwartz added an extended dictum:

The issue of whether a multi-section statute violates the “single subject” rule is one of those perplexing legal controversies in which general rules and decisions embracing them may be found, indeed multiplied, on each side of the particular controversy, . . . and the result, and the group of cases to be cited in support of it, lies ultimately in the eye of the judicial beholder.²¹⁴

He would have (had he charge of the Florida Supreme Court) put an end to judicial enforcement of the legislative single subject requirement:

[T]hat . . . the single subject provision affects only the legislators themselves, leads also to . . . the suggestion that that clause is properly subject only to interpretation and enforcement by the legislature (which frequently engages in just this sort of self-regulation on the floor) and the governor in making his decision on whether to approve a particular bill, rather than the courts. Such a holding would vindicate the sound and often discussed but seldom applied principle that every branch of the government is responsible for the enforcement of pertinent provisions of the constitution.²¹⁵

Judge Cope (who would succeed Judge Schwartz as Chief Judge) dis-

211. See *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957); *Colonial Inv. Co. v. Nolan*, 131 So. 178, 179 (Fla. 1930). *Canova* mentioned “log rolling” as well as notice concerns. *Flink*, 94 So. 2d at 184. Subsequent Florida Supreme Court opinions sometimes give priority to the logrolling worry. See, e.g., *State v. Thompson*, 750 So. 2d 643, 646–47 (Fla. 1999). But if logrolling were an independent concern, subsequent codification should not moot the question of the initial bill’s constitutionality. It makes more sense, plainly, to think of logrolling as a legislative possibility giving rise to the fair notice apprehension.

212. 836 So. 2d 1112 (Fla. 3d Dist. Ct. App. 2003) (en banc), *aff’d*, 887 So. 2d 1063 (Fla. 2004).

213. *Franklin*, 836 So. 2d at 1113.

214. *Id.*

215. *Id.* at 1114 n.4 (emphasis in original).

sented. Cope identified “a simple method of analysis” rooted in the language of the constitutional requirement itself.²¹⁶

The key to single subject analysis is that the Legislature must state the single subject in the title. It is the Legislature’s responsibility to say what the single subject is. Where a single subject challenge is raised, the judiciary’s sole role is to find the legislatively-stated single subject and determine whether it covers the contents of the legislative Act.²¹⁷

The approaches proposed by the two Chief Judges are, we can see, brilliant. Schwartz recast judicious retreat as affirmative adjudication—as an injunction to legislative and gubernatorial responsibility. Cope recognized that legislative compliance with the constitutional titling requirement relieves judges of the need to identify the relevant statutory subject and therefore opens a way for close judicial scrutiny of statutory coherence—scrutiny that, as it figured in his opinion, need not employ any special vocabulary since it purports to check a prior legislative determination and thus may proceed, ostensibly minimally, in ordinary language terms.²¹⁸ Reviewing the third district decision, the Florida Supreme Court, dividing 4-3, eschewed brilliance (it may seem). Chief Justice Pariente’s majority opinion passed over Judge Schwartz’ suggestion. Pariente did initially adopt Judge Cope’s focus on the legislatively-specified short title. But she also worried about instances in which the legislature proffered an utterly bland, entirely broad formula, and—plainly inconsistently with Cope’s proposal—treated the analysis of coherence as inviting an open-ended, swamping consideration of “the citation name, the full title, the preamble, and the provisions in the body of the act,” and also (if necessary) “the history of the legislative process.”²¹⁹ “There is no bright line rule”²²⁰ Justice Quince, although dissenting, argued similarly. Analysis required finding “the true subject,” which might or might not be “expressed in the title.”²²¹

216. *Id.* at 1116 (Cope, J., dissenting) (emphasis omitted); see discussion *supra* note 11 and accompanying text.

217. *Franklin*, 836 So. 2d at 1116 (Cope, J., dissenting).

218. Both approaches, it should be noted, required important preliminary work. It was not only necessary for Judge Schwartz to show the confused state of judicial thinking about the single subject requirement; he also needed to demonstrate how frequently single subject inquiries involved consideration of statutory provisions substantively irrelevant to the immediate facts of the case at hand. Judge Cope was obliged to work through several possible candidate titles presented on the face of a statute—the long title (essentially naming every part), the short title (the initial summarizing phrase following the enacting formula), and (in some instances) the popular name legislatively-assigned to a statute. Cope concluded that the language of the constitutional titling requirement itself marked the short title as the pertinent one.

219. *Id.* at 1077–78.

220. *Id.* at 1079.

221. *Id.* at 1086 (Quince, J., dissenting).

Why did Chief Justice Pariente augment and in the process undercut Judge Cope's analysis? Cope agreed with Judge Schwartz that the proper perspective from which to appreciate the single subject requirement was legislative, and that the proper role of the judiciary, in this instance, was to hold the Florida Legislature to its constitutional duty—to assure itself fair notice. Disagreement concerned only the means to the common end. Pretty obviously, Pariente (and also Justice Quince) did not start with the idea of a distinctive legislative perspective. Legislative drafters can hardly be expected to monitor closely all parts of a bill and also its legislative history, at least in cases (the cases most likely to raise the single subject issue) in which the content of legislation is a work in progress. Platonic attention to "the true subject" also seems unlikely in this context. The Florida Supreme Court, it appears, instead adopted the point of view of readers rather than writers of legislation. The Justices wrote as they read, in other words, as judges or, more democratically, as skeptically attentive legal readers regardless of office. Concern for possible legislative titling games, appreciation of the potential usefulness of various legal materials, reservation of the independent stance—all are of a piece.

But if the fair notice demand underlying the legislative single subject requirement does not originate in the distinctive needs of legislative process, what is the concern to which it responds, the concern that gives it content? Consider: Titles index. Legislative titles are readers' guides to what (the titles make it appear) matters most in complex legislative texts.²²² For purposes of interpreting a legislative enactment in advance of codification, legislatively-attached titles may serve as an at least thin substitute for the rich catalog of priorities the surrounding sequence of codified provisions—including their own sets of section and subsection headings—often affords readers seeking to assign emphases to the terms of individual provisions.²²³ Titles mark legislative priorities and thus identify emphases readers should bring to bear in judging the implications of not yet codified enactments. Titles, thus, are not simply

222. It is important to distinguish between titles given bills by legislators as part of the enactment process and titles inserted by codifiers as part of their editorial work. The latter efforts—it is well-established—are not legally pertinent. *See supra* note 219. I use "titles," therefore, to refer to legislatively-added titles only.

223. "A heading of a section or subsection of a statute is part of the law and can be used to glean statutory intent." *Vill. of Wellington v. Palm Beach County*, 941 So. 2d 595, 600 (Fla. 4th Dist. Ct. App. 2006), *rev. denied*, 954 So. 2d 29 (Fla. 2007); *see Fajardo v. State*, 805 So. 2d 961, 963 (Fla. 2d Dist. Ct. App. 2001) (citing earlier decisions). For an emphatic concatenation of illustrations of how, subsequent to codification, the arrangement and substance of surrounding statutory provisions may be put to use in judicial interpretation of individual enactments, see *Horowitz v. Plantation General Hospital*, 959 So. 2d 176, 181–86 (Fla. 2007).

indexes—they are specifications of canonical emphases.²²⁴ It is this normative mapping, we can see, that explains the inclusion of the single subject limit alongside the titling requirement. Genuinely scattershot legislation, even if accurately titled, would suggest nothing about relative priorities (there would be no relative priorities to suggest) organizing the enacted bill.²²⁵ Codification makes titular markings often much less relevant—not necessarily because codifiers substitute their own system of titles (codifiers are administrators and not themselves legislators),²²⁶ but because codifications locate statutory provisions, supply a substantively adjacent context of other statutory provisions giving content to consistency norms or other interpretive disciplines. We can therefore understand both the purpose and also the short shelf life of the single subject discipline.

2. BALLOT SUMMARY ACCURACY

Ballot summary scrutiny might be understood as a variant of the legislative single subject inquiry—as the Florida Supreme Court has itself recently noted.²²⁷ The summary, within the terms that I have developed here, identifies canonical emphases—selects from the accumulated terms included in a proposed amendment primary elements to be taken seriously in processes of interpretation.²²⁸ Interpretation is in

224. “Canonicity is not a property of the work itself but of its transmission, its relation to other works in a collocation of works” JOHN GUILLORY, *CULTURAL CAPITAL* 55 (1993). I use the term “canon” here in its literary sense, and not in the sense, for example, of the familiar idea of “canons of construction.” For this latter use, in especially sophisticated fashion, in the context of interpretation of constitutional amendments, see Frickey, *supra* note 161, at 504–26.

225. *State v. Thompson*, 750 So. 2d 643 (Fla. 1999), supplies an especially obvious example: The legislation there was largely concerned with criminal law sentences and procedures in connection with prosecution of violent criminals. *See id.* at 647. But two sections of the bill provided (1) a civil cause of action for damages in cases of violation of injunctions protecting against domestic violence; and (2) another civil action—for both compensatory and punitive damages—in cases of continued domestic violence. *See id.* Although all parts of the bill were concerned with violent acts, it is not difficult to argue that the legal contexts within which the criminal law changes and the civil action additions would need to be assessed are plainly substantially different.

226. On codifiers as administrators and their titling as persuasive only, *see State v. Bradford*, 787 So. 2d 811, 818–19 (Fla. 2001), and *State v. Bussey*, 463 So. 2d 1141, 1143 (Fla. 1985). *See also* FLA. CONST. art. X, § 12(h) (“Titles and subtitles shall not be used in construction”).

227. *See Fla. Dep’t of State v. Slough*, 992 So. 2d 142, 148–49 (Fla. 2008).

228. Constitutions in South Africa, India, and a few other states incorporate “directive principles” as “guides,” in particular instances “a point of reference” or “interpretation tool.” Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961, 970 (2000); *see* G. Alan Tarr & Robert F. Williams, *Foreword: Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1119–20 (2005) (discussing possible applicability in U.S. state constitutional settings). It is not clear whether consideration of these principles is a mandatory part of interpretation—and thus strongly canonical—or rather, whether consideration is presumptively proper if undertaken (weakly

important part always also installation, presupposing and accomplishing the necessary work of fitting amendment text within the larger context of the Florida constitution, indeed Florida law generally. Ballot summaries matter, therefore, because they figure—potentially, anyway—in an interpretive undertaking that is not only part of the process of voting, but also encompasses drafting and implementation of constitutional amendments, therefore connecting voting with these other efforts. From this perspective, *Crawford v. Gilchrist* and the *Armstrong* case overlap.²²⁹ The key question is not whether voters might have—within any given electoral process—alternative sources of information, but whether a proposed amendment includes legally necessary materials: including, inter alia, a sufficient specification of how the proposed amendment fits within the larger set of pertinent legal materials. Accordingly, a summary becomes misleading if it fails to mention or mischaracterizes parts of a proposed amendment that in fact plainly, substantially change Florida law—or alternatively, misleadingly presents parts that in fact leave Florida law unchanged.²³⁰

a. As applied

Armstrong v. Harris itself fits readily within this account. The ballot language there failed to mark adoption of the federal understanding of cruel and unusual punishment as working a significant change in Florida law.²³¹ Recent ballot summary decisions, moreover, frequently pick out summary elements plainly central to interpretive efforts generally—including but extending beyond the voting decision. Thus, an acceptable summary must “clearly state[] the chief purpose of the measure”²³² Insistence on statement of purpose might at first appear to be unexceptionable and thus unrevealing—but the literal language of an amendment might not declare its purpose in so many words, and thus one sort of summary at least (a fair copy, as it were) would not either. But purpose as such matters much precisely if the ballot summary is itself a relatively autonomous legal document, assigned its own distinct task: *indexing*—orienting or organizing voters or judges or administra-

canonical.) Within a regime that acknowledges the possibility of multiple indexing schemes, weak canonicity may itself suffice to establish the preeminence of canonical indexes.

229. Regarding *Crawford v. Gilchrist*, see discussion *supra* pp. 19–22.

230. See, e.g., *In re 1.35% Property Tax Cap*, 2 So. 3d 968, 975–76 (Fla. 2009); *Slough*, 992 So. 2d at 148–49; *In re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 641–43 (Fla. 2004). Express acknowledgement that a proposal substantially changes Florida law is not necessary if the summary of the proposed amendment’s own terms plainly implies the change. E.g., *In re Health Hazards of Second-hand Smoke*, 814 So. 2d 415, 418–19 (Fla. 2002).

231. *Accord In re Treating People Differently Based on Race*, 778 So. 2d 888, 898 (Fla. 2000); *In re People’s Prop. Rights*, 699 So. 2d 1304, 1308–09, 1311 (Fla. 1997).

232. *Health Hazards of Second-hand Smoke*, 814 So. 2d at 419.

tors processes of interpretation.²³³ The interpretive point of view is especially obvious in cases dealing with problems posed by definitions. Proposed constitutional language occasionally includes broad wordings that drafters leave undefined; in other instances, proposed amendments incorporate quite specific possibly esoteric or artificial definitions. What should ballot summaries disclose? The Florida Supreme Court has held that at least some open-ended terms in proposed amendments left undefined must be identified as such in ballot summaries; proposed terms left undefined but readily associated with straightforward or otherwise predictable legal definitions need not be stressed;²³⁴ summary terms that are associated with insufficiently obvious legal definitions fail unless the pertinence of the definitions is somehow noticed in ballot summaries.²³⁵ Notice here is plainly not notice concerning the substance of a proposed amendment (a voter is not well-positioned, in the moment immediately

233. *City of Miami v. Staats*, 919 So. 2d 485, 486 (Fla. 3d Dist. Ct. App. 2005) illustrates one variation. This case did not involve a proposed constitutional amendment, but rather a nonbinding straw ballot question presented to voters as part of a special county-wide election: "Straw Ballot Question No. 1 Shall the voters of Miami-Dade elect the Tax Assessor instead of the County Manager of Miami-Dade County appointing the Tax Assessor?" *Id.* For present purposes, this difference does not matter: Citing *Armstrong v. Harris* and *Askew v. Firestone*, the Third District Court of Appeal panel ruled the ballot question invalid. *Id.* at 487. Judge Fletcher emphasized that the ballot language failed "to adequately inform the voting public that their response has no official effect . . ." *Id.* (Judge Fletcher also noted that the question did not clearly state that the matter was not a city affair strictly but, if binding, would have required county-wide approval; in addition, the ballot language erred in identifying the office it addressed. *Id.* Neither of these latter difficulties would have mattered if it were plain that the results of the vote would be nonbinding.) Uncertain voters would not be able to discern from the language of the presented question itself—phrased in manifestly decisive terms—that they were being asked to participate in an advisory exercise. The ballot language thus confused (in this sense falsely communicated) its own claim to a particular legal status (as a request for advice).

The phrase "straw ballot" itself, however, was included in the ballot language. *Id.* at 486. Judge Fletcher had to have supposed—he did not discuss the matter—that "straw ballot" insufficiently proclaimed voting results to be nonbinding, or that the emphatic cast of the ballot language put in question, in this particular context, the usual meaning of the phrase. Even so, we might wonder, if the straw ballot would have been regarded by city and county officials, as well as courts, as only advisory (officials no doubt knew what a "straw ballot" was), what precisely was the problem created by confused voters? The real damage done, it might be argued, was interpretive. Officials—like voters—could not be sure as to what the results of the straw ballot meant. Some voters might have voted negatively because they thought they were being asked to change law and, even if they had an initial opinion, they were unwilling to act decisively. Others might not have voted at all because the question appeared to be legally decisive and these voters too were not ready to act (even if they held initial opinions). If so, Judge Fletcher was right (within the terms of the argument I have developed) to invoke *Armstrong* and *Askew*.

234. *See, e.g., In re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195, 201 (Fla. 2007); *In re Referenda Required for Local Land Use Plans*, 938 So. 2d 501, 504–06 (Fla. 2006); *In re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1237 (Fla. 2006); *In re Same Fee for Same Health Care Serv.*, 880 So. 2d 659, 665 (Fla. 2004).

235. *See, e.g., Fla. Minimum Wage*, 880 So. 2d at 641–42; *Health Hazards of Second-hand Smoke*, 814 So. 2d at 418–19; *Treating People Differently*, 778 So. 2d at 896–99; *People's Prop. Rights*, 699 So. 2d at 1308–09.

prior to voting, to consider closely the significance of a constitutional text's gaps or intricacies—even assuming the text was at hand). Rather, notice is notice of the potential significance of interpretation down the road: the possibility that subsequent judicial or administrative readings of proposed constitutional language might substantially shape a would-be amendment's legal impact.²³⁶ At the same time, therefore, notice of this possibility is tantamount to marking pertinent terms as *rightly* understood as delegations, as primary topics for judicial or administrative elaboration and improvisation.²³⁷

b. *Buster* revisited

Perhaps notably, within the perspective that I am sketching here the ballot summary addressing the constitutional amendment scrutinized in *Florida Hospital Waterman, Inc. v. Buster*²³⁸ appears problematic. The summary asserted: “This amendment would give patients the right to review, upon request, records of health care facilities’ or providers’ adverse medical incidents, including those which could cause injury or death.”²³⁹ Opponents argued that the summary overstated the change in Florida law that the amendment might work because there were “existing methods to obtain this information.”²⁴⁰ The Supreme Court concluded—utterly persuasively—that an earlier sentence in the summary declaring that “Florida law ‘restricts’ information concerning adverse medical incidents” was careful enough: “The amendment creates a broader right to know about adverse medical incidents than currently exists.”²⁴¹

Amendment opponents, it appears, did not call attention to the interplay of the proposed Florida constitutional language and United States statutory directives.²⁴² The federal Health Care Quality Improvement Act provides that “any person” associated with “professional review action” by a “professional review body” (for example, a hospital peer review board) “shall not be liable in damages under any law of the

236. See, e.g., *In re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). See also *Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 671–73 (Fla. 1st Dist. Ct. App. 2007) (failing to distinguish between amendments and revisions without practical significance).

237. See, e.g., *In re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004) (obviously vague term “medical liability” undefined in summary was sufficient reference to matters “better left to subsequent litigation”).

238. 984 So. 2d 478, 482 (Fla. 2008).

239. *In re Patients' Right to Know About Adverse Med. Incidents*, 880 So. 2d 617, 619 (Fla. 2004).

240. *Id.* at 623.

241. *Id.*

242. See *id.* at 621–22.

United States or of any State (or political subdivision thereof) with respect to the action” if the review process was properly conducted as statutorily defined.²⁴³ Congress, however, did not in so many words privilege information generated by peer review investigations and the like.²⁴⁴ In this respect, the federal act and the Florida constitutional amendment are not in direct conflict.²⁴⁵

But Congress also explicitly declared:

Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.²⁴⁶

This provision, while allowing states to provide “greater” immunities or other “protection” for peer review processes, effectively encapsulates the principal programmatic thrust of the federal statute: the statute’s own specifications of proper peer review procedures fix threshold conditions determining whether information disclosed in the course of peer review inquiry may become a basis for damages liability otherwise recognized under either federal or state law. Thus, if records developed in peer review proceedings disclose apparent facts suggestive of hospital or physician negligence implicating not only the doctor or doctors who are the immediate focus of peer review proceedings,²⁴⁷ but also “any” other person, these disclosures might be said to be generated by “professional review action” within the meaning of the Health Care Quality Improvement Act. Peer review and subsequent lawsuits might therefore be understood to be tied sufficiently closely together to meet the Act’s “with respect to” test for damages immunity.²⁴⁸ The federal statutory immunity would therefore seemingly govern, even if Florida’s own, evi-

243. 42 U.S.C. § 11111(a) (2006); 42 U.S.C. § 11112 (2006) (review procedure requirements). Although questions as to the applicability of the Act’s immunity often arise in suits brought by physicians directly contesting hospital denial of staff privileges, other individuals or entities who provide information to peer review panels and who are sued also may claim the immunity. *See, e.g., Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 39 (1st Cir. 2002).

244. *See* § 11111(a); *Imperial v. Suburban Hosp. Ass’n*, 37 F.3d 1026, 1030–31 (4th Cir. 1994).

245. *W. Fla. Reg’l Med. Ctr., Inc. v. See*, 18 So. 3d 676, 685–86 (Fla. 1st Dist. Ct. App. 2009).

246. 42 U.S.C. § 11115(a) (2006).

247. This possibility is considered at length and analyzed characteristically trenchantly by my colleague Mary Coombs, in *How Not to Do Medical Malpractice Reform: A Florida Case Study*, 18 HEALTH MATRIX 373, 420–23 (2008).

248. *Cf. Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 372 (2008) (state law was “with reference to” for statutory preemption purposes insofar as it “produces the very effect that the federal law sought to avoid”).

dently narrower peer review immunity did not.²⁴⁹

The ballot summary “right to review” characterization, set against the backdrop of federal law as well as Florida law, now appears carefully drawn: “review” makes no claim regarding *use* and therefore implicitly acknowledges the possibility that whatever is learned in the process of “review” may have no practical value for litigation purposes, for example. But this nuanced hedge is also in tension (putting it mildly) with ordinary legal understandings of “right.” “Right” implies—presumably—the possibility of legal action to give effect, to enforce, to act legally in some meaningful way. It may well be, of course, that there are efficacious modes of acting that remain available even if access to courts through usual modes of suit are not. But given ordinary legal understandings, shouldn’t the ballot summary have pointed in some clearer way to the likely only limited modes of recourse that federal law might leave individuals exercising their Florida constitutional “right to review”? *Armstrong v. Harris* redux?²⁵⁰

249. See FLA. STAT. §§ 766.101 (3) & (4) (2007); *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So. 3d 236, 243 n.1 (Fla. 4th Dist. Ct. App. 2009). Enforcement of general tort obligations—for example, the duty of care—may fall within the scope of federal statutory preemption even though, within their own terms, tort duties themselves do not single out and specifically address matters as characterized in federal statutes—the key, it appears, is whether common law duties respond—crucially, in substantively different ways—to the same general concerns that prompt federal law. See, e.g., *Riegel v. Medtronic, Inc.*, 522 U.S. 312, 321 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442–43 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522–23 (1992) (plurality opinion).

250. Cases involving abuse of amendment submission procedures, I would argue, are not *Armstrong* cases even if such cases involve conduct plausibly characterizable as efforts to deceive election officials and voters. Amendment processes as such are ordinarily irrelevant to the task of fitting amendment language within the larger constitutional and legal ensemble. If abuse of process voids an amendment accurately presented to voters and other interpreters, some other explanation must lie. *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 556 (Fla. 1st Dist. Ct. App. 2006), presents a recent challenging case. The allegation—treated as true for purposes of summary judgment—was that proponents of a legalized gambling initiative (approved by voters) had acted fraudulently by claiming that submitted petitions were in compliance with constitutional requirements. *Id.* at 557. The First District Court of Appeal held that voter approval did not cure the fraud, were it ultimately proved at trial. *Id.* at 561. The challenge to the petitions was brought before the election, but the Circuit Court postponed ruling until after election day. *Id.* at 557. The court relied repeatedly on *Crawford v. Gilchrist*’s insistence that constitutional propositions are binding law. *Id.* at 560–61 (repeatedly quoting *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912)). See discussion *supra* Part II. B. “[C]ompliance is mandatory.” *Floridians Against Expanded Gambling*, 945 So. 2d at 560. But there were also recurring invocations of *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000)—sounding the theme that proponents had, if allegations held up, worked “to fraudulently create the illusion” of complying “with the mandatory constitutional prerequisites.” *Floridians Against Expanded Gambling*, 945 So. 2d at 561. “[I]t is difficult to say how the voting public would have voted on the amendment if the public knew it was placed on the ballot by the proponent’s fraudulent conduct.” *Id.* at 561 n.6. Do we really suppose that voters are influenced (or should be) by the assumption that a proposal satisfied the signatures requirement? Should voters defer—to some extent—to proponents’ wishes because enough people signed petitions? No one would suppose

... 3. OVERLAPS

The ideas that I argue should be treated as shaping identification of self-executing amendments and analysis of the content of ballot summaries are not entirely distinct – in this respect themselves evidence the complexity implicit in Florida constitutional understandings. We catch glimpses in decisions of the Florida Supreme Court reviewing legislation regulating initiative procedures.

*Smith v. Coalition to Reduce Class Size*²⁵¹ addressed an effort of the Florida Legislature to introduce into the initiative process a requirement that the then-Secretary of State prepare a financial impact analysis of all initiative-proposed constitutional amendments, and place a fifty word summary on the ballot along with the ballot distillation of the text of the proposed amendment.²⁵² The legislature also voted to put the same requirement on the next election ballot as a proposed constitutional amendment.²⁵³ The issue in *Smith*, raised and decided before the election (at which voters approved the constitutional amendment²⁵⁴), was whether the Legislature was constitutionally empowered to enact the statutory version of the financial impact analysis requirement.²⁵⁵ Writing for a majority of the court, Justice Harding thought not. Nothing in the language of article XI, section 3, addressed or presupposed financial impact statements.²⁵⁶ Article XI, section 3, is “a self-executing constitu-

that the proposed amendment, once adopted, would implicitly repeal the signature requirements, replacing them with some “plausible misrepresentation” substitute. If that were the effect, of course, *Armstrong*’s concerns (as characterized here) would be precisely pertinent. Disclosure of petition processes should have been made. (Arguably, the single subject question might also loom.) Perhaps the First District was not willing to rest its decision solely on *Crawford* because, as Chief Justice Whitfield also acknowledged in *Crawford*, “mandatory constitutional prerequisites” encompassed only those constitutional specifications deemed to be “essential mandatory provisions” or “vital elements.” *Floridians Against Expanded Gambling*, 945 So. 2d. at 560 (quoting *Crawford*, 59 So. at 966–68). Invoking *Armstrong* and the voter perspective, it might have seemed, provided a way of distinguishing what was “essential” or “vital” from what was not. But if the *Armstrong* concerns are not actually apt, what then? Of course, if the question of voter deception derives from the mismatch of ballot summary language and the substance of the proposed constitutional amendment, *Armstrong* is plainly pertinent, even if the substance of a proposed amendment was process. *In re Nonpartisan Commission to Apportion Legislative Districts.*, 926 So. 2d 1218, 1228 (Fla. 2006), concerned a summary that declared that the proposal established a “non-partisan method of appointment” for selecting members of the apportionment commission set up by the amendment. *Id.* Looking at the actual wording of the amendment, however, the Supreme Court concluded that “[w]hile the commission itself may operate in an independent, nonpartisan fashion, the method of selecting the commission members is decidedly partisan.” *Id.* at 1228–29. The summary was thus invalid. *Id.* at 1229.

251. 827 So. 2d 959 (Fla. 2002).

252. *Id.* at 960.

253. *Id.*

254. See FLA. CONST. art. I, § 17.

255. *Smith*, 827 So. 2d at 961.

256. *Id.* at 963.

tional provision.”²⁵⁷ Including a financial impact analysis in ballot language was not “necessary to ensure ballot integrity.”²⁵⁸ The statutory provision for impact analysis was unconstitutional.²⁵⁹

Justice Harding quoted at length from *State ex rel. Citizens Proposition for Tax Relief v. Firestone*.²⁶⁰ In this 1980 opinion, Justice Overton emphasized the “delicate symmetric balance” implicit in the constitutional provision for both legislative and initiative proposed amendments.²⁶¹ “[A]ny restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process.”²⁶² As a result, legislative regulation of initiative processes was proper only in connection with preservation of ballot integrity.²⁶³ “Ballot integrity is necessary to ensure the effectiveness of the constitutionally provided initiative process,” and thus would not “weaken . . . the initiative process.”²⁶⁴ Overton’s *Tax Relief* opinion did not draw Harding’s distinction between constitutional provisions that are or are not “self-executing.” Did Harding and Overton disagree in any fundamental way? Reading article XI, section 3, Justice Harding was plainly invoking the idea of “sufficiency,” indeed a version evocative of a very strong model of straightforward organization—the amendment itself supplied all that was pertinent, in this sense possessed an “integrity” that the Florida Legislature was required to respect. Justice Overton’s insistence that ballot integrity must be the touchstone in judging legislative additions is plainly of a piece.

It may be argued, however, that Harding and Overton, focusing closely on article XI, section 3, pushed substance—the content of would-be amendments—too far to the margin. These proposals, of course, would add to the Florida Constitution their own emphases, marked initially in ballot summaries or subsequently in interpretive glosses. In particular, therefore, the question of financial costs and benefits might seem pertinent to voters gauging whether to support added commitments and also to other, later interpreters judging the extent and implications of constitutional emphases. Article XI, section 3 ought not to be read in isolation, we may think—but read complexly, acknowledging the substance of proposed amendments and their possible

257. *Id.* at 962.

258. *Id.* at 963.

259. *Id.* at 964.

260. 386 So. 2d 561 (Fla. 1980).

261. *Id.* at 566.

262. *Id.*

263. *Id.* at 567.

264. *Id.* at 566–67.

implications.²⁶⁵

The Supreme Court's recent decision in *Browning v. Florida Hometown Democracy, Inc.*, PAC²⁶⁶ revisited the question of legislative power to regulate initiative processes. This time, the issue presented to the court had to do with the constitutionality of statutory attempts to establish procedures addressing efforts by Florida citizens to revoke (withdraw or in effect remove) their signatures from initiative petitions. The accumulation of a sufficient number of signatures is a necessary step in moving a proposed constitutional amendment onto the ballot for voter consideration. Initially anyway, it is easy to understand the question of signature revocation to be a matter arising quite routinely in the course of initiative efforts, and therefore closely-tied—indeed, *integral*—to the constitutional scheme of initiative amendment. The Florida Supreme Court nonetheless ruled that the statutory effort was invalid.

The legislation allowed political action committees to draft, distribute, market, and submit signature-revocation forms—to in effect mount signature-revocation campaigns. Moreover, under the law, revocation was irrevocable—a Florida citizen could not legally change her or

265. *In re Extending Existing Sales Tax*, 953 So. 2d 471 (Fla. 2000), shows how conclusions about self-executing provisions become—sometimes complicatedly—part of the legal background pertinent in ballot summary assessment. Two proposals defining procedures to be used in considering whether to include various services within the reach of the state sales tax, held up too long in the early stages of the initiative process, incorporated July 2008 deadlines for legislative action that fell in advance of the November election at which voters would consider the proposals. *Id.* at 488. As a result, if voters approved the proposals, the amendments—if implemented literally—would subject most services to tax. *Id.* at 484. The ballot summaries, otherwise judged to be accurate, did not acknowledge this result. *Id.* at 485. The Florida Supreme Court held that the summaries were defective. *Id.* at 492. In 1995, however, the Court had approved another proposal, authorizing casino gambling, that set a July 1995 deadline for legislative action, also impossible to meet since the proposal would not come before voters until November 1996. *In re Fla. Locally Approved Gaming ("FLAG Initiative")*, 656 So. 2d 1259, 1263–64 (Fla. 1995). Justice Amstead, writing for the *Sales Tax* majority, stressed what he took to be a clear distinction: “[I]n *FLAG Initiative*[,] legislative regulation was clearly contemplated as a predicate to the amendment becoming operable, whereas, in this case, the critical part of the amendment is self-executing.” *Extending Existing Sales Tax*, 953 So. 2d at 484. It is not clear, though, that the Florida Supreme Court fully worked out the implications of the self-executing notion in this context. The proposals did not, by their terms, take effect (if passed) until January 1, 2009. *See id.* There was therefore a window within which the Florida Legislature could undertake the review that the proposals contemplated, even if it was literally too late. Would late review—say, in November or December rather than the pre-July review that the amendment supposed—be barred by the adopted proposals? Exercise of legislative judgment was plainly one main point of the proposals. We might reasonably conclude that the new tax procedures would not have been self-executing (in the strongest sense, anyway) until 2009. The pertinent question for ballot language would then become—should the summaries have noted the need for quick legislative action? The summaries, though, already did that in effect by calling attention to the January 1, 2009 deadline. *See id.* at 484–85.

266. No. SC08-884, 2010 WL 546768 (Fla. Feb. 18, 2010).

his mind a second time and again sign a second petition proposing a given amendment.

These signature-revocation campaigns are inherently designed to vitiate the effectiveness of the petition-circulation process because those entities conducting revocation campaigns may submit their gathered revocation forms *as late as February 1 . . .*, which is *the same date* on which the Secretary of State must verify whether the initiative proponents have gathered enough signatures Hence, initiative proponents will likely receive no notice with regard to how many of their gathered, signed petition forms have been revoked until it is too late to gather, submit, and verify additional signatures. In operation, this timing requirement would erase the citizen-initiative process from article XI²⁶⁷

In a targeted fashion, these campaigns seek to change elector-signatories' minds . . . before any ensuing amendment referendum and accompanying public discourse occur Rather than curbing any alleged fraudulent practices present in the petition-circulation process, these provisions incentivize a race to the bottom Once an elector has signed but later revoked his or her signature, he or she may *NEVER* again sign the relevant initiative petition and, in a parallel fashion, initiative proponents are forever prohibited from obtaining this elector's support to place the initiative proposal on the ballot for the next general election. . . . The restrictions that the instant provisions place on the petition-circulation process substantially reduce the size of the audience that the sponsor can reach, and render it less likely that the sponsor can garner the requisite number of signatures²⁶⁸

But why shouldn't the court have deferred to the legislative judgment that signature revocation procedures were needed to protect against fraudulent signature submissions by initiative proponents and that authorizing PAC efforts to seek out citizens wishing to revoke signatures was an efficient means of protecting ballot integrity?²⁶⁹

[A]rticle XI, section 3, is a "self-executing" constitutional provision, which was adopted to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their fundamental organic law. . . . As a result, article XI, section 3 provides an additional check and balance against legislative and executive power, which is not present at the federal level. . . . Hence, . . . [the] assertion that the Legislature and the executive branch possess broad power to regulate the initiative process, subject in all cases to deferential review, is in direct conflict with the very nature of the

267. *Id.* at *4.

268. *Id.* at *4–5.

269. *See id.* at *16 (Polston, J., dissenting).

conferred fundamental right, which acts as a check on such power.²⁷⁰

Close judicial scrutiny therefore followed:

On one hand, constitutional provisions are presumed self-executing to prevent the Legislature from nullifying the will of the people as expressed in their Constitution. . . . On the other hand, the Legislature may provide additional laws addressing a self-executing constitutional scheme assuming that such laws supplement, protect, or further the availability of the constitutionally conferred right, but the Legislature may not modify the right in such a fashion that it alters or frustrates the intent of the framers and the people.²⁷¹

Justice Harding's assertion in *Smith* that the self-executing status of a constitutional provision mattered in considering legislative authority thus returns with a vengeance! In *Hometown Democracy*, "self-execution" defines the relationship of a given constitutional provision vis-à-vis others—in this instance ordinary acknowledgements of legislative and executive responsibility and thereby also fixes the appropriate judicial perspective. "Self-execution" becomes, in the process, a means of mapping constitutional complexity, a means of assigning priority to one provision and its commitments even while also acknowledging and fixing the pertinence of others. We can see also that this way of putting matters is a close cousin to the idea of "canonical indexing" that I have argued lies in the background in the ballot summary cases like *Armstrong v. Harris*. A provision, once identified as self-executing, becomes the key to grouping and differentiating, to ordering relationships across a range of now-understood as related constitutional provisions. And therefore, as the *Hometown Democracy* majority opinion made clear, whether a given provision is understandable as self-executing turns on whether it is possible for the provision to perform this indexing—whether in substance the provision includes enough working material to describe (to index) the larger constitutional relationships. "Congress passed the Act 'to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior.'"²⁷²

V. PREMISES

Constitutional complexity and associated notions work as *premises*—preoccupations or starting points that help orient and shape analy-

270. *Id.* at *6.

271. *Id.* at *7.

272. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 632 (3d. Cir. 1996) (quoting H.R. Rep. No. 99-903, at 2 (1986)).

sis. It is important, therefore, to acknowledge the suppositions that these premises themselves carry.

A. *Associating Voters, Judges, Administrators, and Legislators*

I make heavy use of an equation of voters, judges, executive officials, and legislators. Only if these several actors may be understood as participating in some relevant way (even if at different stages) in something like the same project—reacting to constitutional amendments—is it possible to underscore as central the distinctive problems of interpretation posed by constitutional conjunctions, terms in some sense playing off (or against or with) each other. The Florida Supreme Court's efforts, I argue, are best approached from this hermeneutic perspective. But why should we suppose that voters and judges, for example, are in some important sense involved in the same enterprise when they read and try to come to grips with constitutional provisions? Their tasks are plainly different, and often so too (we may think) their approaches. Professor Schacter elaborated on this theme emphatically and persuasively in her well-known study:

A central point suggested by this study is a radical rupture between two conceptions of law. Law, on the one hand, is seen by the courts . . . in highly *positivist*, material terms. . . . [T]he law principally consists of the statutory text and what is reflected in other formal legal sources The farthest this conception extends is to include ballot material, which is mandated by and prepared in accordance with state law, reduced to an identifiable text, and reminiscent of traditional legislative history.

Contrast a second, *popular* conception of law—law as it is seen from the perspective of the voters in an initiative campaign. . . . The words of the law are but a starting point for the larger, more complex, and sprawling social process of generating legal meanings. In the context of initiative laws, the mass media form a central, indeed constitutive, part of this larger organization and production of meaning.²⁷³

The assumption that voters and judges are quintessentially different is also difficult, however. Voters may vary a great deal in their methods of assessment and the measure of sophistication they actually bring to assessing and voting on amendment proposals. Should judges, confronting constitutional provisions that their own training and experience mark as complex, nonetheless read straightforwardly, on the assumption that that is the way they think that most voters read—or the way, at

273. Schacter, *supra* note 69, at 147–48; *see id.* at 131–38 (summarizing research on mass media influence). Schacter studied initiatives having the effect of statutes—not constitutional amendments. But this slightly different focus is immaterial for present purposes.

least, that the median voter reads?²⁷⁴ Should judges instead expand the range of materials they consider to encompass mass media depictions and the like in order to reconstruct the voter environment?²⁷⁵ Or should judges suppose that voters by and large suppose that judges will read constitutional amendments the way judges ordinarily read legal documents—sometimes complexly, therefore—even if voters do not read this way? Constitutional provisions come to the attention of judges within contexts identified—constitutionally—as proper occasions for judges to bring to bear the distinctive resources of legal instruments and processes. If constitutional provisions are “law” in the ordinary sense (as we so often declare), and if the capacity for complexity is an ordinary attribute of legal instruments, judges might be thought to be acting outside their office if they denied to themselves, in matters of constitutional construction, access to usual interpretive possibilities.

Jane Schacter is right. Voters and judges will likely sometimes (often?) understand constitutional language in different ways. But “this culture clash” may not be “problematic”²⁷⁶—or rather, it may not be *problematically problematic*. The possibility that popular and legal understandings diverge, I would argue, is a pointed challenge to drafters of amendment proposals and ballot language—a spur to trying to square popular norms and legal interplays, to acknowledging therefore *both* the felt necessities of the given moment and also the persisting institutional workings within which any particular constitutional proposal will have its effects.²⁷⁷ Judges and other lawyerly interpreters, of course, feel the same spur in constructing their own understandings of what amendments

274. It is possible to argue, of course, that judges should always interpret all constitutional provisions—and not just particular amendments—by attempting to adopt the perspective implicit in common understandings. Robert Williams has argued that this is in fact the distinctive methodological supposition of state constitutional law. See Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 194–97 (2002). Even setting aside problems posed by clear constitutional uses of terms of art and more oblique allusions to other bodies of law, it is hard to ignore the impact of repeated intense attention to constitutional terms, and the differing emphases that emerge, even if “ordinary language” is in some sense (as it surely is) the principal communicative medium—some differentiation in usage, the emergence of something like a distinctive genre, is hardly surprising.

275. For a sense of the difficulties involved in this approach, see Staszewski, *supra* note 7, at 46–47.

276. Schacter, *supra* note 69, at 149.

277. This twinned structure (or something much like it) is outlined at greater length and put to work in two remarkable articles, works of my colleague Bill Blatt. William S. Blatt, *Minority Discounts, Fair Market Value, and the Culture of Estate Taxation*, 52 TAX L. REV. 225 (1997); William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287 (1996). There may be circumstances, of course, in which this compound perspective is not pertinent, within which constitutional law and judicial interpreters must choose, for example, between acknowledging the independent significance of extra-constitutional acts and asserting the ordinary requirements of law. But the drafting, proposing, and judicial review of constitutional amendments would not ordinarily seem to be such occasions. The

accomplish. The three limits that the Florida Supreme Court has repeatedly taken seriously in considering amendments and amendment proposals, we can see, hold drafters—and at the same time the Justices themselves—to this task in different ways.²⁷⁸ The inquiry into whether amendments are self-executing rewards drafting that displays “due regard”—sufficiently recognizes the complexities created by competing interests. Ballot summary accuracy requirements insist that drafters include—mark as pertinent—all legally significant changes amendments would make, and not just those evocative of perhaps too-immediate or too-general public concerns. With regard to these matters, it appears, judges who draw upon their ordinary legal competencies in responding to proposal language and ballot summaries are simply playing their part in organizing and maintaining the requisite common constitutive tension.²⁷⁹

B. *Institutional or Formal Complexity?*

Much of the on-going debate about direct democracy begins with a comparison of initiatives and the like and legislatures. The underlying question concerns either the degree to which direct democracy is actually “democratic,” or whether the absence of “republican” filtering mechanisms built into representative institutions (paradigmatically legislatures) marks initiatives etcetera as troubling even if they are in some sense democratic.²⁸⁰ But these inquiries raise questions themselves. As deployed, ideas of “democracy”—more precisely, specifications of the democratic deficiencies of direct democracy—are often strikingly thoroughgoing, treating constitutional initiatives and the like as properly subject to suspicion in gross.²⁸¹ Elaborations of “republican” aspects of

Fourteenth Amendment of the United States Constitution may supply a counter-example. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–119 (1998).

278. The single subject demand penalizes efforts to draft amendments in ways that would purport to treat the amendments as though they were narrow responses to discrete problems if in fact the amendments might well have large effects vis-à-vis the overall constitutional structure. See Appendix *infra*.

279. The pertinence of ordinary expectations regarding the form and content of legal instruments is especially apparent in *Romer v. Evans*, 517 U.S. 620 (1996), in which the United States Supreme Court ruled that a Colorado initiative-proposed amendment was inconsistent with the Fourteenth Amendment Equal Protection Clause because the amendment, as drafted, imposed “a broad and undifferentiated disability on a single named group, [in this case, homosexual individuals] . . . unprecedented in our jurisprudence.” *Id.* at 632–33. “[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . .” *Id.* at 632. “It is not within our constitutional tradition to enact laws of this sort.” *Id.* at 633.

280. For thorough-going efforts to work within both perspectives, see Staszewski, *supra* note 7, at 39–59; Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–11 (2003).

281. For an over-arching, historically-framed development of this line of thinking, see Harry

legislative action proceed similarly.²⁸² To be sure, it is not impossible that legislative processes, carefully characterized, might sometimes provide a reference point for assessing initiatives and the like. For example, Philip Frickey's work in this vein highlights and evaluates, with notable sophistication, features present or absent in the content of particular proposals.²⁸³ The democratic starting point is also sometimes developed in similarly fine-grained ways.²⁸⁴ But as Frickey acknowledges—and as Elizabeth Garrett has demonstrated at length²⁸⁵—it is simply an inescapable fact that the overall constitutional regime, in many states, is mixed or “hybrid,” includes both modes of direction democracy and representative institutions as constituent elements.²⁸⁶ Approaches that develop models and criteria mostly by focusing on one or the other of the compounded elements appear to be always worrisomely incomplete, perhaps biased from the outset, and thus burdened as well as prompted by their own starting points.

What would “hybrid theory” look like? Professor Garrett's work stresses the interaction and sometimes complementarity of processes of direct democracy and institutions of representative government, considering ways in which, for example, officeholders or candidates use initiative efforts as adjuncts to their personal election efforts, at times thereby facilitating voter evaluation of candidates, but in other instances confusing or otherwise degrading the electoral environment.²⁸⁷ In an especially ambitious effort, she joins with Mathew McCubbins to outline in considerable detail an initiative scheme that takes legislative process as its governing analogy, at one stage indeed literally incorporates legislative involvement, and at several points includes administrative oversight and

N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997). An especially ambitious analytical argument for representative democracy vis-à-vis direct democracy is another important illustration. Clark, *supra* note 7. See also Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983 (2001).

282. The republican case for across-the-board skepticism is made emphatically in Professor Eule's now-classic article. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1548–51, 1558 (1990). For a more recent discussion, exploring institutional alternatives to judicial review as the principle republican protection, see Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 914–24 (2006).

283. See Frickey, *supra* note 161, at 510–26.

284. E.g., Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 OKLA. L. REV. 227 (2006); Elizabeth Garrett, *Commentary, Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005).

285. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005).

286. “[D]irect democracy is a part of government that affects the majority of Americans. Seventy-one percent of Americans live in a state or city (or both) that allows the popular initiative.” *Id.* at 1096.

287. See Garrett, *Promise and Perils*, *supra* note 284.

enforcement.²⁸⁸ This combination of modalities means to make possible an initial specification of policy parameters, subsequent disciplined elaboration, refinement and reconsideration of the content of initiative proposals, and ultimately effective implementation of initiative terms in the wake of affirmative popular vote.

But tâtonnement exercises of this sort, it seems clear, suppose background models of fair elections or good legislative or administrative order. In combination, these models may to some degree war with each other.²⁸⁹ But even considered separately, they may prove controversial. For example Dennis Thompson has sketched an account of fair election campaigns, in the process proposing a striking irrelevance theorem:

We should not design campaigns to disrupt the more stable, long-term views that most voters hold before the campaign starts (which they may not be able to articulate but which their predicted voting behavior expresses). To the extent that campaigns help all voters (including the late deciders) bring their decision on election day into line with their long-term views, they are serving a desirable democratic function. Campaigns are more likely to perform this function to the extent that they are balanced and focused on fundamentals.²⁹⁰

This is a plainly controversial assertion. At least sometimes, we might want to think, campaigns work and should work (intentionally or otherwise) precisely to put in question “stable, long-term views.” If so, destabilizing maneuvers are therefore sometimes precisely the point.

Exercises in direct democracy indeed possess this unsettling potential. “Direct democracy is by its nature a discontinuous, non-institutional, non-interactive lawmaking event”²⁹¹ If we accept these last propositions, we might reasonably doubt the overarching applicability of Thompson’s premise and its corollary norm of “balanced and focused,” forthrightly epiphenomenal campaigns.

In this article, I have sidestepped questions of legislative, administrative, and election norms. Instead of beginning with institutions, their core characteristics, and their interactions, I emphasize constitutions and amendments as documentary concatenations, the range of their substantive interplays, and the problems for interpreters that formal irresolution

288. Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299 (2007).

289. See, e.g., Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 713–14 (2001): “[T]he term ‘democracy’ irretrievably incorporates premodern conceptions of government that do not reflect our genuine political commitments. It is the administrative state, and not the concept of democracy, that embodies these commitments.” *Id.* Rubin briefly discusses initiative elections. See *id.* at 761–62.

290. Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1053 (2005).

291. Frickey, *supra* note 161, at 508.

presents. Institutional arrangements matter, of course. But attention to interpretive challenges—at least in the Florida context, I think—highlights opportunities the Florida Supreme Court’s work and the Florida Constitution itself suggest that might not otherwise be apparent. Just like institutional explorations, though, the tack I take implies background commitments. Principally, I associate problems (or resolutions) of constitutional meaning with complexity as it manifests itself in constitutional provisions. Complexity is not merely noise or static, a by-product of drafting accidents or political processes without meaningful content. Concurrences or tensions, conjunctions or overlaps or gaps, other sorts of formal wrinkles: these ought to be, often enough, plausible indicators of constitutional substance. Such juxtaposition effects, it might be said, are justified or refuted by results—the readings they motivate in and of themselves. Textual conjunctions, however, are not only—not necessarily points of origin as such for constitutional substance. Instead of focusing on interactions themselves, in their various forms, we might notice first the several constitutional provisions that are brought together. It is their separate contents set in relationship with each other that pose problems of reading; it is the arrived-at arrangement of the several provisions that frames—that constitutionalizes—the substantive interpretation that is ultimately put forward.

APPENDIX

On its face, the article XI, section 3 single subject requirement limiting initiative-proposed constitutional amendments appears—rather plainly—to evoke (indeed exemplify) the constitutional model of straightforward organization.²⁹² Read as a group, however, the decisions of the Florida Supreme Court enforcing this provision, I think, in fact point to a preoccupation evocative of constitutional complexity.

The initiative single subject requirement may be understood—the Florida Supreme Court has suggested—as responding to a deficiency in the initiative drafting process. “[T]he single-subject limitation exists because the citizen initiative process does not afford the same opportunity for public hearing and debate that accompanies the other constitutional proposal and drafting processes (i.e., constitutional amendments proposed by the Legislature, by a constitutional revision commission, or by a constitutional convention.)”²⁹³ In the cases that come before it, however, the Supreme Court frequently invokes two tests that put into question its own explanation. Legislatively-proposed amendments—like

292. See discussion *supra* page 905.

293. *In re Nonpartisan Comm’n to Apportion Legislative Dists*, 926 So. 2d 1218, 1224 (Fla. 2006).

initiative-proposed amendments—might group more or less independent propositions appealing to different voting blocs (so-called “logrolling”)—but logrolling dooms only initiative-proposed amendments. So too, legislatively-proposed amendments—again like initiative-proposed amendments—may redefine the responsibilities of more than one branch of state government—and again only the initiative proposal therefore fails.²⁹⁴ What is it about legislative deliberative processes that makes the difference? From a voter perspective, it would seem, legislative and initiative amendments present the same challenges.

Setting aside their recited formulas, Florida Supreme Court decisions, considered in the aggregate, suggest that the initiative proposals that are especially vulnerable are often proposals that are manifestly constitutionally underinclusive—not conflicted on their own terms, but seemingly leaving intact obviously inconsistent existing constitutional provisions.²⁹⁵ Shortfalls of this sort arbitrarily abbreviate proposals that would otherwise present voters with opportunities to consider the merits of substantial constitutional change. Constitutionally underinclusive proposals, we can also see, may not just complicate further the complex organization of the larger aggregate of constitutional indexes. Juxtaposition of an underinclusive proposal and unamended existing provisions, suggestive of opposing themes, might inject new divergences communicating unpredictably—perhaps chaotically—across understandings of still other constitutional provisions insofar as the proposal or its counters figure in formulations of indexes characterizing those provisions as well. Within these terms, the initiative single subject constraint enforces substantive focus and regulates jumbling of constitutional indices. It works as “a rule of restraint designed to insulate Florida’s organic law from precipitous and cataclysmic change.”²⁹⁶ Single subject review, it would seem, starts from pretty much the same worry that Justice Drew expressed in *Adams v. Gunter* in interpreting the predecessor constitutional limit—now revised to eliminate the temptation to textual game playing that the predecessor had invited.

Why, then, is there no single subject restriction governing legislature-drafted proposed amendments? Both initiative and legislative amendments should take into account pertinent constitutional complexity. We might think that legislative processes ought to be ordinarily well set up to do so, given their ordinary tendency to compromise and qualify. But under-elaborated amendments may occur in both legislative and

294. See, e.g., *id.* at 1224–26; *In re High Speed Monorail*, 769 So. 2d 367, 369 (Fla. 2000).

295. For an especially clear use of this analysis, see *In re Treating People Differently Based on Race*, 778 So. 2d 888, 894–95 (Fla. 2000). See also Gudridge, *supra* note 2, at 899–901.

296. *In re Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994).

initiative drafting processes because simplification appears to be a pragmatic tactic in electoral processes. The same pragmatism, it appears, might counsel drafting of constitutional amendments in ways that substantially understate their constitutional ambition. This is, arguably, less a problem in the legislative setting as such, which resists large-scale revision (we may think) most of the time. But this very tendency suggests the potential usefulness of an alternative process more open to ambition. We might understand initiative proposal to be that process (taking Governor Askew's "Ethics in Government" campaign as paradigm). Enforcement of the single subject requirement works to require articulation of constitutional ambition—embraced complexity.²⁹⁷

297. See Gudridge, *supra* note 2, at 899–901.