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## Florida Public Bond Financing – Comments on the Constitutional Aspects

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## FLORIDA PUBLIC BOND FINANCING—COMMENTS ON THE CONSTITUTIONAL ASPECTS\*

GROVER C. HERRING\*\* & GEORGE JOHN MILLER\*\*\*

*It is hard for an empty bag to stand upright . . . .*

Benjamin Franklin

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### I. INTRODUCTION

The fiscal policies of any community are a vital part of its operations. The greater public interest, except in times of depression, centers on what is to be paid for publicly, who is to pay for it, and in what shares. A distinct, yet closely related and equally important policy issue is whether to pay at the time or pay later. With state constitutional revision again to the fore,<sup>1</sup> some of the current discussion naturally turns to constitutional regulation of debt financing.

\* The authors wish to acknowledge the assistance of Miss M. L. Brewer, Treasurer of the City of West Palm Beach, Florida, and past president (1965) of the Florida Chapter of the Municipal Finance Officers Association for her assistance in gathering much of the basic research material utilized herein. A copy of each source referred to in this paper is on file in the Baron de Hirsh Meyer Law Library at the University of Miami School of Law, Coral Gables, Florida.

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1. For many months, under the able leadership of Chesterfield H. Smith, former

As might well be expected, disagreement exists. Are the existing provisions outmoded when considered in relation to Florida's economy of today? Should all constitutional restrictions be eliminated? Or should more be added? If so, what should the limitations be at the state level, at the county level, at the municipal level, and at the level of those overlapping areas usually called "special districts"? Should the limitations vary with the level? Should the limitations be substantive, procedural, or both? What types of measurement should be used in setting these limitations and, in any event, to what extent should they go into the constitution?

In attempting comments on some of these problems certain facts and figures not normally connected with a strict legal approach are important. Comparisons with federal debt financing and with debt financing in other states are helpful. On the other hand, Florida's own history is important because the constitutional provisions here discussed are viewed with an eye to Florida. What another state finds good or bad in practice is not necessarily the answer for Florida. As Holmes observed in his great treatise:

The life of the law has not been logic, it has been experience. . . . In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history, and existing theories of legislation.<sup>2</sup>

Similarly, in order to decide whether a change is desirable we must first ascertain what the law is. What it should be necessarily involves, in turn, an analysis of what it was, what it is, and what effects it has produced.

Some of the popular statements glibly repeated by statesmen and jurists, as well as by laymen, are worthy of analysis. Most of these statements are partial truths, or at least they have enough basis within a particular frame of reference to be rated by many as axiomatic. Yet few if any will stand up under thorough scrutiny and not one of them is completely accurate. Some are more nearly false than true. Accordingly, we later examine some of these stock remarks which masquerade as principles beyond challenge.

## II. DEFINITIONS

Although for reasons of space it is impossible to undertake an explanation of the innumerable technical terms commonly used in public bond financing,<sup>3</sup> a few basic definitions relating directly to this discussion

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president of the Florida Bar, a commission of outstanding persons from various walks of life has been working energetically on a proposed revision of the entire state constitution. Their recommendations will be carefully considered by the Florida Legislature, whose proposal will go to the electorate for adoption or rejection, FLA. CONST. art. XVII.

2. THE COMMON LAW 1 (1881).

3. Clear and accurate explanations of the terms most commonly used appear in INVEST-

should prove helpful, particularly in view of the general confusion in Florida regarding certain of the major distinctions.

A *bond* is a formal promise in writing and under seal to repay a certain sum of money at a fixed time to a specified party or to its holder, and to pay interest at a designated rate at definite periodic intervals.<sup>4</sup>

A *general obligation bond* is a bond secured in whole or in part by pledge of the full faith and credit of the issuing community, including its power to levy and collect ad valorem taxes on property therein. If a general obligation bond is subject to some special limitation, such as a fixed total dollar amount, or a certain percentage of assessed valuation of real property, or the average of the operating budgets of the community over the past three years, the bond is still a general obligation bond but is more properly referred to as a limited general obligation bond. This type of bond is quite common, and in general parlance the word "limited" is omitted in referring to it; it is lumped with unlimited general obligation bonds.

A *revenue bond* is a bond that is secured solely by pledge of the revenue produced by the facility or facilities for the benefit of which the bond is issued and its sale proceeds used, that is not secured directly or indirectly, in whole or in part, by a pledge of the issuer's faith and credit or of any of its taxing powers, including the power to levy or receive excise taxes, and that does not constitute a lien or encumbrance, legal or equitable, on any real property of the issuer or on any of its personal property other than the revenues pledged to secure payment of the bond.

A *special obligation bond* is a bond that is secured in whole or in part by a pledge of revenues derived from sources other than the facility or facilities for the benefit of which the bond is issued and its sale proceeds used, but that is not secured by pledge of the full faith and credit of the issuing community. A bond secured both by revenues from the facility being constructed and by one or more of the many taxes other than the ad valorem tax should be classified as a special obligation bond rather than a revenue bond, although it is actually a hybrid of the two.

Bonds are sometimes referred to by purpose as well as by source, for example: capital outlay bonds, housing authority bonds, road and

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MENT BANKERS ASS'N OF AMERICA, FUNDAMENTALS OF MUNICIPAL BONDS, 1-8 (3d ed. 1963) [hereinafter cited as FUNDAMENTALS].

4. This definition follows closely the one given in The New York Times, Apr. 17, 1966, § 11, pp. 5-6 [hereinafter cited as N.Y. Times Series]. This section presents a series of short articles, prepared by members of the Municipal Securities Committee of Investment Bankers Association of America, with clear definitions and explanations. The best comprehensive treatise on the legal aspects of bond financing is JONES, THE LAW OF BONDS AND BOND SECURITIES (4th ed. Bowers 1935). Unfortunately this 3-volume work is out of print, but several law libraries have copies. It was last supplemented in 1950.

bridge bonds, and water and sewerage bonds. No further definition of this type of bond is necessary here, but note that the two classifications should not be used interchangeably.

Bonds are also classified by certain structural characteristics. Such terms as serial issues, serial maturities, callable at a premium, and callable without premium are used, but the definitions of these terms are likewise unnecessary here.

### III. SKETCH OF FLORIDA BOND HISTORY

Investors and Florida taxpayers, especially the owners of homes and other immovable property, have both endured some bitter experiences in debt financing. These were more bitter for the real property taxpayers, since most of the issues in default were eventually paid off at their expense. As far back as 1841, following the 1837 national depression, Florida's excessive borrowing for unsuccessful internal improvements was the major factor in causing the state to default and finally to repudiate four million dollars of bonded debt; only three other states utilized this means of escape.<sup>5</sup>

Later, the gross mismanagement of Florida government by the carpetbaggers and the relatively "terrific" debt that they foisted on the state during the so-called "Reconstruction" of 1865-1876 marks another period of bond troubles.<sup>6</sup> Although the present constitution, adopted in 1885, set tight limits on incurring state debt<sup>7</sup> it left the local governments in a position to use public bond financing heavily for whatever the courts would uphold as "a public purpose." The local governments accordingly had a field day in later years.

To those of us who experienced it,<sup>8</sup> the boom of the early twenties was certainly not worth the debacle that started in the late twenties and continued into the thirties.<sup>9</sup> Florida led the nation in number of school taxing districts in default, placed third in the reclamation and irrigation district default race, lapped the field in the county default event, and also pulled handsomely ahead in the defaulting cities and towns event. In short, Florida won the national grand championship with points to spare.<sup>10</sup>

5. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 7-8 (1963) [hereinafter cited as HEINS].

6. DOVELL, FLORIDA 569-570 (1952) [hereinafter cited as DOVELL]. For a thorough and delightfully written survey of this period, with detailed analysis of a mass of supporting data, see chapters XIV-XV.

7. FLA. CONST. art. IX, §§ 6-10.

8. Mr. Herring wishes it distinctly understood that he is not in this age bracket.

9. See DOVELL, *supra* note 6, ch. XVIII, for detailed analysis and interpretation.

10. HILLHOUSE, MUNICIPAL BONDS 24-27, 83-87 (1936) [hereinafter cited as HILLHOUSE]. This treatise, written by the Director of Research, Municipal Finance Officers' Ass'n, was printed in 1936. Unfortunately it is out of print. As stated in its Preface, it is a "study in pathology," emphasizing the mistakes from the historical and administrative standpoint.

After that horse had left the barn for good and won his race, the legislature and the electorate closed the door part of the way on local issuance of general obligation bonds.<sup>11</sup> The objectionable feature was not so much that they placed an inequitable share of the total tax load on the real property owner, but rather that they placed the entire load of the risk on him alone.<sup>12</sup> Now, however, that another horse has joined the stable, in the form of recovery and state prosperity (except in some of the rural areas),<sup>13</sup> one again hears the cry that it is time to reopen the barn door.

The 1930 amendment did not attempt to stop public spending, and indeed it has not done so. But it did attempt to stop imposing the entire risk on the real property owner unless he consented to shoulder all of it by so voting. The result has been extensive use of revenue bonds and special obligation bonds for debt financing in Florida. The security underlying these bonds places some of the risk on the investor<sup>14</sup> and spreads the bulk of it among taxpaying homeowners, non-taxpaying homeowners,<sup>15</sup> and non-homeowners. The tax burden, as distinct from the risk burden, is proportional to the taxpayer's use of the facility for which the revenue bond is issued. As regards special obligation bonds, the tax varies with the amount of the taxed item that the user of it purchases; if he can afford to buy a lot of it, he can afford to pay more tax. The important point is, however, that when those who voted in the tax, or their elected representatives that voted it in, decide to abandon what they later regard as a sinking ship, they do not place the taxpaying homeowners in the dilemma of having to save the ship by themselves or sink with it.<sup>16</sup>

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Because of the scarcity of this reference, we note, from pp. 7, 25, 26, that as of Jan. 1, 1936 bond defaults had already occurred in 47 out of Florida's 67 counties, in 204 out of its 514 municipalities, in 79 out of its reclamation, levee, irrigation, and drainage districts, and in 28 of its special assessment districts, for a total default record of 621. The nearest other states on total figures were Arkansas with 290 defaults, Louisiana with 256, North Carolina with 250, Texas with 247, Michigan with 217, and California with 184.

11. FLA. CONST. art. IX, § 6.

12. The practical effect of this ultimate liability, contingent but painfully definite, is usually not felt until "good times" have spun though their inevitable cycle into relatively bad times, at which period any single group of taxpayers in the community is least able to carry the entire load.

13. It is doubtful whether many of these rural citizens, with their solid sense of values in life and their way of living, would have realized their supposed plight without the recent federal enlightenment. By federal standards the average Florida single citizen does not get enough to live on. The per capita income released Apr. 24 by the U.S. Commerce Department is only 2,547 dollars for 1964, but this figure still places Florida 28th among the 50 states. See *The Palm Beach Post*, Apr. 25, 1966, p. 1, col. 6.

14. We call attention to the fact that no one has presented a single argument, other than alleged increased cost to the borrower, in support of the notion that the investor should not bear some of the risk. As a practical matter he is surely better informed on the nature and value of the security underlying the bond issue than is the local taxpaying homeowner on what his ultimate tax liability will be.

15. The word "non-taxpaying" is here used with relation to the property tax. The exempt freeholder (who need not even be the head of a family) pays other types of taxes, just as the non-exempt freeholder does, but he bears no risk.

16. We discuss later, on the basis of the incomplete Florida figures available, whether

The legal history of Florida public bond financing would not be complete without calling attention to the fact that the stringent 1885 restrictions on issuance of bonds by the state are not the only provisions ever used by Florida. Article XII, section 7, of the Constitution of 1868 authorized the legislature to issue state bonds "for securing the debt of the state and for the erection of state buildings, support of state institutions, and perfecting of public works." In other words, the 1885 change was necessarily deliberate, regardless of whether one believes that it was wise. It is evident that the strictness of the limitation has resulted in later constitutional amendments, the use of special state agencies, and the arrangements for leasing and paying rent that have come into being since 1885. Florida bond history points up the need to consider seriously, at this time, the advisability of liberalizing state bond issuance to meet capital outlay for state highways, the state university system, and state office buildings, including expansion of the Capitol itself, and other projects definitely "state" in nature (in that they are not susceptible to financing by local governmental agencies).

#### IV. MAJOR CONSTITUTIONAL PROVISIONS RELEVANT TO PUBLIC BONDS

Florida has many constitutional provisions relevant to public bond financing. Patterson summarized these in 1953 in a thorough historical and analytical survey<sup>17</sup> covering not only municipal bonds but also those of other governmental agencies in Florida and those of the state itself. Although few major changes have occurred since the publication of his article, the passage of time requires a new examination of the law in this field. As practicing attorneys know and as laymen discover to their sorrow after proceeding on an uninspired reading of constitutional and statutory provisions alone, these provisions mean in practice what our supreme court says they mean at any given time. Arriving at accurate conclusions demands careful study of the relevant case law.

Fortunately a sound article bringing Patterson largely up to date has just appeared.<sup>18</sup> Since these articles are readily available, their de-

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this major type of bond financing has worked well in Florida, and whether investors have regarded their assuming a share of the risk in revenue bond financing as worth a substantially higher cost of borrowing.

17. Patterson, *Legal Aspects of Florida Municipal Bond Financing*, 6 U. FLA. L. REV. 287 (1953) [hereinafter cited as Patterson]. Giles J. Patterson, former president of the old Florida State Bar Ass'n, was for years one of Florida's outstanding bonds attorneys and was recognized by many as the best. The procedural aspects of the bond validation process under Florida Statutes ch. 75 (1965) is well covered by Messrs. Frank L. Watson and R. G. Cunningham, Jr., in Chapter 10, *Florida Civil Practice After Trial*, pages 567-605 (1966). This chapter explains how the bond validation proceedings should be handled under chapter 75, Florida Statutes and Fla. App. R. 4.3 including forms.

18. Madison, *Municipal Short Term Borrowing & Contracts*, Fla. Mun. Record, Apr. 1966, p. 8. Despite the title limitation, the author found it necessary to review many supreme court decisions because, as he points out, FLA. CONST. art. IX, § 6 makes no distinction between short-term borrowing and long-term borrowing. William M. Madison is city attorney of Jacksonville, a position he has held with distinction for many years.

tailed analyses will not be repeated; rather, this article will confine itself to the summary approach, filling in the few gaps that remain.

The major constitutional provisions on public bond financing appear in Article IX, sections 2, 6, 7, and 10.<sup>19</sup>

Certain tax provisions, though not express regulations of bond financing, are nevertheless relevant. These are the provisions directing the legislature to authorize counties and incorporated municipalities to assess and impose taxes for county and municipal purposes only, granting to owners of homestead realty an exemption from all taxation, except assessments for special benefits, up to an assessed valuation of 5,000 dollars, exempting from taxation real property to the assessed value of 500 dollars for every widow and every bona fide resident of Florida that has lost a limb or become disabled in war or by misfortune, exempting from taxation the household goods and personal effects to the value of 500 dollars owned by a family residing in this state, and exempting by negative wording all property held and used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes.<sup>20</sup> Bond financing is also practically affected by the constitutional prohibition of state income tax and the prohibition of any state inheritance or estate tax

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19. The portion of § 2 which is relevant here reads:

[N]o levy of ad valorem taxes upon real or personal property except intangible property, shall be made for any state purpose whatsoever. . . .

This 1940 amendment in effect bars the state from pledging real property taxing power; the state lacks this taxing power itself.

Section 6 reads:

The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, and the Counties, Districts, or Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts or Municipalities shall participate, to be held in the manner to be prescribed by law; but the provisions of this act shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such Counties, Districts, or Municipalities.

Section 7 reads:

No tax shall be levied for the benefit of any chartered company of the State, nor for paying interest on any bonds issued by such chartered companies, or by counties, or by corporations, for the above-mentioned purposes.

Section 10 reads:

The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stock-holder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

20. The provisions referred to appear respectively in FLA. CONST. art. IX, § 5; art. X, § 7; art. IX, §§ 9, 11; and art. XVI, § 16. We also call attention to the landmark case *Amos v. Mathews*, 99 Fla. 1, 126 So. 308 (1930), which held that state taxes must be used for state purposes, county taxes for county purposes, municipal taxes for municipal purposes, and special district taxes for special district purposes. See the discussion in *Patterson*, *supra* note 17, at 294-297. As regards the personalty exemption to a resident family head, the legislature in 1955 increased the exempted amount from \$500 to \$1,000, by FLA. STAT. § 192.201 (1965).



amounting to more, in state and federal tax combined, than the federal tax alone would be without the complementary state tax.<sup>21</sup>

A few major exceptions have been made to the basic principles originally laid down. These have been effected, as they should be, by constitutional amendment. The exceptions are: the levy of two cents per gallon on gasoline and the appropriation of the proceeds to retire county and district road bonds issued prior to July 1, 1931, with the surplus available for road and bridge construction; the appropriation of motor vehicle license tax proceeds to finance public school outlay and the retirement of bonds issued for this purpose; the grant of authority to the legislature to provide for special tax school districts and for the issuance of bonds by them for public free school use, subject to certain procedural and substantive limitations; the later authorization to the legislature to determine by law the apportionment and distribution of state appropriations to the county boards of public instruction; and the 1963 amendment creating the capital outlay and debt services trust fund for institutions of higher learning and junior colleges, appropriating thereto the revenue from gross receipt tax proceeds collected from every person, including municipalities, receiving payment for electricity, gas, use of telephones, and sending of telegrams.<sup>22</sup>

Finally, there are such relatively minor provisions as those authorizing issuance of revenue bonds to acquire land and equipment for outdoor recreation promotion; the exemption of motor vehicles (including since the 1965 amendment all trailers not permanently affixed to the land) from all outdoor taxation other than the state operational license tax; and the now expired exemption of taxation for a certain period on realty used by new industrial plants and motion picture studios.<sup>23</sup>

## V. COMPARISONS

State, county, and municipal bond financing in the United States has a long history. Some of it is disappointing but most of it is commendable, at least from the investor's standpoint.<sup>24</sup> In 1690 the Colony of Massachusetts, faced with mutiny by its soldiers and sailors, who were then fighting the French, floated successive issues totaling 40,000 pounds in five-shilling bills of credit. Drafting and printing expenses were minimal; the instrument consisted of 61 words. It was issued by order of the "General Court," bore no interest, had no maturity date in the earlier issues, and was not legal tender; but it was stated to be "in value

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21. FLA. CONST. art IX, § 11.

22. These provisions appear respectively in FLA. CONST., art. IX, § 16, and in art. XII, §§ 18, 17, 9 (and 7 to some extent) and 19.

23. These provisions appear respectively in FLA. CONST., art. IX, §§ 17, 13, 12, and 14. Also important is art. IX, § 15, which allows the legislature to distribute to the counties equally all state excise taxes on the operation of pari-mutuel pools.

24. For a thorough discussion see HILLHOUSE, *supra* note 10, ch. II.

equal to money," and the Colony treasurer had to accept it at face value in "all publick payments" and for any Colony stock in the treasury.<sup>25</sup> Though naively conceived when judged by modern standards and not a bond by strict definition, it served the purpose of a bond.

By 1950 the total of state, territorial, and municipal bonds outstanding exceeded 23 billion dollars; and by 1960 it exceeded 66 billion, with over three-fourths of the total increase occurring after 1925.<sup>26</sup> Today the total is approximately 100 billion dollars.<sup>27</sup> By way of comparison, the annual cost of local government in the United States has risen from 8 billion dollars in 1946 to more than 46 billion in 1964, the recent rate of increase being eight percent a year.<sup>28</sup>

While the recent "Great Society" budgets of well over 100 billion dollars annually, without counting social security,<sup>29</sup> substantially exceed the state, county, and municipal annual operating costs, the ratio of roughly two to one does not warrant the remark, frequently heard of late, that state and local governments have become unimportant.

A comparison of the relative federal-local ratios of outstanding debt to annual costs is noteworthy. The federal government runs at a ratio of three to one, without counting the social security debt, even while imposing a much larger current tax burden on the taxpaying citizens.<sup>30</sup> The state and local ratio is only two to one, as the foregoing figures show.

25. LEBENTHAL & Co., INC., MUNICIPAL BONDS FOR THE INDIVIDUAL INVESTOR 6-8 (1960) [hereinafter cited as LEBENTHAL]. This pamphlet is recommended to anyone first approaching the subject of municipal bonds.

26. FUNDAMENTALS, *supra* note 3, at 25; LEBENTHAL, *supra* note 25, at 9.

27. The figures of U.S. Bureau of the Census, reported in the *Municipal Finance Officers' Association News Letter*, Jan. 1, 1966, p. 1, show the total of this debt on June 30, 1965 as 98.7 billion dollars, of which all but 6 million was long-term debt. Of the long-term total, the state debt aggregated 26.2 billion, while that of local governments accounted for 66.5 billion; *cf.* GOODBODY & Co., THE BOND BUYER'S MUNICIPAL FINANCE STATISTICS, Mar. 1966, p. 26 [hereinafter cited as GOODBODY], INTERNATIONAL CITY MANAGER'S ASS'N, THE MUNICIPAL YEAR BOOK 231-234 (1965) [hereinafter cited as MUN. YEAR BOOK], N.Y. Times series, *supra* note 4, at 3.

28. GOVERNMENT AFFAIRS FOUNDATION, INC., STATE CONSTITUTIONAL RESTRICTIONS ON LOCAL BORROWING & PROPERTY TAXING POWERS iii (1965) [hereinafter cited as GAF]. This publication gives an excellent summary for each state.

29. This huge additional item, though never officially admitted to be a tax, is from any practical standpoint an added tax for those who work and therefore have to pay it. Though the public has been deliberately duped as to these levies by the official reference to social security payments in such euphemisms as "trust fund" and "old-age insurance," the only "trust assets" are an I.O.U. from succeeding generations—assuming they will be willing to demand from themselves the necessary "contributions" and will be able to pay these. Needless to say, the very government that follows this practice would not dream of letting insurance companies use future premiums owed by their policyholders as their reserves. If this federal "trust fund" were added to the officially admitted national debt, that debt would even now be more than double the admitted figure, which presently is conceded to be 325 billion dollars; see FEDERAL RESERVE BANK OF PHILADELPHIA, THE NATIONAL DEBT 8 (1965).

30. From the Special Report on the Allocation of the Tax Burden and the Benefits of Government Expenditures by Income Class 25 (1966), prepared by Tax Foundation, Inc., a non-profit organization with offices at 50 Rockefeller Plaza, New York, as of the 1961 figures.

This comparison, at the very least, indicates that the state and local governments have been much more successful in paying as they go and more conservative both in leaving unpaid remainders as their legacy to succeeding generations and in superimposing on their own present tax burden the growing amount of tax proceeds needed merely for interest on debt.<sup>31</sup>

The state and local governments have attained this result despite the fact that the bulk of state and local debt has been incurred to meet part of the cost of building educational facilities, public utilities, and roads, the useful life of which logically warrants letting their future users pay some of the installments provided the prospective useful lives of these facilities are properly calculated from the standpoint of probable obsolescence as well as simple physical deterioration.<sup>32</sup> In other words, the state and local governments have something to show for their expenditures of borrowed funds, yet have borrowed less.

One reason for the disparity in ratios is the fact that state and local governments are closer to the people, who are able to maintain more effective control of their representatives in government, not only through elections but also through referendums on specific debt issues and through the opportunity to vote on proposed constitutional amendments or charter changes. Another reason is that, with a few notable exceptions,<sup>33</sup> the highest state courts have not shown the ingenuity of their federal counterparts in circumventing constitutional provisions. They have preferred to let the electorate decide the issue by voting on constitutional amendments.

Many scholarly theorists in the field of local finance are now recommending the complete abolition of restrictions on incurring local government debt, preferring to leave decisions of this nature to the unlimited discretion of the representatives chosen for local government leadership. This view is argued, for example, by L. L. Ecker-Racz, Assistant Director, Advisory Commission on Intergovernmental Relations,<sup>34</sup> The underlying philosophy is that "progress in the country's private sector goes hand-in-hand with an enlarging dependence on governmental programs."<sup>35</sup>

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31. FEDERAL RESERVE BANK OF PHILADELPHIA, *THE NATIONAL DEBT* 5 (1965), gives the 1965 annual figure alone on the national debt as 11 billion dollars; in 1964 the figure was over 10.7 billion, CONGRESSIONAL QUARTERLY SERVICE, *CONGRESS AND THE NATION* 391 (1965). For statistical tables going back to 1791, when the federal debt was 75 million dollars, see FAIRFIELD PUBLISHERS, INC., *THE STATISTICAL HISTORY OF THE UNITED STATES* 720-721 (Rev. ed. 1965).

32. For an analysis of these uses of debt proceeds for all the states see *FUNDAMENTALS*, *supra* note 3, at 24; for Florida see KILPATRICK, *DEBT PROBLEMS OF FLORIDA MUNICIPALITIES* 12-13 (1953), a pamphlet published by University of Florida Public Administration Clearing Service.

33. *E.g.*, *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799 (1938), *appeal dismissed*, 303 U.S. 627 (1938); *Dyche v. City of London*, 288 S.W.2d 648 (Ky. Ct. App. 1956).

34. *Local Tax and Debt Limits—Time for a Change*, release of an address delivered before Section of Local Government Law of A.B.A., August 11, 1964.

35. *Id.* at 2. The "progress" in the United States in the private sector consists, as of

Mr. Ecker-Racz points out that between 1952 and 1962 local governments increased their general expenditures from 17 billion to 40 billion dollars. Of the 23 billion of new current financing, state and federal aid provided only about one-fourth. They more than doubled their property tax collections, which accounted for seven out of eight of their new tax dollars. In addition they increased outstanding debt from 23 billion to 60 billion. The "shackles on local governments," he argues, were imposed when prudence in the conduct of municipal finances left much to be desired.<sup>36</sup> "Like other relics of bygone days," he continues, "they should now be relegated to the archives of historical museums;" the improvement in the quality of local government leadership, and the increased alertness of the public to the conduct of local government affairs justify allowing local government officials to deal with debt problems in the fashion that seems best to them.

Professor Heins reaches the same conclusion in recommending that full borrowing be restored to state legislatures with neither referendums nor any of the other restrictions currently found in state constitutions.<sup>37</sup> He reaches this conclusion by another route, however. In particular, he points to the fact that the states have found ways to circumvent limitations imposed by state constitutions, primarily by the use of revenue bonds issued by state agencies, by the creation of public corporations and authorities with substantial borrowing powers, by lease-purchase agreements, and by inter-agency lending within the state.<sup>38</sup> He concludes that if there is no desire to borrow the restrictions are not needed; if a desire to borrow exists, state legislatures will find a way to do so, regardless of restrictions.<sup>39</sup>

The two lines of argument here summarized are difficult to follow when considered together. On the one hand, the public is urged to trust its representatives implicitly because of the great improvement in the leadership placed in office. On the other hand, the public is urged to remove all restrictions because these leaders cannot be trusted even to follow the organic law established by the public as the basic framework of government; restrictions will be circumvented in any event.

Since these two conflicting lines of argument lead to the same conclusion, one might well suspect that something is wrong with the conclusion. Admittedly the huge scientific strides of recent years have radically changed the conditions under which we live. However, the

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1965, of private debt of 882 billion, up 530 percent over 1945; public debt amounts to 418 billion, up 42 percent over 1945; and the total debt is 1.3 trillion, up 199 percent over 1945, and is still growing, "Your Debts: Too Big?" in U.S. News & World Report, June 14, 1965, p. 45.

36. Ecker-Racz, *supra* note 34, at 4.

37. HEINS, *supra* note 5, at 87, 90.

38. *Id.* at 14.

39. See note 37 *supra*.

authors would submit that no evidence has been presented to indicate that human nature has changed drastically, if at all. To many a politician the soundest investment is still the one that will buy the largest bulk of votes at the next election. The federal and state governments in this country have always been based on a democracy that is not only representative in type but also constitutional. At the local level virtually all municipalities have charters which serve the purpose of a constitution.

Furthermore, as far as Florida is concerned, the facts do not bear out any contention that provisions setting the limits of governmental financial activity are necessarily so ineptly drafted as to be ignored by our state legislature and our judiciary.<sup>40</sup>

One of the most useful decision-making tools used in the purchase of bonds are the ratings accorded them by organizations devoted exclusively to the preparation of such ratings. The symbols used are intended to give the relative classification of a given bond with regard to safety of investment. Bonds with the lowest probability of loss of investment are rated highest. The rating does not purport to indicate probable market changes; neither does it take into consideration the desirability to some purchasers of a higher yield or net return. The mechanics of rating are beyond the scope of this article.<sup>41</sup>

In the United States two major organizations rating state and local bonds are Moody's Investors Service and Standard and Poor's Corporation. Two of the real experts in this field, whose knowledge is based on practical as well as theoretical experience, have presented a careful analyses of the factors that go into a rating, with particular emphasis on Florida, its bond climate, and its major problems. One analysis was delivered by Walter H. Tyler, vice President of Standard and Poor's Corporation, in 1962. Two others were presented in 1960 and 1964 by David M. Ellinwood, vice president of Moody's and later vice president of Morgan Guaranty Trust Company of New York.<sup>42</sup>

Mr. Ellinwood in the fall of 1960 compared bond issues for the first six months of the year in Florida and Connecticut, because both had a comparable volume of financing during that period. Florida paid an average interest rate of 4.126 percent which was 27 percent higher than

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40. See the later portion of this article headed *FLORIDA CASE LAW*, *infra* text page 50.

41. The reader desiring to see how ratings are put together can find a brief explanation in *FUNDAMENTALS*, *supra* note 3, at 21-23, as well as in the manuals published by the two large rating organizations referred to in the text following this note.

42. The Tyler address, *Municipal Bond Rating*, was presented in 1962 at the 20th Annual Short Course for Municipal Clerks and Finance Officers at U. of Fla. Ellinwood's 1960 address, *Municipal Interest Costs in Florida—Some Whys & Wherefores*, appears in *Fla. Munic. Record*, Dec. 1960, p. 32; and his 1964 address, *Factors in Analyzing Municipal Credit*, was delivered to the Section of Local Gov't Law, A.B.A., August 12, 1964 [hereinafter referred to respectively as Ellinwood 1960 address and Ellinwood 1964 address].

the Connecticut rate of 3.253 percent. Furthermore, taking both the interest rate and the repayment schedule into account, the interest over the life of the debt for every 1,000 dollars borrowed was 841 dollars in Florida as compared with 335 dollars in Connecticut, or 2 1/2 times greater. He attributed roughly half of this difference to the rate of debt amortization, which was 20.38 years in Florida as against only 10.3 in Connecticut. The Connecticut issuers, in other words, showed a willingness to pay promptly rather than to leave the debt for future taxpayers. The factors making up the other half of the difference led Mr. Ellinwood to analyze the factors going into credit standing, and with very slight shifts in emphasis Mr. Tyler presented much the same analysis in his address.

Some factors which tend to lower credit standing are: resort to refunding, except for the purpose of effecting a net saving in interest costs; reputation for paying late or not paying at all, including a tendency to litigate the validity of issues previously validated; unfavorable reputation of other municipalities and districts within the state; reliance entirely on a seasonal resort economy; booms, especially those due to financing; improvements for a large anticipated population that has not yet arrived; appeal to new businesses by offering temporary tax exemptions; appeal to the "let's get something for nothing" element, as evidenced from an investor's standpoint by the homestead tax exemption; appeal through current low tax rate as contrasted with appeal through good basic community facilities and relatively low debt coupled with visible tax sources as yet untapped; lack of economy in budgets and of careful screening of spending proposals, frequently forced by irresponsible citizens unwilling to contribute their share of payment and unwilling to share any of the risk; frequent budget crises; unequalized assessments; poor record in collecting taxes; lack of planning, zoning, and subdivision control; relatively heavy debt already outstanding in relation to tax resources (usually with respect to the ad valorem tax); deficiencies in physical plant, even as planned, indicating an early need for still further borrowing when viewed realistically; lack of any coordinated plan for future financing and lack of any organized borrowing schedule; unwillingness of the state to help local communities in fiscal difficulties, or even a complete lack of interest in their problems; evidence of inefficiency and unbusinesslike management by the local government; and bad public relations, such as failure to furnish information particularly requested on the fiscal status of the community, including the bad as well as the good, or a tendency to furnish deceptive or misleading data.

Conversely, the opposites of these factors would tend to improve credit standing. No single taxing area has all of these bad features at the same time, of course, but many a Florida county or municipality has some of them, and some communities have far too many of them.

A practical example of one of these factors is analyzed in part of an excellent and fairly recent study of metropolitan government fiscal problems in Dade County by Professor Wood.<sup>43</sup> The address and the well summarized data in it should be read in full, but one point is decidedly relevant to the instant discussion. Faced with added functions, yet without new taxing powers and without the pre-existing city taxing powers, the Metro commissioners began the reassessment, completion of which was required by 1961 according to the Metro Charter, along with equalization of assessed values. Shortly after the reassessment had been completed the storm broke. Some 200,000 protests from irate property owners, including some 42,000 who had theretofore evaded contributing anything by reason of low assessments, flooded the county manager's office.

At the ensuing election adopting the amendment that repealed this section, the heaviest vote against it occurred in precincts with the lowest average assessed valuations. In blunt English, they had freeloaded long enough to acquire the notion that they were an especially privileged class. One encounters this attitude most acutely in primary and secondary education, where the viewpoint, accurately stated, appears to be, "Nothing is too good for my children as long as my neighbor pays most of the cost and assumes all of the risk. My home is my castle, but his is not." It is highly doubtful, to say the least, whether citizens of this ilk are desirable anywhere, but a swarm of parasites can ruin any community if allowed to impose general obligation debt without accepting any responsibility for its payment. By creating a large class of irresponsible freeholders (Florida is almost unique in this respect among the fifty states) Florida has seriously crippled itself with respect to utilization of the property tax. The result has been a shift to revenue bonds and special obligation bonds.

The chief vehicle for debt financing has traditionally been the general obligation bond, with its pledge of the full faith and credit of the issuer and with the ultimate liability on the property owner, who cannot move his property away. This type of bond accounts for half, or perhaps a bit more than half, of state and local long-term debt,<sup>44</sup> although in most states it is secured by levy of the tax on all property owners rather than on only business property, vacant property, and residences above a certain assessed valuation.<sup>45</sup> In Florida, however, revenue and special obligation

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43. Metro's Financial Squeeze, an address delivered in 1962 at the 20th Annual Short Course for Municipal Clerks and Finance Officers. Professor Wood is Chairman of the Dep't of Government, U. of Miami.

44. N.Y. Times series, *supra* note 4, at 5-6. HEINS, *supra* note 5, at 21, places non-guaranteed state debt at 51.1 percent of total debt in 1958, this being the latest year in his table, as against only 1.3 percent in 1937.

45. For a full analysis of the homestead realty tax exemption see Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption: V*, 2 U. FLA. L. REV. 346 (1949).

bonds now amount to over three-fourths of all municipal debt.<sup>46</sup> None of the state debt of over 764 million dollars<sup>47</sup> is guaranteed by the state, of course, because the constitution limits issuance of state bonds to the purposes of repelling invasion, suppressing insurrection, or refunding operations<sup>48</sup> concerning bonds long since retired.<sup>49</sup>

Revenue bonds and other limited obligation bonds are generally regarded, on a nationwide basis, as being more costly to the issuer than general obligation bonds.<sup>50</sup> On the other hand, the rating of the bond has a still greater bearing on the interest rate,<sup>51</sup> even as among the Group I securities,<sup>52</sup> to which banks as investors are generally confined by law. The highest rated bonds obtain the lowest interest rates,<sup>53</sup> as would of course be expected. Even assuming, however, that non-general obligation bonds required somewhat higher interest rates on a nationwide basis, there is little if any evidence that Florida fits into this pattern. So-called "state" bonds issued by state boards and agencies of Florida are necessarily non-general obligation bonds. Therefore no one can say whether general obligation bonds would have cost more or less, because no issues exist for comparison.

It has proved impossible to obtain the figure for the net interest cost rate for all the state debt of Florida, but the figures which were available are significant.<sup>54</sup> In 1961, when the annual average of the medians of Moody's top four ratings (Group I) for state and local debt reoffering yields, on new issues with 20-year maturities, was 3.50 for the year,<sup>55</sup> the Florida average interest cost rate for the 14 million dollars of bonds issued on behalf of various counties by the Florida Development Commission and the State Board of Education was just under 3.6 percent.<sup>56</sup> The approximately 4 million dollars of 1961 revenue certificates, issued

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46. From 1966 preliminary figures soon to appear in a report by the Florida League of Municipalities.

47. From 1966 figures soon to appear in a report by the Florida Legislative Reference Bureau.

48. FLA. CONST. art. IX, § 6.

49. See Patterson, *supra* note 17, at 295-296 and n.122.

50. Ellinwood 1960 address, *supra* note 42, at 34; HEINS, *supra* note 5, at 36-68. Professor Heins concludes, *id.* at 45, that the average interest cost of revenue bonds exceeded that of general obligation bonds by 0.56 percent in 1957, 0.48 percent in 1958, and 0.66 percent in 1959.

51. FUNDAMENTALS, *supra* note 3, at 23, 26.

52. Group I includes Moody's AAA, AA, A, and BAA, and Standard and Poor's AAA, AA, A, and BBB.

53. FUNDAMENTALS, *supra* note 3, at 23.

54. We realize, of course, that these figures are not conclusive as to net interest cost over the years expressed as a weighted average for all issues and then compared with the same average for the other states, but they are an improvement on mere speculation.

55. FUNDAMENTALS, *supra* note 3, at 26.

56. From 1966 figures soon to appear in a report by the Florida Legislative Reference Bureau.



by what was then called the state board of control for university dormitory and apartment capital outlay, bore an interest cost rate of just under 3.5 percent. In 1964 and 1965 the 75 million dollars of higher education bonds issued were sold at an average net interest cost of only 3.286 percent.<sup>57</sup>

Looking at another available comparison, the municipal bond ratings collected from Moody's and Standard and Poor's as of June 1, 1965 show that county and municipal revenue bonds in Florida in most instances rank equal to or higher than general obligation bonds of the same issues.<sup>58</sup>

In summary, the data available indicate the unsoundness of the contention that Florida and its governmental subdivisions are losing money in substantial sums by financing through non-general obligation bonds. Revenue bonds and special obligation bonds do a good job for Florida. Furthermore, though allowing for variation in the tax load, they place the risk where it belongs, namely, on all the citizens of the community and on the investor. Despite speculation to the contrary, the fact is that the investor finds these types of bonds attractive, as far as Florida is concerned.

Another pertinent comparison is the ratio of state and local debt of all the states to that of Florida. The 1964 national total for state debt alone was just over 25 billion dollars; for Florida it was 630 million.<sup>59</sup> This figure will seem surprisingly low to anyone not familiar with the Florida Constitution.<sup>60</sup> The explanation lies in our intra-state arrangement of debt-financing authority, most of this having been assigned to counties, municipalities, and special districts.<sup>61</sup> The 1964 aggregate local government long-term debt in the United States was a bit over 67 billion; in Florida, it was 1,877 million.<sup>62</sup> Of this Florida amount, just over half represented municipal debt and the remainder was owed by counties and special districts.<sup>63</sup>

Although personal per capita income in Florida is the highest in the Southeast, Florida is still in the lower half of the states.<sup>64</sup> Nevertheless, based on the 1964 figures just noted, Florida local government debt was approximately 3.2 percent of the comparable national total. Even when our relatively low state debt is considered as part of the total, the Florida

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57. *Ibid.*

58. Data published by B. J. Van Ingen & Co., Inc., Miami Branch.

59. GOODBODY, *supra* note 27, at 26.

60. See FLA. CONST. art. IX, § 6.

61. See the portion of this article headed MAJOR FLORIDA CONSTITUTIONAL PROVISIONS, *supra* text at page 12.

62. GOODBODY, *supra* note 27, at 26.

63. See note 46 *supra*.

64. TAX FOUNDATION, INC., FACTS AND FIGURES 46 (13th ed. 1964-1965) 46-47; The Palm Beach Post Times, Apr. 25, 1966, p. 1, col. 6.

state and local long-term debt was exceeded at the end of 1964 in only ten other states, all highly industrialized.<sup>65</sup>

The annual carrying charges on debt have become an increasingly important factor to consider in recent years. At the federal level, they cost the taxpayer over eleven billion dollars a year and constitute one of the highest items in the entire budget. Only defense spending and "welfare" spending still rank ahead of debt interest.<sup>66</sup> At the state and local level, by applying an average interest rate of 3.5 percent, the current interest amount nationally would come to about 3.5 billion dollars, of which the Florida portion is around 90 million.<sup>67</sup> This amount would, for example, meet all operating expenses at the 1966-1967 level for the entire state university system.<sup>68</sup>

## VI. SOME POPULAR MYTHS

Before proceeding further it would be well to clear the atmosphere as to some basic assumptions often made as a predicate to a discussion of state and local debt (which is erroneously, but frequently, lumped in a discussion of taxation).

(1) Everyone either pays an ad valorem property tax or he pays some other kind of tax. This assumption is implicit in the contention that persons owning no realty or tax-exempt realty also pays taxes. This statement is, of course, true, but the conclusion is a non sequitur. The property owner pays the other taxes in addition to and not in lieu of the property tax. He too pays sales tax, and there is no evidence that property owners, as a class, pay any less sales tax per capita than do those owning no real property. There is no evidence that property owners are primarily non-smokers and therefore pay no cigarette tax. There is no evidence that property owners are primarily non-drinkers and therefore pay no alcoholic beverage tax. The same lack of evidence applies to the ownership of savings accounts, mortgages, or securities, to the driving of an automobile or truck and the resultant payment of license and gasoline taxes, and to the numerous minor taxes such as fishing and hunting licenses.

(2) The property owner not only should pay the bulk of local taxes in the form of this additional tax on property but also should assume one hundred percent of the risk. This argument is implicit in the very nature of the ad valorem tax on real property and constitutes the basic attraction of this tax for the tax gatherers. If a person considers the sales tax too high, he can buy somewhere else and escape the tax; and the difficulty of effective collection of the compensating use tax, designed to

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65. See note 62 *supra*.

66. CONGRESSIONAL QUARTERLY SERVICE, CONGRESS & THE NATION 390 (1965); a study of the period 1945-1965.

67. See GOODBODY, *supra* note 27, at 26, for the basis of this computation.

68. From State Budget Commission figures released in April, 1966.

prevent sales tax evasion, is a fact well known to all collectors. If the taxpayer considers the cigarette tax too high, he can cut down on his smoking or stop altogether. The same argument applies to the alcoholic beverage tax and to the various types of legalized gambling tax. If he finds the amusement tax too high, he can watch television or listen to the radio—or even read a book. In any event, he can always move from the community and escape the entire burden of a general obligation debt.

The property owner, on the other hand, is anchored to his home, yet the very factors that would prompt him to leave a particular community, if he could take his home with him, render the home unsalable at a figure even remotely approaching what it cost him. If he leaves anyway, he loses his home and is fortunate if he can salvage enough from it to make even a down payment on a home in another community. Everyone else can leave, but he cannot; as a practical matter the property owners singlehandedly bear the entire risk.

(3) The property owner derives more benefit than anyone else from community facilities and therefore should pay more, if not all, of the tax for these facilities. In the first place, there is no evidence to indicate that the property owner benefits more than others from what are considered community facilities today, with the possible exception of those few services traditionally listed as governmental functions, such as fire protection and that portion of police surveillance needed for the protection of real property as distinct from the protection of life and the assurance of safety.

Even assuming, for the sake of argument, however, that the property owner obtains somewhat greater benefits from the community services, this argument relates to distribution of taxes rather than to distribution of debt risk. Much of the confusion in discussing debt results from the concentration on who should bear the tax load, rather than on the relevant issue, namely, who should bear the risk of having to pay off the debt.

Today in Florida, homes amounting to one-third of the total estimated value of real property are exempt from ad valorem tax, and the bulk of this amount consists of homes valued for tax purposes at less than 5,000 dollars.<sup>69</sup>

(4) A man's home is his castle. This is one of the purest myths ever foisted on the Florida public, as far as liability for public debt is concerned, yet it pops out in almost every political discussion of the homestead tax exemption. The true homestead exemption, which has nothing to do with taxation but rather is an immunity from forced sale under certain circumstances, goes back to the preceding century. To get it one

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69. See note 45 *supra*.

has to be the head of a family, whereas even a single person living alone can get the tax exemption.<sup>70</sup> While explanations of the underlying philosophy of the homestead exemption go as far back as the constitution of 1868, one quotation must suffice in an article of this nature. In a passage relating to the homestead realty and homestead personalty exemptions from forced sale the Florida court quoted with approval an Alabama opinion:<sup>71</sup>

Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pauperism, and of the individual citizen from destruction. Such statutes are entitled to a liberal construction. . . .

As regards the two-thirds of the owners that are not exempt from real property tax in Florida, nothing could be further from the truth than the reference to a man's home as his castle. That portion of the assessed valuation of his home above the 5,000 dollar limit is not exempt from execution for payment of federal, state, county or municipal taxes levied on the home. The present constitutional tax exemption of realty was not adopted until November 8, 1938, and did not become effective until January 1, 1939. It was intended as a tax measure, but it had the unfortunate collateral result of shifting from all property owners to two-thirds of this same group the entire risk of paying off general obligation bonds.

Furthermore, ever since the "mechanical jurisprudence" decision of the supreme court in *Lersch v. Board of Public Instruction*,<sup>72</sup> the free-loader has been entitled to vote shoulder-to-shoulder with the tax-liable freeholder. In imposing the entire risk of any general obligation bond payments on the freeholder, the arguments concerning who should pay the bulk of local taxes have no direct relation to the issue of who should bear the risk; and the actual fact is that in Florida every "castle" of the tax-liable freeholder is built on sand.

The practical effect of homestead law today has degenerated to a complete perversion of the purpose for which this law was originally enacted. Mr. Chief Justice Randall expressed this philosophy clearly in *Carters Adm'rs v. Carter*:

The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill advised promises which their

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70. *Ibid.*

71. *Hines v. Duncan*, 79 Ala. 112, 114-115, 58 Am. Rep. 580 (1885), quoted by the court in *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 229, 77 So. 209, 212 (1917).

72. 121 Fla. 621, 164 So. 281 (1935).

lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others.<sup>73</sup>

Today the freeholder is not even accorded the opportunity of making the ill advised promises himself. Ever since the *Lersch* decision,<sup>74</sup> if he has the misfortune to live in a community with either low assessments or a large percentage of cheaper residences, this type of promise, involving assumption of the entire risk, may well be transferred exclusively to him against his will by irresponsible, freeloading neighbors unwilling to stand behind the result of their vote.

(5) The time to remove restrictions on incurring debt, or perhaps to eliminate them entirely, is during apparent prosperity. Restrictions are unnecessary unless finances get in bad shape. This philosophy, when carefully examined, amounts in plain English to maintaining that the best time to close the barn door is after the horse has gone. Florida has tried this approach before, and the practical effect of debt financing for improvements is well known and is still embedded in the memory of a large number of living Floridians. In the early thirties many a home owner learned that he had been "improved" right out of his home.

Examined from another angle, this philosophy still makes no sense. When times are good, the citizens of a community are better able to pay as they go, or at least more able to resort to debt financing for merely a part of capital outlay with bonds coming due serially in the fairly near future. If the citizens cannot pay the cost of the venture in good times, they certainly cannot do so in bad times. Furthermore, the facilities obtained by spending the bond proceeds cost more. It is common knowledge that the cost of labor and materials rises in times usually referred to as good, and that interest rates go higher. Limitation of improvement expenditures without paying for them is needed more in good times than in bad.<sup>75</sup>

(6) The individual citizen does not have enough intelligence to vote on matters of finance, the details of which are unavoidably complicated. If this argument be sound, it proves far too much; it strikes at the very heart of democracy. If the citizen lacks the intelligence to vote on an issue squarely presented to him, how can he possibly choose intelligently among candidates in campaigns involving many important issues, especially when the candidates agree on some issues, disagree on others, and glibly avoid taking any position on still others? If the voter can be trusted to consider all these issues at once, he can certainly be trusted to decide one of them at a time.

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73. 20 Fla. 558, 569 (1884), going back to the homestead realty forced sale exemption in art. IX of the 1868 constitution.

74. See note 72 *supra*.

75. See HILLHOUSE, *supra* note 10, at 444-450.

There is a growing tendency, when considering constitutional representative democracy, to eliminate "constitutional" from consideration, to belittle and degrade "democracy" and to concentrate almost exclusively on "representative." While it is true that voters have made bad mistakes on occasion,<sup>76</sup> we maintain that the public is still intelligent enough to decide what it wants and what it does not want, how much it is willing to pay, and when to pay which portion of it. We also think that each member of the public votes more intelligently when he knows that he is expected to stand behind his decision and that he will be held responsible for his share, not only of the cost but also of the ultimate risk. At best irresponsibility breeds apathy, and at worst it begets greed and deliberate malice.

(7) The constitution is a strait-jacket which shackles governmental bodies and prevents them from prescribing for the citizen what they know is good for him. No one denies that a constitution is a strait-jacket; in fact, it is deliberately so designed. It intentionally not only sets up the organizational structure and some of the procedure for government but also delineates those areas within which the government may operate or shall not operate. This strait-jacket is not a casket, however, in which the political community and its government is buried once and for all.

The underlying implication of branding a constitution as outmoded or as the dead hand of the past overlooks the fact that every properly drafted constitution creates a definite amending process by which all or any portion of it may be changed, if the citizens that created it so desire. They do, however, reserve to themselves the authority to decide for themselves whether they want any proposed change. The current Florida constitution has been amended over 130 times since its original adoption. Furthermore, a large number of amendments have been proposed to the electorate and rejected. Whether these individual choices by the electorate were wise or not is beyond the scope of this article; the point here is that this type of procedure constitutes the basis of constitutional representative democracy, as distinct from absolute power in the governing body to prescribe for the governed at any time whatever a bare majority of the governing body then deems best for them.

In these days of impatience with the purposes of a constitution and of intolerance of minority rights, a look at history is in order. The majoritarian democracy antics of the French Revolution in its heyday of liberty, equality, and fraternity, were but a scant improvement on the imperial orgies of Nero and Caligula. Our founders were well aware of the grave danger inherent in any governmental process devoid of constitutional restrictions. Said New Englander John Adams:<sup>77</sup>

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76. Mistakes have been made even at the federal constitutional amendment level. See U.S. CONST. amends. XVIII and XXI, relating to "Prohibition."

77. 10 THE WORKS OF JOHN ADAMS 174 (ed. C. F. Adams 1850-1856).

The fundamental article of my political creed is, that despotism, or unlimited sovereignty, or absolute power, is the same in a majority of a popular assembly, an aristocratical council, an oligarchical junto, and a single emperor. Equally arbitrary, cruel, bloody, and in every respect diabolical.

Southerner Thomas Jefferson agreed:<sup>78</sup>

An *elective despotism* was not the government we fought for  
 . . . .

and again:<sup>79</sup>

The people, to whom all authority belongs, have divided the powers of government into two distinct departments, the leading characteristics of which are *foreign* and *domestic*; and they have appointed for each a distinct set of functionaries. These they have made coordinate, checking and balancing each other, like the three cardinal departments in the individual States; each equally supreme as to the powers delegated to itself, and neither authorized ultimately to decide what belongs to itself, or to its coparcener in government.

#### VII. FLORIDA CASE LAW

After surveying all the cases interpreting Florida constitutional and statutory provisions, Patterson presents a summary as of 1953 of the applicable principles relating to state bonds, to county bonds, and to municipal bonds.<sup>80</sup> With the exception of a few minor trends that Patterson anticipated but that were not established law at the time, these principles are still applicable. This indicates not only the soundness of Patterson's analysis, but also a high degree of consistency in the decisions of our supreme court.

Admittedly some few later cases are difficult to explain, at least when based on the reasons advanced. For example, one might be puzzled by a comparison of *Tapers v. Pichard*<sup>81</sup> and *State v. City of Miami*<sup>82</sup> if he should try to draw a distinction, from the standpoint of public necessity, between a jail and a stockade. The distinction that one place of confinement has a roof while the other does not is at least somewhat difficult to grasp. A thorough examination of the opinions, however, shows that the chief vice of the proposed *Miami* stockade bond issue, which had not been submitted for freeholder approval, was that the alleged municipal authority rested merely on some general borrowing provisions in the city charter rather than on definite statutory authorization, and that the

78. BASIC WRITINGS OF THOMAS JEFFERSON 131 (Foner ed. 1944).

79. THE WRITINGS OF THOMAS JEFFERSON 213-214 (Washington ed. 1855).

80. Patterson, *supra* note 17, 325-326.

81. 124 Fla. 549, 169 So.2d 39 (1936).

82. 63 So.2d 333 (Fla. 1953).

so-called "revenue" fund pledged as security for the bonds was the municipal fines and forfeitures fund. By no means could this fund be regarded as revenue from the operation of the stockade. Furthermore *Tapers* rested on a general law antedating in its enactment the constitutional amendment authorizing freeholder vote.<sup>83</sup>

The courts, particularly the appellate courts, are not infrequently criticized for what is in reality a flaw in our system of validating bonds. As Patterson shrewdly observed, a bond validation proceeding "is not an efficient substitute for a litigated cause."<sup>84</sup> In the standard situation, the city attorney, often aided by expert counsel for the bond underwriter and in any event thoroughly familiar himself with the bond issue, takes the initiative in upholding the desired issuance by bringing a validation suit. Against him is the state attorney, whose work is primarily in criminal law but who is expected to present a vigorous attack on the bond issue as a piece of uncompensated additional work frequently performed in haste.

The court, in turn, should not be expected to do the bulk of the research on the law involved, and it simply cannot take the time or muster the facilities necessary to dig out the facts for itself. Indeed, at the appellate level, the court is frowned upon if it roams outside the record on appeal. Under these circumstances the surprising characteristics of the Florida decisions in this field is their high degree of consistency rather than their few instances of apparent inconsistency, even though at times considerable disagreement crops out among the members of the supreme court.<sup>85</sup>

One source of difficulty in deciding what the law is at any given time is the supreme court's inclination to whittle away at an earlier decision and opinion, rather than to, recede frankly from the obvious interpretation of its former holding.<sup>86</sup> No one expects perfection, and most practitioners realize that a court is at times led into error by an inadequate record or an inferior presentation of at least one side of the case.<sup>87</sup>

Since the publication of Patterson's article a reasonably accurate count shows 108 validation proceedings that reached the supreme court, with 95 of these validated below and only 13 invalidated below. The

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83. See FLA. STAT. § 135.01 (1965) and FLA. CONST. art. IX, § 6.

84. Patterson, *supra* note 17, at 327. See also Watson & Cunningham, *supra* note 17.

85. See, e.g., *Grubstein v. Urban Renewal Agency*, 115 So.2d 745 (Fla. 1959), in which counsel made careful judicial analysis possible by presenting an exceptionally thorough record on the facts as well as the law.

86. Two recent opinions illustrate the effective manner in which the supreme court has on occasion clarified the law: *Keating v. State*, 173 So.2d 673, 675 (Fla. 1965), and *Crownover v. Shannon*, 170 So.2d, 299, 301 (Fla. 1964).

87. For a discussion of this point see the remarks made about *Adams v. Housing Authority*, 60 So.2d 663 (Fla. 1952), in the *Grubstein* case, *supra* note 85, at 751, 753, 756, 758-759.



supreme court reversed 12 lower court validations and 7 lower court invalidations, or a total of only 19 reversals, for a net of 90 final validations out of the 108 proceedings reaching it in this type of proceeding. A handful of other cases reached it on proceedings by injunction or declaratory decree. These figures do not include bond cases raising no question as to the validity of the bond issuance, and they likewise do not include cases of per curiam affirmances without opinion of the decree below, usually a decree validating the issue. These cases would be known only to an attorney already familiar with the case in the lower court.<sup>88</sup> Neither do these figures include the numerous validation proceedings that never go beyond the circuit court.<sup>89</sup>

An examination of these 108 supreme court opinions indicates the principles that can, we believe, be summarized for the different levels of issuer.

#### A. State Bonds

As regards state bonds, Florida itself cannot issue any general obligation bonds except to suppress insurrection or repel invasion, as provided in Article IX, section 6. Neither of these powers has been called into play since 1885, when the present constitution was adopted. A state agency cannot issue bonds secured by tax proceeds otherwise than pursuant to constitutional amendment.<sup>90</sup> A state agency can, however, issue revenue bonds payable solely from the net income of a proposed project to be constructed with the borrowed money and not from taxes or any other direct exercise of state power.

#### B. County Bonds

As regards county bonds, counties may issue bonds for county purposes as authorized by state statutes, but a freeholder election is required for issuance of bonds secured wholly or partially by a pledge of ad valorem taxes. Certain exceptions to this general rule exist, namely, the issuance of general obligation bonds without freeholder election to build a courthouse, a jail, and certain other county buildings,<sup>91</sup> but the

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88. *E.g.*, *State v. City of West Palm Beach*, 82 So.2d 756 (Fla. 1955), appeal dismissed, 350 U.S. 960 (1956). The bond issue involved a total of \$14,000,000 of water and sewerage revenue bonds.

89. In these instances, in which a serious attack on the bond issue is seldom made or in which the legal issues raised have already been definitely decided by existing supreme court decisions, the proponents of the bond issue are content, as a practical matter, with a circuit court decree followed by lapse of the appeal period without the filing of an appeal. None of these decisions appear in the reports, of course. See also *Watson & Cunningham*, *supra* note 17.

90. See the 1963 amendment appearing as FLA. CONST. art. XII, § 19. For an opinion on the 75,000,000 dollars of higher education bonds presented for validation in 1964, see *State v. State Bd. of Educ.* 165 So.2d 161 (Fla. 1964).

91. FLA. STAT. § 135.01, still upheld after the subsequent passage of FLA. CONST. art. IX,

supreme court has refused to extend this exception to cover several other types of construction or acquisition without freeholder approval.<sup>92</sup> Counties may issue revenue bonds for construction of new proprietary projects, including utilities, provided the only bond security is the security underlying revenue bonds properly so called, namely, confinement of payment to the revenue of the facility.

Counties may also pledge surplus revenues from other revenue-producing facilities for construction purposes and the revenue of an existing facility for the purpose of enlarging and expanding it, and as of now the issuer need not even prove that this revenue is sufficient to pay the operation, maintenance, and debt services costs.<sup>93</sup> Mr. Justice Caldwell takes the position that validation of revenue bonds without freeholder approval still necessarily involves a finding that the proposed issue is fiscally feasible and will not burden the real property of the issuing community with ad valorem taxes.<sup>94</sup> On the other hand, a majority of the court has recently taken the position that "the fiscal feasibility of a revenue project is an administrative decision to be determined by the business judgment of the issuing agency," and that the judiciary is not responsible for checking on the fiscal integrity of the proposed project.<sup>95</sup>

The supreme court had already refused to upset a revenue bond issue by the Town of Medley,<sup>96</sup> despite the following facts, recognized in the opinion: that contrary to good business practice the municipality had not obtained the advice of a fiscal agent; that the initial purchasers of the bonds drove a hard bargain with the town; that the bonds were sold by private sale at a substantial discount and had an unusually high interest rate and other unusual and undesirable features; and that four types of available excise taxes had been additionally pledged as security. The fact that the taxpayer can obtain no judicial relief for fiscal absurdity, coupled with the fact that he is not even allowed to vote on the proposed issuance, indicates a strong need for requiring a vote or at least a thorough fiscal review of the local decision by a state administrative agency with some knowledge of business, public financing, and particularly debt financing.<sup>97</sup>

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§ 6; note also FLA. STAT. § 167.06 (1965), dealing with garbage disposal and also antedating the freeholder election limitation. This authority was upheld in *City of Jacksonville v. Nichols Eng. & Refresher Corp.*, 49 So.2d 529 (Fla. 1950), and in *City of Jacksonville v. Savannah Mach. & Foundry Co.*, 47 So.2d 634 (Fla. 1950).

92. See Madison, *supra* note 18, for detailed citations relative to voting machines, a public library, a hospital, school buildings, and rights-of-way for roads.

93. Patterson, *supra* note 17, at 326, took the position that the issuing county must submit this proof.

94. *Medley v. State*, 162 So.2d 257, 260 (Fla. 1964).

95. *State v. Manatee County Port Authority*, 171 So.2d, 169-171 (1965), with Caldwell, Drew, and O'Connell, J.J., dissenting.

96. *Medley v. State*, *supra* note 94.

97. HILLHOUSE, *supra* note 10, at 444-446, makes this same review suggestion.

Pledge of gross revenue of a facility, as distinct from net revenue, has been approved by our supreme court.<sup>98</sup> In 1963, however, in *State v. Halifax Hosp. Dist.*,<sup>99</sup> the court admitted that the proposed improvement might well be needed but nevertheless flatly invalidated the issue:<sup>100</sup>

The fact remains, however, that the Constitution requires that the people who are to pay the bill should be given an opportunity to approve the debt before it is incurred . . . the people placed this safeguard in the organic law as a protection to themselves. We did not write the Constitution. We have no power to tamper with it . . . under the Constitution we have no power to substitute our judgment for that of the freeholders. To do so would be rank usurpation.

The court attempted to distinguish the earlier decisions on the ground that the bond ordinance challenged in those decisions did not pledge ad valorem taxes for maintenance and operation to whatever extent might prove necessary. But from a practical standpoint this is a distinction without a difference; maintenance and operating costs have to be met from other available funds, and ad valorem taxes obviously have to be higher to make up the amount siphoned off from the community revenues for these maintenance and operation costs of the facility. In any event the law now, despite *Halifax*, is that all other sources of revenue except ad valorem taxes can be siphoned off as security for special obligation bonds without freeholder approval, and the supreme court will approve no matter how fiscally unsound the project may be.<sup>101</sup>

### C. Municipal Bonds

As regards municipal bonds, a city or town can issue revenue bonds, or a mixture of the two, for any public municipal purpose and can pledge all its operating and tax revenues except ad valorem tax proceeds and fines and forfeitures without freeholder approval, provided the draftsman of the bond resolution or ordinance does not make the careless mistake of contravening Article IX, section 6, openly by pledging ad valorem taxes specifically, or by failing to exclude them specifically, rather than indirectly by siphoning off all other municipal revenues. Perhaps this is

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98. See discussion by Patterson, *supra* note 17, at 318-319.

99. *State v. Halifax Hosp. Dist.* 159 So.2d 231 (Fla. 1963); the full court concurred in the opinion by Mr. Justice Thornal and in the decision reversing a decree validating pledge of gross revenues, without freeholder approval, to secure bonds proposed for building additions to the district hospital.

100. *Id.* at 235.

101. *Medley v. State*, *supra* note 94, decided after the *Halifax* case, *supra* note 99. It certainly appears that the court has no intention of complying with the principles announced in the *Halifax* case and quoted above, provided the draftsman of the ordinance takes care to make the circumvention of freeholder approval indirect rather than direct. This can readily be done by merely inserting in the bond ordinance a provision that the pledge does not include ad valorem taxes.

as it should be, but at least Florida citizens should know where they stand under the latest supreme court decisions.

A municipality can protect itself from profligate debt financing by specific borrowing limitations in its charter, but it is not now required to do so, and only a few city charters require referendum approval for a pledge of a portion or all of the city revenues other than ad valorem tax proceeds. A good example of a decision involving a special-act charter provision specifically requiring freeholder approval of special tax revenue certificates appears in *State v. City of Boca Raton*<sup>102</sup> in which the court upheld the requirement imposed by this charter provision and reversed the decree validating the bonds.<sup>103</sup>

#### D. *Special Assessment District Bonds*

One other type of district must be mentioned: the special assessment district. Prior freeholder approval is not essential to issuance of special drainage district bonds payable solely from special assessments levied against the properties within the district in proportion to benefits assessed by the drainage commissioners.<sup>104</sup> The same type of conclusion had been reached earlier in *City of Orlando v. State*<sup>105</sup> once the court was satisfied that no pledge of municipal ad valorem taxes was involved.

Whether a limited group of property holders should be forced, without any say in the matter, to undergo and pay entirely for supposed

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102. 172 So.2d 230 (Fla. 1965).

103. For another example of strict charter restrictions, see §§ 8.01(3) and 8.03(2) of the West Palm Beach charter, enacted as ch. 65-2381, Laws of Fla. Spec. Acts (1965), subject to referendum at which the voters adopted the charter.

104. *State v. Dixie Drainage Dist.*, 167 So.2d 553 (Fla. 1964), involving FLA. STAT. ch. 298 (1965). The manuscript of this article was completed in early May 1966, and its authors have not attempted to analyze decisions rendered thereafter, but a relatively new Florida situation of practical importance has just come to the fore judicially in what might functionally be termed urban downtown special assessment districts. Accordingly we call attention to *State v. Downtown Development Authority*, decided by the supreme court as Case No. 35, 395 on Oct. 12, 1966. As of this writing the fifteen-day period for filing a petition for rehearing has not expired, and we accordingly refrain from any criticism of the slip copy of the opinion, from which Thornal, C.J., and Roberts and Ervin, J.J., dissented without opinion. The circuit court had entered a decree purporting to validate a 17,500-dollar note of the Development Authority, as well as the relevant population act enacted as ch. 65-1090, Laws of Fla. (1965) and also the levy, without any referendum, of a half-mill ad valorem tax on property within the Development Area. While § 11 of the act authorized a development authority to levy such a tax, the Miami Development Authority had not done so when it adopted the resolution authorizing issuance of the note. Furthermore, the resolution expressly limited the source of note payment to funds derived from this additional tax, "if and when . . . actually levied and collected," and expressly negated any obligation of the City to levy the additional tax or to pay sums from any funds other than the proceeds of this tax, if levied. The supreme court held that the resolution had not created a binding obligation, that a proceeding under Fla. Stat. ch. 75 (1965) could not be used to attempt validation of this type of action, and that the decree below "constituted an invalid exercise of the judicial power of the circuit court." It accordingly reversed with directions to dismiss the petition for validation.

105. 67 So.2d 673 (Fla. 1953).

improvements that they do not want, is certainly debatable. If the property of all the owners in the community cannot be subjected to ad valorem taxes without their consent, the argument that a certain few of them can be so taxed without consent is hardly logical.

A good example of the lengths to which unscrupulous politicians and their greedy supporters will go in attempting to seize authority, apparently without any qualms, is well illustrated in *Rafkin v. City of Miami Beach*<sup>106</sup> in which the city seriously impaired the value of residential property by widening an adequate existing street and then tried to make the abutting owners pay for the impairment caused by the diversion of heavy traffic into this residential area. Even so, the supreme court checked this outrageous scheme by only a four-member majority. Regardless of the desirability of allowing the owners of property allegedly benefited in a special way to vote on whether they want the special benefits, the Florida law is clear: the affected owners are barred from voting on the issue.

#### E. Industrial Aid Bonds

Another major cause of bond issuance litigation concerns the matter of public purpose, which is<sup>107</sup> frequently coupled with the issue of aid to private enterprises by pledge of public credit. Analysis of the most recent cases on this point indicates that services traditionally listed for well over a century as essential, such as courts, courthouses, jails, police protection, fire protection, and city halls or other central administrative quarters, constitute public purposes. In addition, urban slum clearance is a public purpose,<sup>108</sup> improvement of transportation terminals, such as airports, seaports and inland water ports, is now a public purpose,<sup>109</sup> and recreational facilities are public purposes.<sup>110</sup> Ten years<sup>111</sup> ago Professor Alloway shrewdly observed the peculiarity of the doctrine that expenditures for "play" are permissible but expenditures merely for providing an opportunity to make a living are not.<sup>112</sup> If a recreational facility is leased for operation entirely to private enterprise the purpose

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106. 38 So.2d 836 (Fla. 1949).

107. See Tew, *Industrial Bond Financing and The Florida Public Purpose Doctrine*, 20 U. MIAMI L. REV. 171 (1966).

108. *Grubstein v. Urban Renewal Agency*, 115 So.2d 745 (Fla. 1959).

109. *E.g.*, *State v. Manatee County Port Authority*, 171 So.2d 169 (Fla. 1964); *Wiggins v. City of Green Cove Springs*, 159 So.2d 219 (Fla. 1963).

110. *State v. Daytona Beach Racing Recreation Facilities Dist.*, 89 So.2d 34 (Fla. 1956).

111. Alloway, *Constitutional Law*, 10 U. MIAMI L. REV. 143, 157 (1956); 12 U. MIAMI L. REV. 288, 304 (1958); cited by C. Robert Burns, former city attorney of West Palm Beach, in *Municipal, State & County Securities*, 17 FLA. LAW & PRACTICE 458 (1962).

112. *State v. Washington County Dev. Auth.*, 178 So.2d 573 (Fla. 1965); a public housing project to build homes and sell to private individuals for their own use is not related to public health, public safety, public morals, or public welfare (unless in a municipality), and it is not essential to recreation.

is still public,<sup>113</sup> and this principle applies even though the importance of recreation and entertainment to the economy of a tourist state such as Florida has been judicially recognized.<sup>114</sup>

On the other hand, in rural areas the public construction of low-cost housing in a depressed area for sale to private owners desirous of residing there, even when part of an overall master plan to rehabilitate the area, is not a public purpose.<sup>115</sup> By the same token, the use of industrial revenue bonds to construct a plastics factory for lease to a new private enterprise willing to come into the area and provide needed employment is not for a public purpose, even when but a small part of an overall plan to develop a depressed rural area.<sup>116</sup> Taken by itself, the building of a plastics factory is primarily for the benefit of the private enterprise proposed as lessee. On the other hand, the leasing of the entire repair and maintenance facilities for aircraft at a county airport to a private enterprise for profit is a public purpose, since this project helps transportation facilities, and revenue bonds payable solely from rent by the lessee can properly be issued.<sup>117</sup> The supreme court leans heavily on the quantitative test whenever benefit to a private enterprise is involved. But the court has, of late, wavered in determining what is and what is not incidental, between a realistic examination of the overall plan and an isolated consideration of one step of the plan.

Tremendous pressure is being put on the supreme court to authorize industrial aid bonds without a constitutional amendment; and there is much to be said for the view that, if a legislative body at the state, county, or city level conclusively establishes the existence of community benefit and public purpose by securing increased employment opportunity, and if the judiciary therefore sanctions the issuance of industrial aid bonds to assist an incoming private enterprise, then sections 7 and 10 of Article IX will have been virtually repealed from the bench.

We cannot discuss in detail the lengthy subject of industrial aid bonds in an article of this scope, but those interested will find a well written analysis of the more recent Florida cases in *Industrial Development Bonds: Judicial Construction vs. Plant Construction*,<sup>118</sup> and a thorough treatment of the entire controversy in INDUSTRIAL BOND FINANCING.<sup>119</sup> This treatise presents the history of industrial development bonds, the major decisions throughout the country, the arguments

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113. See note 110 *supra*.

114. See concurring opinion of Thornal, J., in *Grubstein v. Urban Renewal Agency* 115 So.2d 745 (Fla. 1959).

115. See note 112 *supra*.

116. *State v. Clay County Dev. Auth.*, 140 So.2d 576 (Fla. 1962).

117. *State v. Okaloosa County Airport & Ind. Auth.*, 168 So.2d 745 (Fla. 1964).

118. Note, 15 U. FLA. L. REV. 262 (1962).

119. Published in 1965 by Goodbody & Co., under the research and editorial direction of Alan B. Lechner.

for and against the use of these bonds, the effects of their use upon industry and upon the communities issuing them, and their interaction with the bond market, plus some well formulated conclusions, recommendations, and proposals.

This volume is recommended to anyone seriously considering the authorization of the issuance of industrial aid bonds, but he should note the danger that feudal authorities may seize upon this type of public bond, the primary advantage of which is the exemption of its interest from income taxation, as an excuse to subject to income tax all municipal bond interest. This would destroy the major practicable source of local debt financing and accomplish what appears to be the modern federal goal of making all state and local government financing completely dependent upon federal aid.<sup>120</sup>

The 1965 legislature in Florida refused to pass HJR 1212 proposing a constitutional amendment permitting local governments to incur debt for industrial, agricultural, or trade development.<sup>121</sup>

#### VIII. CONCLUSION

Thirty-three years ago a host of questions about bond defaults were laid before the Municipal Finance Officers Association. The causes, amounts, past and present, geographical distribution, losses to creditors, effects on municipal credit, and remedies—all were disturbing matters to the public officials of that depression period. In 1936, Dr. Hillhouse, the Association's Director of Research, wrote his outstanding treatise analyzing the mistakes and summing up the answers to those and other questions.

It is both interesting and informative to review today the conclusions on these matters reached thirty years ago by Dr. Hillhouse during the depths of the depression. He observed:<sup>122</sup>

Before the next period of prosperity disrupts our thinking and before the lessons of the last several years have been forgotten, municipal finance specialists should concentrate on how to prevent a recurrence of the present plight. It must be remembered that a decade or two hence there will have been almost a complete turnover of local debt administrators. The new generation in control will know little or nothing of past lessons unless they are written concretely into new principles and practices.

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120. The Kiplinger Tax Letter, Apr. 29, 1966, p. 4, refers to the fact that Rep. Byrnes has introduced a bill providing that an industry leasing a plant financed by industrial aid bonds must pay income tax on the difference between fair rental value and lower rental charged by the lessor municipality.

121. Fla. Munic. Record, July 1965, p. 31.

122. HILLHOUSE, *supra* note 10, at 441.

Some of the highlights revealed as of that time were:<sup>123</sup>

1. Defaults had occurred on every type of bond.
2. Defaults were not restricted to any one section of the country. (New England escaped with the lowest number of defaults while the South and Midwest suffered the greatest number of defaults.)
3. Municipal defaults have been a recurrent phenomenon in the hundred-year period studied, 1835-1935.
4. Losses to bondholders upon defaulted bonds have been relatively negligible when compared either with the total amount of bonds outstanding at any one time or with total amount of bonds in default within any given period.
5. Impairment of a municipality's future credit rating is one of the very serious consequences of a default.
6. States have generally "muddled through" the problems created by municipal defaults.
7. Permanent administrative machinery, when established to cope with municipal defaults, has proved its worth.
8. Defaults result mainly from failure to maintain a proper ratio between fixed debt charges, current operating expenses, and revenues.
9. The accumulation of too heavy an inflexible debt service in boom years is a prime factor in causing defaults.
10. Most of the overborrowing was due to the use of municipal credit in aid of real estate speculation and overdevelopment. The misuse of municipal credit by private enterprise was even then an old story.
11. Municipal credit and real estate speculation must be divorced.
12. The development of sounder practices in debt administration is imperative.
13. More effective debt limits must be adopted, and the problem of overlapping debts faced up to and solved.
14. Adequate state administrative supervision over local debt practices should be developed.

Offering recommendations as to the contents or, alternatively, the complete elimination of constitutional provisions on public bond financing is a risky venture at best. We suggest the following principles with the full realization that disagreement exists as to what provisions of this type should be.

As regards state bonds we suggest that limitations on issuance by the state be included, but that the 1885 restrictions be liberalized so as to minimize the necessity for sporadic amendments, the use of special state agencies primarily for the purpose of issuing bonds that the state itself cannot issue, the resort to lease-rental agreements, and the use of

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123. *Id.* at 471-482.



long-term interagency lending.<sup>124</sup> We suggest that the state should be permitted to issue capital outlay bonds for construction and expansion of the necessary state office buildings, for acquisition of sites and construction of plant and facilities for the state university system and junior colleges,<sup>125</sup> and for building state highways, with this last type of bond being subject to mandatory statewide referendum if proposed above a certain limit in any fiscal year. The power to issue state bonds for the two purposes presently authorized should be retained.

As regards county, city, and special district bonds, we are not convinced that the relatively heavy use of revenue bonds in Florida has been detrimental or has caused any substantial additional expense to the borrowers; on the contrary, we recommend continued predominant use of revenue bonds without mandatory referendum when the bonds are true revenue bonds as previously defined in this article.<sup>126</sup>

As regards general obligation bonds, we suggest elimination of the provision requiring that a majority of the registered freeholders vote on the proposed issuance. Any eligible voter should be encouraged to vote. This restriction, however, actually encourages many voters to stay away from the polls as a means of defeating issuance. Every voter should be encouraged to express his opinion one way or the other. On the other hand, we recommend repairing the sabotage of Article IX, section 6, performed by the supreme court in *Lersch v. Board of Public Instruction*,<sup>127</sup> in which the court looked exclusively at the technical wording of Article IX, section 6, formulated at a time when no one was even aware that a specially privileged, non-taxable class of real property owners would be created in our state. Those asked to bear all of the risks and ultimate responsibility by themselves should be allowed to make the decision on this type of bond issuance, and those too irresponsible to shoulder any of the load, though still expecting a substantial amount of the benefits, should not be allowed to insist that their neighbor carry his own load and theirs too. The "Sarasota Plan," under which for purposes of defraying public school costs the first 2,000 dollars of assessed value is not exempt but the next 5,000 dollars is exempt,<sup>128</sup> is the least that should be done in this connection. The best plan would be to eliminate homestead tax exemption entirely as regards taxation for operating the public schools. From the standpoint of taxation the owner of the more valuable property bears a heavier load than the owner of less valuable property

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124. For a penetrating criticism of inter-agency lending see HEINS, *supra* note 5, at 76-81.

125. If constitutional authority were provided for regional multi-county districts authorized to issue capital outlay bonds for junior colleges, this solution might be preferable.

126. See *supra* text DEFINITIONS.

127. 121 Fla. 261, 164 So.281 (1935).

128. See FLA. CONST. art. X, § 7, as now worded; it includes this amendment for Sarasota County adopted in 1964.

anyway. The important point is that all property owners allowed to vote on imposing the risk should be made to realize that in imposing it they bear at least some small part of it themselves. The same reasoning applies to Article XII, section 17. In fact, the risk argument applies to every type of general obligation bond. The tax exemption logically has nothing to do with the question of who should vote on the imposition of all the risk.

We recommend that some millage limit be retained on ad valorem property taxation, although the ten-mill minimum for county school tax probably should be raised.<sup>129</sup> While we do not believe that issuance of revenue bonds should require a referendum, the siphoning off of all revenue other than ad valorem tax revenue without referendum, which has been the curse of some of the smaller communities controlled by irresponsible and incompetent city councils, is a ruinous process for the community involved and should be stopped. Since the courts have washed their hands of the fiscal feasibility issue,<sup>130</sup> some state or regional agency competent to check financial matters and able to approach the problem without bias might well be given this supervisory task. The initiative for proposing an issue should remain with the local governing authorities. Alternatively, a referendum by all the voters of the issuing community could be required for issuance of special obligation bonds and hybrid bonds. In other words, only issues of revenue bonds properly so called should be permitted without referendum. The indications that Florida voters, particularly municipal voters, are inclined to approve more issues than they disapprove, even under the present limited system of referendums, does not mean that their disapprovals are unimportant.<sup>131</sup> The tendency to approve is shown by the national figures also.<sup>132</sup> The argument sometimes heard that referendums cost a lot of money is not factually supported in Florida.<sup>133</sup>

With the growing revival of interest in local government (a good sign, we submit) perhaps the best solution would be to require a refer-

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129. Cf. FLA. CONST. art. XII, § 8, § 17.

130. This remark is not meant to imply that the responsibility for this type of decision should be placed on the judiciary.

131. Since 1960, to the personal knowledge of the authors, Palm Beach County freeholders approved issuance of 26,750,000 dollars of county school bonds, this being the only issue proposed to them since then. The city of West Palm Beach has since 1960 approved 4,500,000 dollars of general obligation bonds for various public improvements, these being the only general obligation bonds proposed within this period. In the only general obligation bonds issue proposed to the voters of the Town of South Palm Beach since 1960 they approved the issuance of 170,000 dollars of bonds for sewer and water line installations.

132. GOODBODY, *supra* note 27, at 23.

133. The usual cost of a referendum in a city as large as West Palm Beach, with a population of over 60,000, runs only between 1,200 dollars and 1,500 dollars when held in conjunction with a general election. The cost of holding a special referendum in a city this size would only be approximately 3,500 dollars. An amount of this size is a small price to pay for insurance against the mistakes that even the best of local governmental leaders make at times.

endum by all municipal voters or by all county voters, as the case may be, on special obligation or hybrid bonds, unless the city or metro charter expressly provides otherwise, or unless the legislature by statute exempts a particular county from this requirement. In this way the elimination of the requirement would at least be given a careful consideration.

The matter of setting total debt limits on the basis of percentage of assessed valuation, or on the basis of the average of recent operating budgets over a given period, or by some method other than a fixed dollar amount,<sup>134</sup> should be left to the municipality to provide in its charter if it so chooses.

Serious consideration should also be given to the matter of allowing those property owners paying all of the tax and taking all of the risk to vote on whether the proposed public benefits to their property to be financed by special assessments should be conferred. If what is proposed is really a special benefit to the property in a particular area, then by the very nature of this classification the citizens of other areas of the community should not be concerned in the matter. Those about to be benefited should be assumed to have enough intelligence to consider whether they want the benefits at the cost figure proposed, and if they cannot afford the cost they should not be forced to take the benefits. In this connection we point out that the homestead tax exemption, by its terms, does not apply to assessments for special benefits.<sup>135</sup> The same reasoning applies to special districts lying entirely or partially outside municipalities.

We recommend provisions barring the issuance of public industrial aid bonds, in view of the wavering of the supreme court on this matter.

In summary, although few would deny that our present state constitution is sadly in need of revision, with respect both to the internal organization of its contents and to a due regard for the English language, the fact remains that the existing debt-financing provisions have worked quite well in practice.<sup>136</sup> We do not believe that sweeping changes are necessary. Some few changes would be salutary, however, and we trust that this article may have indicated the reasons.

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134. A fixed dollar limit is becoming a very unstable yardstick by reason of the constant and rapid devaluation of the dollar over the past several years, a process controlled entirely by the federal government. The limitation standard should definitely not be pegged to the national currency, in our opinion.

135. FLA. CONST. art. X, § 7.

136. The reader, if he gets this far, may say that we have taken a long time to say so, but we did make a sincere effort to approach the problems without preconceived notions other than a strong belief in our system of constitutional democracy, coupled with the corollary belief that state and local governments should be strengthened and preserved from further encroachment and usurpation by the federal government. The removal in any government of the active and effective participation by the governed has invariably been the sign of a sick polity on its way out.

Robie Mitchell, a nationally respected municipal bond attorney with a firsthand knowledge of the Florida problems, recently defined civilization as "the condition in which one generation pays the last generation's debt by issuing bonds for the next generation to pay."<sup>137</sup> In a more serious vein he stated that his real fear was opening the gates to excessive borrowing and thereby bringing on another era of municipal defaults. We concur.

The constitutional revision committee has a most difficult task, and the Prophet Isaiah might well have had them in mind when he proclaimed:<sup>138</sup>

Thou art wearied in the multitude of thy counsels. Let now the astrologers, the stargazers, the monthly prognosticators, stand up, and save thee from these things that shall come upon thee.

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137. Constitutional Limitations on The Incurring of Debt, an address delivered before the Section on Local Gov't Law, A.B.A., Aug. 1964.

138. The Book of Isaiah 47:13.