

4-1-1994

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Recommended Citation

Patrick O. Gudridge, *Florida Constitutional Theory (For Clifford Alloway)*, 48 U. Miami L. Rev. 809 (1994)
Available at: <https://repository.law.miami.edu/umlr/vol48/iss4/4>

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ESSAYS

Florida Constitutional Theory (For Clifford Alloway)

PATRICK O. GUDRIDGE*

This Essay examines the single subject requirement of article XI, section 3 of the Florida Constitution. But it is also an essay in constitutional theory—exploring the question of what it means to take constitutional texts seriously in constitutional law. From the perspective of readers interested in only one or the other of these topics, the discussion here will include frequent apparent digressions. The two sides of this Essay, I think, support each other. I begin with some introductory observations about constitutional law generally and then locate the Florida explorations within that map.

A.

We purport to work with constitutions, to draw inferences from their structure, to gauge the specificity or generality of their language, to elaborate their overarching themes. But this is mostly surface. The expectations we bring to the act of reading are obviously more important. It is not just a matter of political agendas, narrowly defined. Our jurisprudence in place inevitably obscures or alters our view of constitutional texts. We hold beliefs about how judges should behave, for example, and about the usual features and concerns of law. Moreover, we possess a sense of constitutional history after the constitution. We know how courts and other readers have reacted to constitutional documents, and it is difficult not to perceive broad themes of success and failure playing out in this history. We also obtain a feeling for the language in

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This essay recognizes the retirement of Clifford Alloway from the faculty of the University of Miami School of Law. Professor Alloway, builder of institutions of academic freedom at the University, in the Law School taught always a complex lesson in constitutional law—not only the importance, but the difficulty, of free expression.

I was helped greatly in writing this essay by suggestions and criticisms offered by Gerald Cope, Stephen Diamond, and Michael Fischl. Some of the topics that I take up I discuss at greater length in two works in progress, *Legal Freedom: Reconstruction as Jurisprudence* and *Constitutional Law and Formal Revolution*. These works will include more complete citations to both primary sources and commentary.

which prior readers restated constitutional terms. This gloss tends to become the first subject of our study, rather than the constitutional texts themselves.

Constitutions as texts come into prominence only at the peripheries of constitutional law. There are, of course, issues of genuine first impression, for which the instrument's language is the only available resource. There are also questions that simply never come into controversy; it is as though a constitutional document settled these matters once and for all. Even in these two sets of cases, however, we may doubt the apparent textual primacy. Jurisprudential speculations or extrinsic features of political culture may influence our reading of constitutional provisions or artificially restrict the choice among readings. In any event, it is clear that what we ordinarily regard as the important part of constitutional law does not fall within the category of either the first or the easy case. The issues that occupy most of our attention are both familiar and difficult; in analysis, their text possesses little independent role.¹

This is not to deny the existence of an important dissenting tradition. The appeal to text is a standard move for critics of established constitutional law. And yet, writers such as Crosskey and Berger,² however industrious or ambitious their efforts, seem to remain marginal figures. Their work only occasionally strikes us as part of the body of standard constitutional law itself.³ Justice Black, it may seem, is an important counter-example: a text-citing dissenter who, in the end, actually reshaped constitutional substance. Nonetheless, it is as an individual that Black comes into his glory. We remember the gesture, literally acted out, of his reference to the constitutional document, and we appre-

1. This essay restates conclusions elaborately worked-out and illustrated elsewhere. Important discussions include, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For present purposes, I do not distinguish between efforts to draw conclusions about constitutional law through readings of constitutional texts and efforts to draw such conclusions through analyses of the "original understanding" of constitutional framers. "Original understanding" is a legal fiction much like "legislative intent" or "reasonable person." It is sometimes helpful in organizing the discussion of legal norms, but if it is treated as "real," it is always controversial. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (illustrating the historically contingent character of "original understanding" arguments); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) (identifying question-raising assumptions implicit in "original understanding" arguments).

2. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

3. For critical responses, see, e.g., Henry M. Hart, Jr., *Professor Crosskey and Judicial Review* (Book Review), 67 HARV. L. REV. 1456 (1954); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

ciate the ease with which his jurisprudence served his tactical needs. This, we think, was brilliant constitutional politics, but Black's arguments, as opposed to his results, did not readily become constitutional law. For example, Fairman's refutation of Black's incorporation thesis entered the canon;⁴ incorporation indeed became law, but only refashioned, as Black himself acknowledged, to suit less textual tastes.⁵ Black's interpretation of constitutional language appears as the nominal majority opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,⁶ but most modern readers consider the concurring opinions of Justices Frankfurter and Jackson to be more helpful—precisely because they attempt to develop alternatives to textual inquiry.⁷

There is also John Marshall. Re-reading his famous opinions, we cannot help but note the degree to which the idea of the written constitution, and the features of the particular constitutional instrument as a writing, supply both the logic and the expressive symbolism for Marshall's arguments. *Marbury*,⁸ *McCulloch*,⁹ and *Gibbons*¹⁰ plainly are not dissenting opinions. Such cases are, and their author is, a point of origin for our constitutional law. But in so honoring Marshall, we tend to locate him and his work at simply another point along the periphery. It is as though Marshall were pre-historic: writing before there were any elaborate sequences of constitutional glosses, conspicuously participant in a politics too remote from our own. His intricate constructions in fact serve as neither inspiration nor foil. Rather, for the most part, Marshall's opinions figure in modern constitutional law as mere ornament—honorific sources for propositions in fact ours, their own textual preoccupations irrelevant. Ironically, for us Marshall's opinions teach, as much or more than anything else, the liberation of constitutional law from constitutional text. "[W]e must never forget, that it is a constitu-

4. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). For a recent reinterpretation of the incorporation debate, discussing the Black/Fairman controversy, see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

5. See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring).

6. 343 U.S. 579 (1952).

7. *Id.* at 593-628 (Frankfurter, J., concurring); *id.* at 634-55 (Jackson, J., concurring); see, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668-74 (1981).

Among contemporary participants in constitutional debate, Justice Scalia and almost-Justice Bork espouse versions of a text-based jurisprudence. It is clear in the case of Bork, however, that his personal presence, as reflected in the evident independence of his thinking about constitutional law, was a more important factor (especially for his critics) than his textual methodology. Justice Scalia's career, of course, remains a work in progress.

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

9. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

10. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

tion we are expounding."¹¹ Marshall's point was hermeneutic; we read it as a rationalization for abandoning the interpretive effort.

B.

It is not as though there were once a Golden Age of constitutions—a world we have lost. The idea that constitutional texts are law was not an easy one even at the outset, even if explicitly a topic of constitutional language itself (the Supremacy Clause in the United States Constitution, for example). John Marshall seems to have assumed that constitutional concepts enter into law, even if always high within the hierarchy of legal instruments, only because a constitution is recognizably (understandable as) a legal instrument.¹² A constitution fit within a way of identifying and interpreting documents already available, and more importantly already accepted as applicable, before constitutional provisions themselves were read. The priority of a constitution was thus in an important sense secondary. A constitution's status was not absolute—a fact deriving from the constitution's existence or its own assertions. Its status, rather, was conditional—dependent upon the prominence and plausibility of the legal *modus operandi*. Marshall's insistence upon the priority of the United States Constitution was resolutely local, simply an instance of his insistence upon the priority of law.

Indeed, Marshall himself does more than anyone to restrict the impact of constitutional provisions per se. His demonstration that a constitution is a legal instrument is itself another (mostly Marshall-invented) instrument, a means for registering or recording the process of sorting legal instruments. The judicial opinion, especially in the long form that Marshall worked out, has become the primary text for every reader, even if the ostensible message of that text is the elaboration of some other. This is not to say that after Marshall every judicial opinion ends up primary, even if it is the reader's first resource. Sometimes judicial writers make no attempt to hold the reader and dispose of pertinent issues so easily that the reader believes that the writer believes that the applicable instruments are themselves decisive, and so believing believes herself. Sometimes the judicial writer simply botches the job and is unable successfully to set up a demonstration of how, for example, a constitutional text is put together. Both the opinion and its proffered reading are left in shambles. *Dred Scott*,¹³ we want to think, is an important example. In contrast, Marshall's leading opinions are remarkable works, organized melodramatically, putting in question but in the

11. *McCulloch*, 17 U.S. at 407.

12. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

13. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

end resolving their own form, validating astonishingly the substance of the opinion's constitutional readings by causing readers to see these constitutional readings as resolutions of the opinions' predicament. It is only necessary to read back to back *Martin v. Hunter's Lessee*¹⁴ and *Cohens v. Virginia*.¹⁵ Justice Story flounders. He seems unable to conceive of the long-form opinion as anything other than pieces of lectures. Marshall flaunts his virtuosity. Disparaging and thus distinguishing some of his own language in *Marbury v. Madison*,¹⁶ Marshall calls attention to the judicial opinion as artifice, the work of particular judges. This is, at the same time, the fundamental point of his argument for federal judicial supremacy (to be fair, also Story's argument), and calling to mind *Chisholm v. Georgia*,¹⁷ the beginnings of his reading of the Eleventh Amendment as well.

Since Marshall, the question of the persuasiveness of the constitutional opinion (the legitimacy of its devices) has often overlaid and sometimes obscured or confused the question of the significance of constitutional provisions themselves. It is frequently difficult to determine whether certain readings of constitutional language, those incorporating common law notions for example, are supposed to be persuasive because they reveal something fundamental about the form or function of constitutional texts, or persuasive because they suggest a conception of the judicial role within which the risks of judicial originality seem manageable. The problem is not one peculiar to nineteenth century classicism. Much in the history of constitutional adjudication in the United States Supreme Court, and in the history of constitutional commentary, represents a sequence of attempts to come to grips with the judicial opinion. We can without difficulty note repeated efforts to reform the opinion, to frame an alternative to virtuosity, to Marshall's performance art, in order to reconcile its inherent assertiveness of the judicial opinion with the perception that aggressive judging is inconsistent with democratic norms. The debates among the Justices of the Warren Court, and the intense reactions of academic readers of that Court's work, are rich, familiar sources of illustration.

In fact, the crucial period came just before those debates: the era of transition, the passage away from the classical conception of constitutional law, within which concepts of common law origin seemed to subordinate formally both constitutional texts and judicial opinions, and to regulate substantively legislative agendas. Arguably, this reform

14. 14 U.S. (1 Wheat.) 304 (1816).

15. 19 U.S. (6 Wheat.) 264 (1821).

16. See *id.* at 394, 401.

17. 2 U.S. (2 Dall.) 419 (1793).

movement may have been almost coterminous with the period of duration of its ostensible predecessor. (Perhaps classicism initially was in fact itself reform, deliberately responding to a perceived post-Civil War legal chaos.¹⁸) *The Common Law*,¹⁹ Holmes's 1881 effort to equate the circumstances of legality with legislative freedom, was the first great challenge to classicism. By the beginning of the twentieth century, Holmes was exposing the artifice of classical constitutional opinions; their asserted categories gave way, in the face of his pitiless reading, to controversial social theories.²⁰ Brandeis, Hand, and a legion of academics joined in.

But it was really only after the ascension, and especially the re-ascension, of Charles Evans Hughes that critique became transformative, that change found full voice. The great Hughes opinions, like those of Marshall, call attention to themselves as artifacts, as constructions, and in so doing animate particular conceptions of constitutional law. But Hughes's point was not to justify readings of constitutional provisions as such. Rather, he set up opinions in relationship with each other, to redefine constitutional law within the terms of one opinion's reaction to another. Marshall's opinions worked their effects by and large through the risky, seemingly slipshod organization of the arguments—the reader seizes on a particular reading of the Constitution as a way of resolving the tension in the structure of Marshall's opinion. Constitutional analysis becomes literary cure. Hughes used a number of devices. In *Jones & Laughlin*,²¹ for example, his opinion arguably established its conclusion by the time it finished stating the facts. The description of the relationships among the various parts of the Jones & Laughlin enterprise, pictured as repeatedly folding back on itself after the fashion of a Thomas Hart Benton painting, simultaneously suggested not only why Jones & Laughlin as a whole was engaged in interstate commerce, but also why the dismissal of a few employees at one plant was an inextricable part of that whole.²² In *Jones & Laughlin*, as in a number of his other famous opinions, including the *Shreveport Rate Cases*²³ and *Crowell v. Benson*,²⁴ Hughes also paid unusually close attention to word

18. Cooley's work is here the exemplar. In this respect, I think, the *Treatise on the Law of Torts* may be more revealing than his *Constitutional Limitations*. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT (1st ed. 1879); Patrick O. Gudridge, Thomas Cooley's Torts Jurisprudence (unpublished manuscript, on file with the author).

19. OLIVER W. HOLMES, JR., *THE COMMON LAW* (1881) (Howe ed. 1963).

20. See, e.g., *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

21. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

22. *Id.* at 26-28.

23. *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914).

24. 285 U.S. 22 (1932).

usage in his strictly legal analyses. Sometimes he juxtaposed alternate formulations of (what seemed to be) the same idea. At other times, he called attention to the linguistic characteristics of particular phrasings—most notably in his reference to metaphor in *Jones & Laughlin*.²⁵ This heightening of the reader's sense of word choice served formally subversive purposes. It rearranged the relationship of constitutional categories and judicial opinions. Categories no longer dictated judicial analysis, but were simply terms put to use within, and thus subordinated to, judicial opinion-writing. "The Constitution is what judges say it is" was not so much casual realism as methodological manifesto.

After Hughes, there is the great period of experiment in opinion-writing. Stone, Jackson, Frankfurter, Black, Brennan, Rehnquist—however much they differ among themselves, all manipulate the form of the judicial opinion, calling attention in various ways to its organization and syntax, in order to present as unavoidable their particular conceptions of constitutional law. This is the period we treat as present.

C.

Perhaps I exaggerate.²⁶ It is not difficult, however, to criticize attempts to give a genuine priority to constitutional texts. As a result, it really does not seem at all implausible to speak of constitutional law as largely distinct from constitutions themselves. How could it be otherwise? This is the question I wish to begin answering here. Answering this question fully presupposes a radical rethinking of the entire enterprise of constitutional law. This Essay attempts no more than a tentative first step.

I start in Florida. Specifically, the point of departure is three cases.

25. *Jones & Laughlin*, 301 U.S. at 36.

26. Even setting Justice Scalia to one side, in constitutional law important work continues to be done which pays serious attention to constitutional texts as its starting point. See, e.g., Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993); Amar, *supra* note 4. In this very good work, however, it is still sometimes easy to note a stopping short. Professor Rubenfeld, for example, begins and ends with constitutional language (chiefly the Fifth Amendment Takings or Just Compensation Clause—which he would rename the Public Use Clause), but at the point at which he needs to describe the normative underpinnings of his approach he sets the text aside and explains and justifies his notion of "instrumentalization" in philosophical terms. His textual "solution" does not, he seems to think, identify pertinent normative resources. Professor Amar's use of "rights and privileges" as a key to resolving the relationship of the Bill of Rights and the fourteenth amendment, by contrast, is simultaneously textual and normative. Text, in his reading, points to history illustrating the importance as well as the usefulness of "rights and privileges." Amar's analysis calls attention, however, to another dimension of the constitutional text. Notions like "rights" and "privileges" are not constitutionally unique; they are usages associated (maybe even chiefly) with other legal resources like common law. A full development of his argument, therefore, might need to set these terms in such other settings as well, risking the possibility that "rights" and "privileges" might show diverging (indeed sometimes opposite) presuppositions, thus complicating the constitutional message. See also *infra* note 400.

Fine v. Firestone,²⁷ *Evans v. Firestone*,²⁸ and *In re Discrimination Laws Restriction*²⁹ are decisions of the Florida Supreme Court, the first two issued in 1984, the third handed down in 1994, enforcing article XI, section 3, of the Florida Constitution, a provision regulating attempts to amend that constitution through the initiative process.

Why discuss these cases? Obviously, the general question of constitutional regulation of amendment procedures is important on its own terms, a matter of continuing controversy in federal law as well as within the state systems. Furthermore, the "single subject" requirement—the constitutional restriction on initiative-proposed amendments which was at issue in these three decisions³⁰—has figured in prominent cases in several states.³¹ In fact, however, the Florida Supreme Court is the only court in the United States that has in recent years repeatedly treated the single-subject requirement as a real constraint on initiative-proposed state constitutional amendments.³² In five of these cases (three in 1994), proposed amendments failed the single subject test (in one omnibus opinion, three of four challenged proposals fell at once). *Fine*, *Evans*, and *Discrimination Laws Restriction* are the most important and the most analytically revealing of the decisions in this sequence. Arguably, because there is so little comparable recent caselaw elsewhere, the Florida cases are simply anomalous—flukes. These decisions would remain interesting nonetheless. They supply a useful analytical context

27. 448 So. 2d 984 (Fla. 1984).

28. 457 So. 2d 1351 (Fla. 1984).

29. *In re Advisory Opinion to the Attorney Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (*Discrimination Laws Restriction*).

30. This essay does not discuss the statutory misleading title/summary questions also at issue in some of the cases. *E.g., id.* at 1341-42. *See generally* Askew v. Firestone, 421 So. 2d 151 (Fla. 1982).

31. California's Proposition Thirteen litigation is one example. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978). By my count, twenty-seven state constitutions impose some version of a single-subject requirement as a limit on constitutional amendments.

32. *See e.g.*, *Advisory Opinion to the Attorney Gen. re Tax Limitation*, 644 So.2d 486 (Fla. 1994); *Advisory Opinion to the Attorney Gen. re Ltd. Casinos*, 644 So. 2d 71 (Fla. 1994); *Advisory Opinion to the Attorney Gen. re Criminal Justice Funding*, 639 So. 2d 972 (Fla. 1994); *In re Advisory Opinion to the Attorney Gen. Everglades Trust Fund*, 636 So. 2d 1336 (Fla. 1994); *Discrimination Laws Restriction*, 632 So. 2d at 1018; *Advisory Opinion to the Attorney Gen.—Ltd. Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993); *Advisory Opinion to the Attorney Gen.—Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991); *In re Advisory Opinion to the Attorney Gen.—Homestead Valuation Limitation*, 581 So. 2d 586 (Fla. 1991); *In re Advisory Opinion to the Attorney Gen. English—The Official Language of Fla.*, 520 So. 2d 11 (Fla. 1988); *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984); *Floridians Against Casino Takeover (FACT) v. Let's Help Florida*, 363 So. 2d 337 (Fla. 1978); *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976). *See also* *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970) (predecessor constitutional provision).

within which a revised theory of constitutional texts might work out its vocabulary.

There is first of all the advantage of freedom from associations—the opportunity to respond to the work of a court other than the United States Supreme Court, and the chance to consider the implications of a constitutional provision which is not a routine topic of interpretation within standard constitutional law. Moreover, the single-subject inquiry, at least as it emerges in the Florida cases, tests precisely our sense of constitutional text. The opinions in the cases frequently suggest that the relevant question is whether the challenged amendment conflicts with existing constitutional provisions (other than the single-subject requirement itself). Within this perspective, the single-subject requirement presupposes a theory of constitutions that specifies what “conflict” means and explains why tolerance of conflict is inappropriate. This theory, as I develop it, is one that starts out taking seriously constitutions as texts. Specifically, it treats all constitutional provisions (and thus all constitutions) as “additional texts,” as always co-existing with other documents, perhaps also constitutional, but perhaps statutory, administrative, or judicial in origin.³³ (This approach recognizes, with respect to constitutional texts themselves, a version of the “formal doubling” Marshall and Hughes variously exploited as part of their jurisprudence.) The question of “conflicts” is routine within this view and also almost always easy—one document replaces or assimilates itself into another. However, in some circumstances, I argue, there is no resolution, no basis for choosing one or another provision. It is this class of cases, I conclude, that article XI, section 3, is best understood as addressing.

This summary precisely omits the test of the success or failure of my formulation—the extent to which it is able to open in depth inquiries into constitutional documents, to generate a sense of detail, of change and variation, to supply therefore a meaningful context within which the norms this formulation suggests might elaborate. The argument proceeds by accretion. This Essay begins by briefly summarizing the three Florida Supreme Court decisions, then closely examines the opinions in the cases, setting the opinions within the context of single-subject law nationally. Thereafter, I juxtapose the proposed amendments at issue with provisions already part of the Florida constitution, locating these latter provisions within their own fields of reference—mostly earlier Florida constitutions and Florida Supreme Court decisions but sometimes federal law. In the course of this build-up, this Essay formulates the conception of constitutional conflicts that organizes the single sub-

33. For a well-known use of this perspective, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 519-64 (1969).

ject inquiry. This conception is then briefly applied in a short discussion of the other single-subject decisions. At the end of the Essay, the implications of this approach as a model for constitutional analysis are explored more generally.

I.

Fine v. Firestone,³⁴ *Evans v. Firestone*,³⁵ and *In re Discrimination Laws Restriction*³⁶ do not announce themselves as easy cases. In the course of issuing these three decisions, the justices of the Florida Supreme Court produced a total of eleven opinions.³⁷ The problem was not outcome; in this regard the court was virtually unanimous.³⁸ Rather, the difficulty was one of explanation.

On its face, the single subject requirement of article XI, section 3, as it stood before November, 1994,³⁹ seems straightforward enough: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith."⁴⁰ This particular constitutional provision is not old. To be sure, the single-subject limit had already appeared, as a restriction on legislation, in the 1885 and 1868 constitutions.⁴¹ This restriction was repeated in 1968.⁴² But article XI, section 3, in its current form, was added as an amendment to the Florida constitution in 1972, replacing a proviso limiting initiative-pro-

34. 448 So. 2d 984 (Fla. 1984).

35. 457 So. 2d 1351 (Fla. 1984).

36. 632 So. 2d 1018 (Fla. 1994).

37. Justice Overton wrote the principal opinion in *Fine*. 448 So. 2d at 985. Justices McDonald, Ehrlich, and Shaw issued concurring opinions. *Id.* at 993 (McDonald, J., concurring); *id.* at 995 (Ehrlich, J., concurring in result only); *id.* at 996 (Shaw, J., concurring in result only). In *Evans*, the court's per curiam opinion, 457 So. 2d at 1352, was accompanied by the concurring opinions of Justice Overton, *id.* at 1356; Justice McDonald, *id.* at 1358; Justice Ehrlich, *id.* (specially concurring); and Justice Shaw, *id.* at 1360 (specially concurring). *Discrimination Laws Restriction* yielded two more opinions, the majority opinion of Justice McDonald, 632 So. 2d at 1019, and the concurring opinion of Justice Kogan, *id.* at 1021-24.

38. One judge in *Evans* thought that the proposed amendment in that case satisfied the single-subject requirement. 457 So. 2d at 1360 (Shaw, J., specially concurring). Justice Shaw agreed with the court's alternative ruling in *Evans* that the ballot summary prepared by advocates of the amendment was misleading. *Id.* at 1361; *see also id.* at 1354-55. Another judge in *Evans* felt that the constitutional violation wasn't as clear as that in *Fine*. *See id.* at 1358 (McDonald, J., concurring). In *Discrimination Laws Restriction*, Chief Justice Barkett recused herself. *See* 632 So. 2d at 1021.

39. *See infra* note 405.

40. FLA. CONST. art. XI, § 3.

41. FLA. CONST. of 1885, art. III, § 16; FLA. CONST. of 1868, art. IV, § 14.

42. FLA. CONST. art. III, § 6.

posed amendments "to any section of this constitution."⁴³ This recent reuse of the single-subject formulation, we might think, suggests something about its current comprehensibility. Nor was it the case, even at the beginning of the sequence in 1984, that the Florida Supreme Court confronted the vagaries of a first reading. Three prior decisions of the court, one interpreting the predecessor text,⁴⁴ and two addressing the 1972 amendment,⁴⁵ served as guides.

A.

I take up the cases in chronological order. All three evaluated the constitutionality of proposed amendments of obvious importance.

FINE V. FIRESTONE

The *Fine* litigation followed an order issued by the Florida Secretary of State approving a proposed constitutional amendment entitled "Citizens' Choice on Government Revenue" for inclusion in the 1984 general election ballot.⁴⁶ The proposed amendment, of a type exemplified by California's famous Proposition Thirteen, restricted revenues available to any Florida "taxing unit" to the terms of a formula which added to the revenues available in the preceding year adjustments for inflation and for new revenues raised through ad valorem property taxes, allowing increases in assessments attributable to new construction subject to taxation for the first time. The amendment's text revealed an unsurprising concern that Florida governments, if the amendment were adopted, might seek to circumvent the revenue limit. As a result, the proposed constitutional provision included a subsection requiring that "excess" revenue be held for the "following fiscal period," reducing the allowable revenue for that period. Another subsection, while permitting referendum approval of expenditures exceeding "revenue limits," placed limits on the use of the exceptions procedure. A third subsection authorized taxpayer suits, with allowance for attorney fees, to enforce

43. The earlier language was part of the original text of the 1968 constitution. See *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970). At different times under the 1885 constitution as amended, legislature-proposed amendments were subject to what was in effect a single-subject requirement, *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944) (constitutional language requiring that "[t]he proposed amendments shall be so submitted as to enable the electors to vote on each amendment separately"), or to a requirement, similar to the 1968 provision, allowing an amendment to "relate to . . . any number of subjects, but no amendment shall consist of more than one revised article of the Constitution," *Gray v. Golden*, 89 So. 2d 785, 787 (Fla. 1956).

44. *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970).

45. *Floridians Against Casino Takeover (FACT) v. Let's Help Florida*, 363 So. 2d 337 (Fla. 1978); *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976).

46. *Fine v. Firestone*, 448 So. 2d 984, 986 (Fla. 1984).

the amendment. The crucial provision, however, was one defining "revenue."

[R]evenue includes ad valorem taxes, other taxes and all other receipts, but excludes receipts from the United States government and its instrumentalities, bonds issued, loans received and the cost of investments sold. Receipts of agencies and instrumentalities and proprietary and trust funds shall be included in the revenue of the state or other taxing unit as appropriate.⁴⁷

Plainly, the drafters of the amendment meant to block Florida governments from simply shifting from one form of taxation to another. But the definition did more than that. Its inclusion of "receipts" brought user fees within the limit. Furthermore, while nominally permitting government borrowing, to the degree that bonds would be secured by government revenues, the inclusion of "receipts" also indirectly restricted the use of debt financing.

In short order, *Fine v. Firestone* reached the Florida Supreme Court. The central question was whether such an all-encompassing revenue cap could properly be placed on the ballot via the initiative process given the restrictive language of article XI, section 3. The court concluded that the initiative proposal in fact lacked the necessary unity:

[T]he Citizens' Choice proposal contains at least three subjects. It limits the way in which governmental entities can tax; it limits what government can provide in services which are paid for by the users of such services; and it changes how governments can finance the construction of capital improvements with revenue bonds that are paid for from revenue generated by the improvements.⁴⁸

EVANS V. FIRESTONE

The proposed amendment at issue in *Evans* sought to reform litigation rules in Florida. The proposal, labeled by its supporters "Citizen's Rights in Civil Actions," provided that no party to a civil action could be found "liable for payment of damages in excess of his/her percentage of liability," guaranteed the right to summary judgment if "no genuine dispute exists concerning the material facts of the case," and prohibited the award of "noneconomic damages" (for pain and suffering, loss of consortium, etc.) "in excess of \$100,000 against any party."⁴⁹ As in *Fine*, the Florida Supreme Court held that the amendment's language violated the single-subject limitation:

The proposed amendment now before us affects the function of the

47. *Id.* (quoting the proposed amendment).

48. *Id.* at 992.

49. *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984).

legislative and the judicial branches of government. Provisions a and c of the amendment, which limit a defendant's liability, are substantive in nature and therefore perform an essentially legislative function. On the other hand, provision b, elevating the summary judgment rule currently contained in Florida Rule of Civil Procedure 1.510, is procedural and embodies a function of the judiciary.⁵⁰

IN RE DISCRIMINATION LAWS RESTRICTION

The proposed amendment at issue would have added to article I, section 10 of the Florida Constitution (prohibiting bills of attainder, ex post facto laws, and laws impairing contractual obligations) a proviso barring "[t]he state, political subdivisions of the state, municipalities or any other governmental entity" from adopting "any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic . . . other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status."⁵¹ Definitions of "sex," "marital status," and "family status" included in the amendment precluded antidiscrimination legislation protecting persons homosexually-oriented.⁵² This proposal, according to the Florida Supreme Court, was multiply unconstitutionally multiple:

By including the language "any other governmental entity," the proposed amendment encroaches on municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary. In addition, the amendment modifies article I, section 2 of the Florida Constitution, dealing with the basic rights of all natural persons, and also affects article I, section 6 of the Florida Constitution, dealing with the right of employees to bargain collectively.

The proposed amendment also violates the single-subject requirement because it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed.⁵³

B.

The explanatory difficulty that these cases pose suggests itself, at one level, through the break with the Florida Supreme Court's own past practice. In two not-much-earlier cases, decided in 1976 and 1978, challenging initiative-proposed amendments under article XI, section 3, the

50. *Id.* at 1354.

51. *Discrimination Laws Restriction*, 632 So. 2d at 1019.

52. *See id.* The proposed amendment also declared that the amendment itself would effect the repeal of previously enacted inconsistent laws. *See id.*

53. *Id.* at 1020.

court had ruled that the single-subject requirement did not bar voter consideration of propositions seemingly at least as complicated as the revenue cap at issue in *Fine* and the civil litigation reform proposed in *Evans*. *Weber v. Smathers*⁵⁴ held that an "Ethics in Government" proposal addressed only one subject, in the constitutional sense, even though it set financial disclosure standards for public employees, public officials, and candidates for office, adjusted the retirement rights of individuals found to be in violation of disclosure rules, and placed limits on the conduct of lobbyists.⁵⁵ *Floridians Against Casino Takeover (FACT) v. Let's Help Florida*,⁵⁶ approved a proposed amendment which legalized casino gambling, provided for its taxation, and regulated the distribution of the taxes collected.

The analysis offered by the court majority in *Weber* was quite terse. *FACT*, however, developed at some length ideas Justice England had outlined in a concurring opinion in *Weber*, emphasizing that article XI, section 3, was not the only single-subject restriction to be found in the Florida Constitution. Article III, section 6 restricted laws enacted by the state legislature to "but one subject and matter properly connected therewith," and the *FACT* opinion explicitly associated its reading of article XI, section 3 with the relaxed approach Florida courts had traditionally taken in applying article III, section 6.⁵⁷ Moreover, the court in *FACT* noted that the present language of article XI, section 3 was a reaction to the decision of the Florida Supreme Court in *Adams v. Gunter*,⁵⁸ reading literally and narrowly the language of the 1968 constitutional provision authorizing initiative-proposed amendments to "any section of this constitution."⁵⁹ *FACT* read this history to mean that, under article XI, section 3, the question of whether or not an initiative proposal would alter more than one section of the constitution was now irrelevant.

The justices writing in *Fine* and *Evans* could not agree as to whether the ultimate conclusions drawn in *Weber* and *FACT* were consistent with those reached in the 1984 cases.⁶⁰ But Justice Overton, in

54. 338 So. 2d 819 (Fla. 1976).

55. *Id.* at 820-22.

56. 363 So. 2d 337 (Fla. 1978).

57. *Id.* at 340-41.

58. 238 So. 2d 824 (Fla. 1970).

59. 363 So. 2d at 339-40.

60. In *Fine*, Justices Ehrlich and Shaw suggested that both *Weber* and *FACT* were wrongly decided within the terms of the court's new approach. See *Fine v. Firestone*, 448 So. 2d 984, 996 (Fla. 1984) (Ehrlich, J., concurring in result only); *id.* at 996, 999 (Shaw, J., concurring in result only). Justice McDonald, however, appeared to conclude that *Weber* at least was correct in result, although the issues were not thoroughly analyzed at the time. See *id.* at 994, 995 n.5 (McDonald, J., concurring). But Justice Overton, in his *Evans* opinion at least, saw the results in *Weber*, *FACT*, *Fine*, and *Evans* as "totally consistent." *Evans v. Firestone*, 457 So. 2d 1351, 1357 (Fla. 1984) (Overton, J., concurring).

his majority opinion in *Fine*, committed the court, at the least, to rejecting the organizing assumptions of *FACT*. Variations in the language between the article III, section 6, legislative single-subject rule and that of the article XI, section 6, initiative limitation,⁶¹ Overton thought, were linked to fundamental differences in the nature of the legislative and initiative processes, thus justifying stricter judicial review of initiative-proposed amendments. He first noted that:

we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative.⁶²

Second, and more importantly for Overton, "we should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature."⁶³ Specifically, as Overton had already noted, the single-subject requirement worked to protect the integrity of the constitutional text by preventing the possibility of "multiple precipitous changes in our state constitution" as a result of log-rolling proposals inducing voters "to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support."⁶⁴

Given his concern over the impact of a proposed amendment upon the organization of the existing constitution, it was no surprise that Justice Overton also concluded that, despite the holding in *FACT*, *Adams v. Gunter* continued to be relevant insofar as it emphasized the importance of being able to identify, from the text of an amendment itself, which provisions of the existing constitution the amendment would alter.⁶⁵ The point here was in part the need for the public to be able to appreciate the effect of a proposed amendment.⁶⁶ In addition, Overton stressed the subsequent judicial role in interpreting an initiative-added constitutional amendment, and the differences in this regard between the prod-

61. Justice Overton noted that article III, section 6, required that legislation "embrace but one subject and matter *properly connected* therewith" whereas article XI, section 3, limited an initiative-proposed amendment to "but one subject and matter *directly connected* therewith." 448 So. 2d at 988-89 (emphases added by Justice Overton).

62. *Id.* at 989.

63. *Id.*

64. *Id.* at 988.

65. *Id.* at 989.

66. "This is necessary for the public to be able to comprehend the contemplated changes in the constitution" *Id.*

ucts of legislative and initiative processes. Once more, the underlying theme was the risk of a disordered constitutional text:

The problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict. . . . Reliance on the application of this principle . . . would grant to this Court broad discretionary authority in determining the effect of a proposed amendment or revision on the existing constitution. No official record of legislative history or debate would be available to aid this Court in the construction of an amendment resulting from an initiative proposal. We do not believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of redrafting substantial portions of the constitution by judicial construction.⁶⁷

C.

Justice Overton's own interpretation of the single subject requirement emerged from his criticism of *FACT*. There was now room for an approach to article XI, section 3, which was more rigorous than that which Florida courts employed in applying article III, section 6. Overton had made the case for reading a proposed amendment in context, from within the existing constitution. The question of whether an amendment addressed only a single subject was "functional" rather than "locational." To this extent, *FACT*, rather than *Adams v. Gunter*, remained the model.⁶⁸ The desired "logical or natural oneness of purpose," however, might properly be discerned by considering "how an initiative proposal affects other articles or sections of the constitution."⁶⁹ To this extent, *Adams v. Gunter* replaced *FACT*. The error in *Adams* (and in the earlier version of article XI, section 3, which *Adams* enforced), it appeared, was simply one of confusing surface structure with deep structure.

But was this new version of the single-subject test itself simply surface structure—merely a rhetorical overlay? Justice Overton's opinion in *Fine* is not, in the end, all of a piece. Overton referred repeatedly, but not exclusively, to the existing constitutional text in analyzing the unity (or multiplicity) of the initiative proposal. He noted that, in restricting "all types of taxation," the proposal assimilated taxes treated as separate in the Florida constitution, indeed addressed by at least six

67. *Id.*

68. *Id.* at 990.

69. *Id.*

different constitutional provisions.⁷⁰ But this was dictum. Overton declared that he would not decide whether "the limitations on the various types of tax revenue are separate subjects" inasmuch as the proposal contained "other distinct subjects."⁷¹ In the course of identifying the "second distinct subject" of the proposal as its "restriction on the operation and expansion of all user-fee services," Overton did not refer at all to the constitutional text.⁷² The great variety of user-fees, he suggested, and the many considerations involved in their use, were sufficient to show that user-fees could not, as the proposed amendment attempted, be simply lumped with taxes in one all-encompassing reform.⁷³ Yet, in discussing the impact of the proposed amendment on the use of revenue bond financing, Justice Overton listed the various provisions of article VII of the Florida constitution which, contrary to the thrust of the proposal, "allow governmental entities to finance the construction of capital improvements with funds from government bonds without the necessity of an election."⁷⁴ Moreover, his conclusion that "the present constitutionally-established revenue bond funding scheme" was "a distinct subject" not "connected to the limitation on tax revenue for general governmental operations" derived from the repetition and separation of the various discussions of the bond financing characteristics in the organization of the existing constitutional text.⁷⁵ By the close of Justice Overton's opinion in *Fine*, therefore, it was apparent that the "functional" test was an inquiry into the complexity of a proposal. It was not at all clear, however, whether the existing constitutional text was to be the primary factor in determining what was complex or simple, or instead whether complexity was "a matter of public record," illustrated by constitutional language but originating from general knowledge about "governmental operations."⁷⁶

The concurring opinions in *Fine* emphasize the opposing strains in Overton's opinion. Justice McDonald highlighted the "multiple propositions" included within the initiative proposal by cataloging the existing

70. *Id.* at 991.

71. *Id.*

72. *See id.*

73. These subjects clearly involve two separate and distinct functional operations of our government. General tax revenue, utilized for general governmental operations, and user-fee revenue, primarily utilized to fund services received by the paying consumers, do not have a natural relation and connection as component parts or aspects of a single dominant plan or scheme and, therefore, are clearly separate subjects under this proposal.

Id.

74. *Id.*

75. *See id.* at 992.

76. *Id.* at 991.

constitutional provisions which "the proposed amendment would have the immediate effect of amending . . . or repealing sub silencio."⁷⁷ For McDonald, it was precisely this manifold impact of the proposal on the present constitutional structure, which was neither specified in the language of the amendment itself nor in the ballot summary to be presented to the voters, which was the source of the difficulties that the single-subject requirement was intended to prevent. "[T]he electorate cannot know what it is voting on" because the "very broadness of the proposal makes it impossible to state what it will affect and effect."⁷⁸ If the amendment were to be adopted, "the lack of specific amendments to specific sections and articles of the constitution would create chaos as to which parts of that document have or have not been affected and in what manner."⁷⁹ Justice Ehrlich, however, downplayed the significance of whether an initiative proposal was or was not an "amendment of other sections of the constitution."⁸⁰ The crucial question, to Ehrlich, was the presence or absence of "logrolling"—whether a proposal appeared to pair "a popular measure with an unpopular one in order to enhance the likelihood of passing the less-favored measure."⁸¹ Justice Shaw, although stating that analysis of a proposed amendment to determine "whether it conflicts with existing provisions of the constitution" was "highly pertinent to the question of whether it encompasses only one subject," thought that judges ultimately must resort to an inquiry shaped by the purposes of the single-subject rule.⁸² These purposes, he believed, were two: to ensure that "initiatives are sufficiently clear so that the reader, whether layman or judge, can understand what it purports to do and perceive its limits," and to ensure that "there is a logical and natural unity of purpose in the initiative so that a vote for or against the initiative is an unequivocal expression of approval or disapproval of the entire initiative."⁸³

D.

All of the opinions in *Evans* portrayed *Fine* as controlling. The idea that the organization of the existing constitution is the key to classifying a proposed amendment as unitary or multiple, however, was much

77. *Id.* at 995, 994-95 (McDonald, J., concurring). For McDonald's list, see *id.* at 995.

78. *Id.*

79. *Id.*

80. *Id.* at 996 (Ehrlich, J., concurring in result only).

81. *Id.* at 995-96. Ehrlich did not apply his approach to the proposal at issue in *Fine*; rather, he was principally concerned with the question of the continued vitality of *Weber* and *FACT*. See *id.*

82. *Id.* at 998 (Shaw, J., concurring in result only).

83. *Id.*

less prominent. Counsel defending the propriety of the civil action initiative contended that rules governing the scope of a defendant's liability for damages and the availability of summary judgment "would create no conflict with any other existing constitutional provision" and therefore the proposed amendment was "self-contained" within the meaning of article XI, section 3.⁸⁴ The per curiam opinion issued by the supreme court accepted counsel's claim, but declared that *Fine* did not establish the presence or absence of "multiple conflicts" as "the exclusive test for the single-subject requirement."⁸⁵ Instead, *Fine* was read as identifying the risk of log-rolling as the "fundamental concern" lying behind article XI, section 3—now evidently a concern wholly independent of questions of textual integrity.⁸⁶ Not stopping to explain the link to log-rolling, the court in *Evans* next announced that the applicability of the single-subject requirement turned on whether or not a "proposed amendment changes more than one government function."⁸⁷ It was the mix of substance and procedure, and thus legislative and judicial responsibilities, that rendered the civil action amendment improper.⁸⁸

Justice Overton, concurring in *Evans*, supported the per curiam holding's simplified account of *Fine*. Article XI, section 3, as Overton now summarized it, restricted "the electorate's attention to only one functional addition or change to the constitution."⁸⁹ Justice Shaw reiterated his view that the primary concern of the single-subject rule was clarity; from this perspective, the civil action amendment, he believed, presented little difficulty.⁹⁰ Only Justice McDonald, in an opinion joined by Justice Ehrlich, returned to *Fine*'s emphasis on the risks the amendment process posed to constitutional organization:

The one subject restriction placed in the initiative process is deliberate. Such amendments must be specific, well-defined in scope, and limited to one subject and matter directly connected therewith. The 1885 constitution became larded with special interest amendments; the framers of the 1968 Constitution and the 1972 amendment sought to minimize the possibility of that recurring.⁹¹

McDonald, however, made no real attempt to explain his assertion that

84. *Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984).

85. *Id.* at 1354.

86. *Id.*

87. *Id.*

88. *See id.* The summary judgment provision in the proposed amendment, because of its procedural character, was not "directly connected" to the other provisions, inasmuch as it would affect actions where damages were either not sought or not at issue. *See id.*

89. *Id.* at 1357 (Overton, J., concurring).

90. *See id.* at 1360-61 (Shaw, J., specially concurring). Shaw agreed with his colleagues that the ballot language was misleading. *See id.* at 1360.

91. *Id.* at 1358 (McDonald, J., concurring).

"[m]ore than one subject is plainly evidenced in this amendment."⁹²

E.

Ten years later, writing for the majority in *Discrimination Laws Restriction*, Justice McDonald remained concerned with "how the proposal affects other provisions of the constitution."⁹³ Accordingly, he stressed the impact of the proposed amendment on three allocations of authority and two protections of rights already contained within the Florida Constitution.⁹⁴ He also read the single-subject requirement as a constraint protecting "voters from being trapped" into accepting parts of a constitutional proposal the voters oppose in order to obtain a change the voters favor⁹⁵—the log-rolling concern stressed in the *Evans* per curiam opinion. Echoing Justice Overton in *Evans*, McDonald also phrased the single-subject concern as "whether the proposal affects separate functions of government."⁹⁶ This sensitivity to "separate functions," specifically an awareness of the multiple possible focuses of antidiscrimination legislation, shaped Justice McDonald's analysis of the particular log-rolling problem created by the proposed amendment at issue: "The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status."⁹⁷

Justice Kogan, in his concurring opinion, subsumed the log-rolling problem within the more general question of fair notice. "The voters should never be put in a position of voting on something that, while perhaps appearing to do only one thing, actually will also result in other consequences that may not be readily apparent or desirable to the voters."⁹⁸ For Kogan, however, the problem of possible "collateral effects"⁹⁹ was not just a question of informed voting, but also of constitutional presuppositions.

The various parts of the Constitution require a harmony of purpose both internally and within the broader context of the American federal system and Florida law itself. Any initiative that tends to undermine that harmony most probably will violate the single-subject and

92. *Id.*

93. *Discrimination Laws Restriction*, 632 So. 2d at 1019-20.

94. *Id.* at 1020.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1023 (Kogan, J., concurring).

99. *Id.* at 1022.

ballot summary requirements, because the initiative is proposing to do something that may have a broad and unstated "domino effect."¹⁰⁰

This formulation allowed Kogan not only to invoke Justice McDonald's list of constitutional impacts, but also to note "a possible violation of federal fair housing guidelines," "the probable automatic repeal of statutes protecting collective bargaining," and "the possible repeal of veterans' preference laws."¹⁰¹

II.

Is there really any point to these close readings? In the larger number of recent cases, the Florida Supreme Court has treated compliance with the single-subject requirement as an easy question, in each instance upholding the proposed amendment.¹⁰² We might suspect that, whatever the verbal variations, the cases display a tendency to conform to single-subject law as it has worked itself out over a longer run in other jurisdictions. A common-sense "functional" test of complexity, we would not be surprised to conclude, represents a relatively noncontroversial state of the art.

This easy hypothesis, however, does not hold.

A.

Close judicial engagement with the single-subject limit on constitutional proposals begins near the end of the nineteenth century.¹⁰³ At this point, the constraint that the courts interpreted and applied usually took the form of a requirement that separate amendments be presented separately to voters.¹⁰⁴ The initial sequence of cases, ending around 1920,

100. *Id.* Justice Kogan emphasized that the initiative remained available to Florida citizens if citizens wished to propose multi-headed amendments, but only in the form of a petition drive to call a constitutional convention, which could draft and propose complex amendments for voter ratification. *Id.* at n.6; see FLA. CONST. art. XI, § 4. "[A] revision . . . must be more carefully drafted and thus requires a more elaborate process for development, so that a constitutionally sound and harmonious product will result." 632 So. 2d at 1022 n.6.

101. 632 So. 2d at 1022.

102. See *infra* Part VI.

103. Various worded single subject limits on constitutional amendments appear in state constitutions with some frequency beginning in the mid-nineteenth century. *E.g.*, Indiana Const., art. 16, § 2 (1851); Louisiana Const. of 1845, Title VIII, art. 140; Wisconsin Const., art. XIII, § 1 (1848).

104. See, *e.g.*, *Hammond v. Clark*, 71 S.E. 479, 484 (Ga. 1911); *McBee v. Brady*, 100 P. 97, 100 (Idaho 1909); *Lobaugh v. Cook*, 102 N.W. 1121, 1123 (Iowa 1905); *Gottstein v. Lister*, 153 P. 595, 598 (Wash. 1915); *State ex rel. Hudd v. Timme*, 11 N.W. 785, 789 (Wis. 1882). *But cf.* *People ex rel. Elder v. Sours*, 74 P. 167, 176-77 (Colo. 1903) (declaring single subject limit not imposed by separate amendment provision and holding amendment at issue addressed only one subject in any event). The early cases, it should be noted, all dealt with single-subject restraints placed on legislatively-initiated amendments.

discloses little coherence among the results. Courts found some amendments to be appropriately unified, and others to be unconstitutionally multiple. In several of the cases, it would appear the opposite conclusion could have been defended with at least equal force.¹⁰⁵ The judges themselves were aware of the diverse results.¹⁰⁶ But they also called attention to what they saw as an essential agreement concerning the test to be applied.¹⁰⁷ To the reader three-quarters of a century later, however, that test seems almost meaningless—the judges referred to “single subject” or some cognate formula like “unity of purpose” as though it clarified the question, rather than simply restated it.¹⁰⁸ If there is present value in these early cases, therefore, it cannot lie in either the pattern of results or the judicial formulation of the inquiry. Instead, if there is any key here, it must lie in whatever we can learn about the working assumptions which, for these judges, linked the beginning and end of their efforts.

In this regard, the initial opinions in fact disclose much:

First, the judges themselves often perceived the cases as difficult. The amendments at issue were frequently complex (and thus there was a real issue as to whether the particular amendment violated the single-subject requirement) and of manifest importance within the state politics of the period. At stake, for example, were amendments providing for the election of judges, the authorization of home rule, and the establish-

105. Compare, e.g., *McBee v. Brady*, 100 P. 97 (Idaho 1909) (judicial reorganization amendment unconstitutionally multiple) and *State ex rel. McClurg v. Powell*, 27 So. 927 (Miss. 1900) (amendment providing for election of judges at several levels within judicial system not unitary), with, e.g., *People ex rel. Elder v. Sours*, 74 P. 167, 177-78 (Colo. 1903) (Denver home rule amendment unitary) and *Hammond v. Clark*, 71 S.E. 479, 484-85 (Ga. 1911) (amendment raising judicial salaries and shifting from state to counties the burden of paying salaries included “more propositions than one” but “all tended to carry out one general purpose, and dealt with a single subject-matter”) and *Gottstein v. Lister*, 153 P. 595 (Wash. 1915) (initiative and referendum amendment unitary). See also *State ex rel. Adams v. Herried*, 72 N.W. 93, 97 (S.D. 1897) (“It must be conceded that courts and lawyers may easily differ regarding the result reached herein.”).

106. See, e.g., *Hammond v. Clark*, 71 S.E. 479, 482 (Ga. 1911); *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 847 (N.D. 1918); *Turner v. Ramsey*, 163 P. 712, 713-14 (Okla. 1917). Some courts attempted to portray the law as consistent by rejecting diverging cases as wrongly decided. See, e.g., *Gottstein v. Lister*, 153 P. 595, 601 (Wash. 1915).

107. See, e.g., *Lobaugh v. Cook*, 102 N.W. 1121, 1125 (Iowa 1905); *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 847 (N.D. 1918) (“the conflict principally turns upon the application to the particular case of a principle which is quite generally adhered to”).

108. “In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.” *State ex rel. Hudd v. Timme*, 11 N.W. 785, 791 (Wis. 1882). “[T]he true test should be, can the change or changes proposed be divided into subjects distinct and independent, and can any one of which be adopted without in any way being controlled, modified, or qualified by the other?” *McBee v. Brady*, 100 P. 97, 103 (Idaho 1909).

ment of initiative and referendum procedures.¹⁰⁹ The manner in which the cases came before the courts added tension as well. For the most part, litigation followed popular ratification of the amendments (the reverse of the present-day order).¹¹⁰ Judges, therefore, confronted Alexander Bickel's "counter-majoritarian difficulty" in its most extreme form. Invalidation of an amendment placed a court in opposition, not only to the legislative will, but also to the general will directly expressed—the judgement of the people themselves, voiced in the course of ratification.¹¹¹

Second, the judges responded to their predicament, in part, by emphasizing the origin of the constitutions themselves (and therefore single subject rules) in popular ratification, the legitimacy of judicial review in general, and the justiciability of the issue at hand.¹¹² Further, they sought to extricate themselves from Bickel's difficulty by connecting the constitutional requirement they enforced with popular sovereignty. The idea behind the rule of "one amendment, one vote," the judges explained, was to protect the integrity of the ratification process. If amendments were restricted to a single subject, voters would avoid the complications created by "log-rolling," the need to determine whether a favored proposition was worth the cost of a tagged-on addition which, if presented separately, some, perhaps many, voters might well oppose.¹¹³

109. See, e.g., *State ex rel. McClurg v. Powell*, 27 So. 927 (Miss. 1900) (election of judges); *People ex rel. Elder v. Sours*, 74 P. 167 (Colo. 1903) (Denver home rule amendment); *Gottstein v. Lister*, 153 P. 595 (Wash. 1915) (initiative and referendum). The largest single group of cases dealt with amendments proposing reforms of the judicial system—for example, changes in the jurisdictional structure of state courts, jury trial rules, and the salaries of judges. See *Hammond v. Clark*, 71 S.E. 479 (Ga. 1911); *McBee v. Brady*, 100 P. 97 (Idaho 1909); *Gabbert v. Chicago, R.I. & P. Ry. Co.*, 70 S.W. 891 (Mo. 1902).

110. See, e.g., *Hammond v. Clark*, 71 S.E. 479 (Ga. 1911); *McBee v. Brady*, 100 P. 97 (Idaho 1909); *State ex rel. McClurg v. Powell*, 27 So. 927 (Miss. 1900).

111. Evidence of stress is particularly apparent in a sequence of Mississippi cases. See *Powers v. Robinson*, 93 So. 769 (Miss. 1922), *disapproving State ex rel. Howie v. Brantley*, 74 So. 662, 664-67 (Miss. 1917), *disapproving State ex rel. McClurg v. Powell*, 27 So. 927 (Miss. 1900).

112. See, e.g., *Hammond v. Clark*, 71 S.E. 479, 482 (Ga. 1911); *McBee v. Brady*, 100 P. 97, 101-03 (Idaho 1909); *State ex rel. McClurg v. Powell*, 27 So. 927, 930 (Miss. 1900). See also *Livermore v. Waite*, 36 P. 424, 425-26 (Cal. 1894); *Ellingham v. Dye*, 99 N.E. 1, 18-23 (Ind. 1912).

113. See, e.g., *McBee v. Brady*, 100 P. 97, 101 (Idaho 1909); *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 847 (N.D. 1918). Logrolling, it was thought, was coercive.

Since the foundation of the federal government, nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter. The reasons for preventing this pernicious practice are more forceful when considered in connection with . . . proposed constitutional amendments. . . . In the legislature each member has the opportunity to offer amendments. . . . It is not so with the elector.

State ex rel. Adams v. Herried, 72 N.W. 93, 96 (S.D. 1897). Courts also invoked the idea of fraud. If a proposed amendment embraced more than one subject, it was likely that a voter would not appreciate the full significance of the proposal (especially if the ballot summary was brief),

Single-subject amendments, therefore, clarified the general will, made the exact significance of the popular vote apparent.¹¹⁴

Third, however useful this reading of the single-subject rule was as a device for reducing judicial anxiety, its analytical implications were limited. The idea that the integrity of the ratification process presupposes a single-subject constraint is surely not a self-evident proposition. Voters know their own views as well with regard to trade-offs as with more straightforward questions of preference. If we value democratic judgment, whatever the risk of occasionally unreadable votes, we should be interested in such judgment in complex matters at least as much as in simpler cases. More to the point, judges in the initial cases required some criterion for distinguishing single from multiple subjects. Concern for the integrity of the ratification process perhaps justified the effort to devise a test, but such concern did not, of itself, supply one. There were efforts, especially in the very first cases, to suggest that whether an amendment was an improper aggregate should be judged from the point of view of the voter.¹¹⁵ But references to the voter's perspective were quickly equated with (or held to be regulated by) "common sense," and the underlying question was thus reformulated rather than resolved.¹¹⁶

Fourth, to the extent that there was a common understanding in the opinions of what was or was not a single subject, it appeared to be peculiarly legal, as judges connected (with varying rigor) the mode of analysis employed in the constitutional amendment cases with approaches used in other cases, in which single-subject rules were applied in evaluating or interpreting state statutes and municipal charter amendments.¹¹⁷

and vote to ratify an amendment on the basis of a false sense of its substance. *See, e.g.,* *McBee v. Brady*, 100 P. at 104.

114. "The evident purpose . . . is to exact the submission of each amendment to the Constitution on its merits alone, and to secure the free and independent expression of the will of the people as to each." *Lobaugh v. Cook*, 102 N.W. 1121, 1122 (Iowa 1905). *Accord* *Jones v. McClaughry*, 151 N.W. 210, 216 (Iowa 1915).

115. *See, e.g.,* *McBee v. Brady*, 100 P. 97, 103 (Idaho 1909); *State ex rel. McClurg v. Powell*, 27 So. 927, 930-31 (Miss. 1900).

116. *See, e.g.,* *Hammond v. Clark*, 71 S.E. 479, 485 (Ga. 1911) ("Almost every amendment to the Constitution or to a legislative act involves more than a single proposition."); *see also* *State ex rel. Hay v. Alderson*, 142 P. 210, 214 (Mont. 1914); *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 846-47, 850 (N.D. 1918); *Gottstein v. Lister*, 153 P. 595, 598 (Wash. 1915) ("the question must be viewed in a broader aspect as one largely of common sense"). Indeed, in the very first case in the sequence, *State ex rel. Hudd v. Timme*, 11 N.W. 785 (Wis. 1882), the court acknowledged that the amendment at issue could conceivably be broken down into two propositions, but took it for granted that the result of separate votes would be that "they should either both be defeated or adopted." *Id.* at 790. "[R]atification of the one and the rejection of the other" would be an "absurdity." *Id.* at 791.

117. *See, e.g.,* *People ex rel. Elder v. Sours*, 74 P. 167, 177 (Colo. 1903) (analogy to single-subject limit on legislation); *Hammond v. Clark*, 71 S.E. 479, 486 (Ga. 1911) (same); *City of Chicago v. Reeves*, 77 N.E. 237, 243-44 (Ill. 1906) (same); *State ex rel. Morris v. Mason*, 9 So.

There was a second, less explicit, linkage as well. Single-subject formulations also appeared in a wide range of cases, concerned with such issues as the multifariousness or underlying unity of pleadings,¹¹⁸ the nature or propriety of objections raised at trial and thus questions presented on appeal,¹¹⁹ the divisibility of insurance policies,¹²⁰ and the construction of statutes.¹²¹ Against this backdrop, an alternative reading of the early single-subject cases becomes apparent. The point, ultimately, was not the integrity of democratic processes, but the integrity of law.¹²² The single-subject requirement, simply because it was part of the constitution and whatever its justification, was entitled to honest

776, 800-01 (La. 1891) (same); *Gabbert v. Chicago, R.I. & P. Ry. Co.*, 70 S.W. 891, 897 (Mo. 1902) (same); *Gottstein v. Lister*, 153 P. 595, 600-01 (Wash. 1915) (single-subject limit on municipal charter amendments). See also *Turner v. Ramsey*, 163 P. 712, 713-14 (Okla. 1917) (referring to constitutional amendment cases in applying single-subject restriction on municipal charter amendments). For an acknowledgement that application of single-subject requirements was less rigorous where legislation (rather than constitutional amendments) were at issue, see *State ex rel. McClurg v. Powell*, 27 So. 927, 930 (Miss. 1900).

118. See, e.g., *Braddock v. Louchheim*, 87 F. 287, 287 (C.C.E.D. Pa. 1898) (multifariousness) (dictum); *The G. Reusens*, 23 F. 403, 405 (S.D.N.Y. 1885) ("single subject" of litigation in fact allegation of fraudulent conveyance, and thus admiralty jurisdiction improper); *Phillips v. Wells*, 133 S.E. 581, 586 (Va. 1926) (multifariousness). The link between legislative and constitutional single-subject requirements and pleading rules is especially easy to see in judicial analyses of single-subject limits on legislation. The issue was frequently framed as a question of the conformity of a bill with its title—whether the title's unifying account of the proposed legislation accurately summarized, and therefore put legislators on notice as to, the bill's entire content. See, e.g., *Northern Pac. Exp. Co. v. Metschan*, 90 F. 80, 83 (9th Cir. 1898); *In re Miller*, 244 P. 376, 377-79 (Ariz. 1926); *State ex rel. Davis v. Love*, 126 So. 374, 378 (Fla. 1930). But see *Brass v. State*, 34 So. 307, 309 (Fla. 1903) (distinguishing rule prohibiting indictments encompassing inconsistent crimes from constitutional provision restricting legislation to single subject).

119. See, e.g., *Hindman v. First Nat'l Bank*, 112 F. 931, 934-35 (6th Cir.), *cert. denied*, 186 U.S. 483 (1902); *Felton v. Newport*, 92 F. 470 (6th Cir. 1899).

120. See, e.g., *Northern Assurance Co. v. Case*, 12 F.2d 551, 552-54 (4th Cir. 1926); *Downey v. German Alliance Ins. Co.*, 252 F. 701, 704 (4th Cir. 1918) (collecting cases).

121. See, e.g., *Naponiello v. United States*, 291 F. 1008, 1009-10 (7th Cir. 1923) (Congress may treat as single-subject criminal activity addressed separately by states but has not done so to extent necessary to bring extortion within existing mail fraud statute); *United States v. Whiffen*, 23 F.2d 352 (S.D. Ohio 1927) (single subject analysis to determine independence of statutory provisions), *rev'd*, 277 U.S. 229 (1928); *Knapp v. Byram*, 21 F.2d 226, 227-30 (D. Minn. 1927) (three judge court) (single-subject notion used to identify special legislation not repealed by implication by subsequent general law).

122. We do not understand from the mere fact that the people of this state have expressed as their will that certain provisions should be incorporated in the Constitution, such fact alone would make that expressed will a part of the Constitution. The fundamental law of the state prescribes the limitations under which the electors of the state may change the same, and, unless such course is pursued, the mere fact that a majority of the electors are in favor of a change and have so expressed themselves, does not work a change. Such a course would be revolutionary, and the Constitution of the state would become a mere matter of form.

McBee v. Brady, 100 P. 97, 102 (Idaho 1909). See also *Koehler v. Hill*, 14 N.W. 738, 751 (Iowa) (not single-subject case), *reh'g denied*, 15 N.W. 609 (Iowa 1883).

enforcement.¹²³ All-encompassing labels, purporting to disclose the unity in diverse provisions, invited judges to set aside their ordinary care, their claim to precision, in the use of legal language.¹²⁴ Behind this normative perspective was a particular conception of law. The categories of legal analysis acquired force, added to their substantive persuasiveness, because of their taxonomic capacity to reduce the various aspects of complex situations to sequences of separated elements. The single-subject requirement worked to preserve this capacity for constitutional provisions—to keep constitutions functioning as law.¹²⁵ The

123. See, e.g., *McBee v. Brady*, 100 P. 97, 102-03 (Idaho 1909); *Gabbert v. Chicago, R.I. & P. Ry. Co.*, 70 S.W. 891, 894 (Mo. 1902) ("Sworn to support the constitution, as the supreme law, the judges are required to see that an alleged amendment thereto has become such in the only way which that instrument has provided.").

124. "Whether amendments are one or many must be solved by their inherent nature . . . and not upon the mere blanketing of a name, such as 'amendments relating to the judicial department' or to 'the legislative department.'" *State ex rel. McClurg v. Powell*, 27 So. 927, 931 (Miss. 1900). See also *Lewis v. Dunne*, 66 P. 478, 480 (Cal. 1916) (In connection with legislative single-subject requirement: "All subjects cannot be conjured into one subject by the mere magic of a word in a title."). Unity was therefore a fact "which must exist in truth and reality, and not simply be declared to exist by the legislature." *McClurg*, 27 So. at 930; see *McBee v. Brady*, 100 P. 97, 103 (Idaho 1909) (characterizing amendment as a "lump"); see also *Fairfield v. Foster*, 214 P. 319, 323 (Ariz. 1923) (legislature may not circumvent line item veto by purporting to group appropriation "items"). The reverse proposition also held; legislative refinement could not obscure essential unity. "Though the Legislature may call that which is distinctly a tax by some other name, it nevertheless remains a tax." *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 842 (N.D. 1918). It counted strongly in an amendment's favor if its seemingly distinct parts could be shown, through an analysis of the pertinent substantive law, to be in fact expressions of the same underlying legal concept. See, e.g., *Gottstein v. Lister*, 153 P. 595, 601 (Wash. 1915) (governor's veto an exercise of legislative power, and therefore properly addressed in amendment dealing with initiative and referendum). Cf. *Lewis v. Dunne*, 66 P. at 479-80 (legislative single-subject requirement invalidates bill revising Code of Civil Procedure in part because Code itself encompasses no single subject).

125. Even after amendment, "the constitutional scheme" would remain "symmetrical, harmonious, and independent," each provision able to "stand alone without the other." *State ex rel. McClurg v. Powell*, 27 So. 927, 931 (Miss. 1900). The idea that a constitution, like other forms of law, was a taxonomy is implicit, for example, in statements describing a given constitution as providing for "many distinct and independent propositions which are in no way involved or controlled by other provisions," and in recommendations that amendments be drafted in a form which called attention to the possibility that a constitution (pre-amendment) addressed "the same particular subject . . . in several sections," so that the proposed amendment "could cover the necessary changes to be made in each section," *McBee v. Brady*, 100 P. 97, 104 (Idaho 1909), the amendment thus becoming a reform of constitutional organization as well as substance. Constitution as taxonomy was the explicit theme of *City of Chicago v. Reeves*, 77 N.E. 237 (Ill. 1906). A constitutional amendment affecting the application of several constitutional provisions did not violate a requirement that amendments only address one article. Each article of the constitution encompassed but a single-subject. So long as an amendment's parts were all germane to that subject, their impact on other constitutional provisions could be disregarded as merely incidental. See *id.* at 240. The notion that a constitution was (or should be) organized as a sequence of naturally-divided and self-contained provisions was as often the basis for upholding an amendment as invalidating it.

As the section stood prior to this amendment, it formed one "symmetrical,

product of democratic process was law and must, therefore, possess the attributes of law.

B.

This jurisprudence, it is easy to see, was of a piece with other branches of the constitutional law of the period. Seeing this, of course, we expect change, and indeed change occurred. By the 1940s, judges decreasingly relied on their ability to discern the "true" subjects of amendments or statutes and increasingly deferred to the formal conceptions of the constitutional drafters.¹²⁶

*Keenan v. Price*¹²⁷ becomes the leading case. There, the incumbent governor challenged the validity of a recently adopted Idaho constitutional amendment that changed the term of office for constitutional officers from two to four years, barred governors from holding office for consecutive terms, and also permitted constitutional officers to reside in the county of the seat of government, and not just the seat of government itself.¹²⁸ Echoing the approach of earlier cases, one member of the Idaho Supreme Court concluded that "there is no relation between the proposition of increasing the term of office of the governor and the further proposition that he is ineligible to serve more than one term without an intervening period of time."¹²⁹ The other four justices, however, proceeded differently. Their majority opinion quoted at length from prior

harmonious, and independent" feature of our constitution, and, when amended by the adoption of this seventh amendment, it retained all of its harmony and symmetry; and the court and lawyer looking to the fundamental law would naturally expect to find the whole under the one comprehensive title, "Trial by Jury."

Gabbert v. Chicago, R.I. & P. Ry. Co., 70 S.W. 891, 897 (Mo. 1902). See also *State ex rel. City of Fargo v. Wetz*, 168 N.W. 835, 848-50 (N.D. 1918) (amendment addressing several provisions of existing constitution in the course of altering tax structure substituted new unifying conception for that organizing former scheme). In opinions upholding amendments as essentially unitary, courts frequently justified the complexity of an amendment at issue as necessary if it were to be self-contained, and asserted that the consequence of an over-zealous application of the single-subject rule would be a break-down, rather than preservation, of constitutional form. See, e.g., *Hammond v. Clark*, 71 S.E. 479, 485 (Ga. 1911) ("an amendment could not be submitted as a whole, but would have to be broken up into fragments, and submitted in disjointed propositions"); *Lobaugh v. Cook*, 102 N.W. 1121, 1124-25 (Iowa 1905) (explaining why amendment changing term in office of supreme court justices properly addressed seemingly distinct question of mode of selecting chief justice). See also *State ex rel. Hudd v. Timme*, 11 N.W. 785, 790 (Wis. 1882) (separate submission creates risk of defeat of part of unified proposal destroying "the usefulness of all the other provisions when adopted").

126. The idea of respect for legislative discretion was not entirely absent in the earlier opinions. See, e.g., *State ex rel. Hay v. Alderson*, 142 P. 210, 212-13 (Mont. 1914); *Gottstein v. Lister*, 153 P. 595, 598 (Wash. 1915). It was clearer in the earlier formulations, however, that discretion was confined. See, e.g., *Lobaugh v. Cook*, 102 N.W. 1121, 1124 (Iowa 1905).

127. 195 P.2d 662 (Idaho 1948).

128. *Id.* at 664-66.

129. *Id.* at 686-87 (Miller, J., dissenting).

single-subject decisions in Idaho and other states, but emphasized passages urging deference to legislative judgment.¹³⁰ The opinion also noted that the state constitution had itself included in a single section all of the topics addressed by the amendment,¹³¹ and pointed out the difficulty that the legislature would have encountered if it had needed to present its changes to the voters in the form of separate amendments.¹³² These latter observations were obviously not in and of themselves decisive reasons for seeing the amendment at issue as unitary. But the court's conclusion mooted the question of decisiveness:

What constitutes related matters is for the legislature to determine in the first instance when it proposes an amendment, and if there is any reasonable basis or theory upon which such determination is founded, and the same is not arbitrary or capricious, its judgment in that regard should be respected.¹³³

This is, of course, a clear statement of the rationality standard, familiar in modern constitutional law as a signal that legislative action will probably be upheld. It marks a clear shift away from the earlier perspective, within which courts equated respect for the integrity of familiar linguistic categories with the idea of legality, and thus tended to suppose that such categories were indeed rigorous. Constitutional categories become simply another subject for legislative address, in principle restatable in terms of various groupings and divisions, in the end a matter for legislative discretion. After *Keenan*, most courts adopted this new view.¹³⁴ Outside Florida at least, there are very few cases in the last half century (especially prior to this decade) in which constitutional amendments fail to survive single-subject testing.¹³⁵

California caselaw is the most elaborate. Beginning with its decision in the Proposition Thirteen case,¹³⁶ the California Supreme Court has repeatedly upheld, in the face of single-subject challenges, initiatives

130. *See id.* at 677, 678.

131. *Id.* at 680.

132. *Id.* at 681.

133. *Id.*

134. *E.g.*, *State ex rel. Jones v. Lockhart*, 265 P.2d 447, 452 (Ariz. 1953); *Perry v. Jordan*, 207 P.2d 47, 50 (Cal. 1949). Compare *Gray v. Golden*, 89 So. 2d 785, 789 (Fla. 1956) ("any reasonable thesis" as to unity held sufficient in case upholding proposed Dade County home rule amendment), with *City of Coral Gables v. Gray*, 19 So. 2d 318, 322, 320 (Fla. 1944) (decrying risk of "skillful wording of one joint single resolution" and evoking "common sense" in the course of striking down proposed amendment restructuring government offices in two counties).

135. Recent decisions invoking single subject requirements to invalidate proposed amendments include, *e.g.*, *State ex rel. Clark v. State Canvassing Bd.*, 888 P.2d 458 (N.M. 1995); *Missourians to Protect Init. Proc. v. Blunt*, 799 S.W.2d 824 (Mo. 1990); *In re Initiative Pet. No. 344*, 797 P.2d 326 (Okla. 1990); *In re Initiative Pet. No. 342*, 797 P.2d 331 (Okla. 1990).

136. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978).

ranging from the relatively simple four-part constitutional amendment that Proposition Thirteen enacted¹³⁷ to huge omnibus measures adding and amending multiple constitutional provisions as well as variously revising California legislation.¹³⁸ It is enough that an initiative show a "unifying theme."¹³⁹ "Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex."¹⁴⁰ The cases explicitly reject analysis of the possibility of "log-rolling" as a relevant starting point.¹⁴¹

This dramatically relaxed approach to the single-subject requirement is not without its critics.¹⁴² There are also cross-currents within the California jurisprudence. In *Raven v. Deukmejian*, the supreme court upheld almost all of an initiative revising California constitutional and statutory criminal procedure in multitudinous ways, but struck down (and severed) one part of the initiative amending the state constitution to require that the principal provisions of the California Bill of Rights addressing criminal procedure be construed in conformity with the decisions of the United States Supreme Court.¹⁴³ Although all provisions of the amendment satisfied the single-subject requirement, this one part alone constituted an improper "revision" rather than "amendment" of the state constitution.¹⁴⁴ The conformity requirement, the California court reasoned, "substantially alters the preexisting constitutional . . . framework."¹⁴⁵ In a subsequent case, refusing to label as a "revision" an initiative imposing term limits and other legislative procedural reforms, the

137. *See id.* at 1289-92.

138. *See, e.g.,* *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982); *Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46 (Cal. 1979).

139. *Eu*, 816 P.2d at 1321.

140. *Fair Political Practices Comm'n*, 157 P.2d at 850.

141. Log-rolling analysis, as the California Supreme Court understands it, is illimitable and thus unworkable. The risk that voters would prefer one provision but not another "is inherent in any initiative containing more than one sentence or even an 'and' in a single sentence unless the provisions are redundant." *Id.* at 50.

[A]lmost all laws whether enacted by a legislature or adopted directly by the people through an initiative contain both benefits and burdens. The decision to enact laws, whether directly by the people or through their representatives, involves the weighing of pros and cons. The resolution of few public issues is free from this balancing process and exercise of choices.

Brosnahan, 651 P.2d at 282-83.

142. *See, e.g., Eu*, 816 P.2d at 1318 (Mosk, J., dissenting in part); *Brosnahan*, 651 P.2d at 289-312 (Bird, C.J., dissenting). For a vigorous defense early in the sequence, see Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983).

143. 801 P.2d at 1083-85.

144. *Id.* at 1085-90. The California constitution requires that "revisions" be undertaken by a constitutional convention or the state legislature; initiatives may attempt only "amendments." *See id.* at 1085.

145. *Id.* at 1089. "[I]n practical effect, the new provision vests a critical portion of state

court emphasized that the crucial fact in *Raven* was the initiative's obliteration of a substantive lawmaking responsibility (the power to interpret constitutional guarantees) hitherto part of the California system.¹⁴⁶ A similar analysis organizes another line of decisions concerned with efforts, in the course of enacting annual appropriations bills, to substantively amend other statutes. The California Supreme Court unanimously invoked the single-subject requirement (which applied equally to legislation and initiatives) to bar omnibus appropriations bills grouping unrelated changes to substantive statutes, notwithstanding the ostensible purpose of such bills to limit expenditures within appropriations limits.¹⁴⁷ State intermediate appellate courts have repeatedly struck down individual provisions of appropriations bills, again on single-subject grounds, if those provisions appeared to work substantive changes.¹⁴⁸ Opinions in these cases acknowledged the line of initiative single-subject cases, and indeed, at times, purported to apply the same analysis. In fact, however, the approach is strikingly different. The possibility of log-rolling is frequently mentioned as a reason for concern, although no effort was made to prove its existence in the circumstances at hand. The existing legal environment served as the measure of whether the challenged legislation was indeed unconstitutionally multiple.

If these last cases in important respects resemble the recent Florida decisions, the California initiative cases themselves are worlds apart. The underlying assumption associated with *Keenan v. Price* is fundamental. If there are no necessarily apt taxonomies, if vocabularies that group and differentiate are available across varying levels of generality, it is genuinely difficult to explain which conclusion—"unity" or "multiplicity"—is correct.

III.

Clearly, *Fine*, *Evans*, and *Discrimination Laws Restriction* are not California cases. It is a hard question, however, as to what is the underlying basis of the Florida approach. Log-rolling concerns, distinctions between "amendments" and "revisions," calls for clear expressions of voter preferences—all these notions make appearances in the Florida Supreme Court opinions that I have summarized, but all are also notions the California discussions effectively criticize. None of these themes

judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan." *Id.*

146. *See Eu*, 816 P.2d at 1318.

147. *Harbor v. Deukmejian*, 742 P.2d 1290, 1300-04 (Cal. 1987).

148. *E.g.*, *California Labor Fed'n v. Occupational Safety & Health Standards Bd.*, 7 Cal. Rptr. 2d 399, 401-05 (Cal. Ct. App. 1992); *Planned Parenthood v. Swoap*, 219 Cal. Rptr. 664, 669-74 (Cal. Ct. App. 1985).

itself defines a measure of unity; none is able therefore to preempt recognition of the usual plasticity of language. Given the ordinary overlap of unifying and diversifying readings of proposed amendments, conclusions about the presence or absence of "singularity" seem forced, somehow arbitrary.

There is another line of thinking in the Florida opinions, though, that warrants close study. The recurring references to existing constitutional provisions as benchmarks for judging the unity or multiplicity of proposed amendments echo the older single subject cases. It is now the constitutional text, however, rather than law as such whose integrity proposed amendments threaten. This formulation raises two questions that the Florida opinions themselves do not much pursue. What is it, exactly, that the overlay of existing constitutional terms and proposed amendment terms shows? Why should a conflict in terminology of this sort (however defined) matter? These questions have answers. But the first requires a series of close readings of the parts of the Florida Constitution relevant for the amendments at issue in *Fine*, *Evans*, and *Discrimination Laws Restriction*. These readings, it turns out, only occasionally track the constitutional explorations of the Florida Supreme Court in its opinions in these cases. The model of conflict that emerges, however, points to the same conclusions that the justices drew; it also suggests conclusions (not all of them identical to those of the Florida Supreme Court) in the other recent single subject cases. We will also be able to identify normative underpinnings and thus answer the second question: What justifies serious single subject review?

I begin with *Fine*—more precisely with the provisions of the Florida Constitution in the background of *Fine*'s conclusion.

A.

The text of article VII of the Florida Constitution is daunting. Its eighteen sections address finance and taxation in sometimes elaborate detail.¹⁴⁹ Ten sections deal with taxes levied by the state legislature, counties, municipalities, school districts, and special districts.¹⁵⁰ Seven sections take up aspects of bond finance.¹⁵¹ One section authorizes the appropriation of state funds to aid local governments.¹⁵² Notwithstanding its length, article VII is obviously incomplete. Property taxes are discussed repeatedly, for example, for purposes of allocating revenue

149. Three sections have been added since the *Fine* decision, further complicating but not altering the overall form of article VII.

150. FLA. CONST. art. 7, §§ 1-7, 9, 13 & 18. Section 18, adopted in 1990, postdates *Fine*.

151. FLA. CONST. art. 7, §§ 10-12, 14-17. Sections 11 and 17, adopted in 1984 and 1988 respectively, postdate *Fine*.

152. FLA. CONST. art. 7, § 8.

(taxes on intangible property fall within the domain of the state government as such while taxes levied against tangible property accrue to counties, municipalities, school districts, and special districts),¹⁵³ defining exemptions (the homestead exemption is the most generally applicable),¹⁵⁴ and insuring administrative fairness (e.g., assessment criteria must be equally applied).¹⁵⁵ By contrast, article VII addresses income taxes only briefly (in order to distinguish between essentially forbidden personal income taxes and permitted, but constrained, corporate income taxes).¹⁵⁶ No section discusses sales taxes. Article VII is also strikingly uneven in its claims to decisiveness. For example, whether taxes tied to the operation of pari-mutual pools constitute a revenue source exclusively available to state government, shared between state and county governments, or exclusively available to county governments is left to the legislature to decide; although, if the legislature turns these tax revenues over to counties, article VII requires that the distribution be equal among all counties. Repeatedly, in dealing with taxation or debt financing by counties, municipalities, school districts, and special districts, article VII itself grants authority but also requires the legislature to act, either through authorization or the implementation of legislation. In some cases, constitutional provisions addressing, for example, tax exemptions or bond financing may in addition or alternately require referendum approval by state or local voters. Article VII is also inconsistent in its attention to detail. Thus, property taxes (especially those levied on tangible property) are the subject of much more careful (or at least detailed) treatment than other taxes. Similarly, certain forms or uses of debt financing are closely described, while others are only generally characterized.

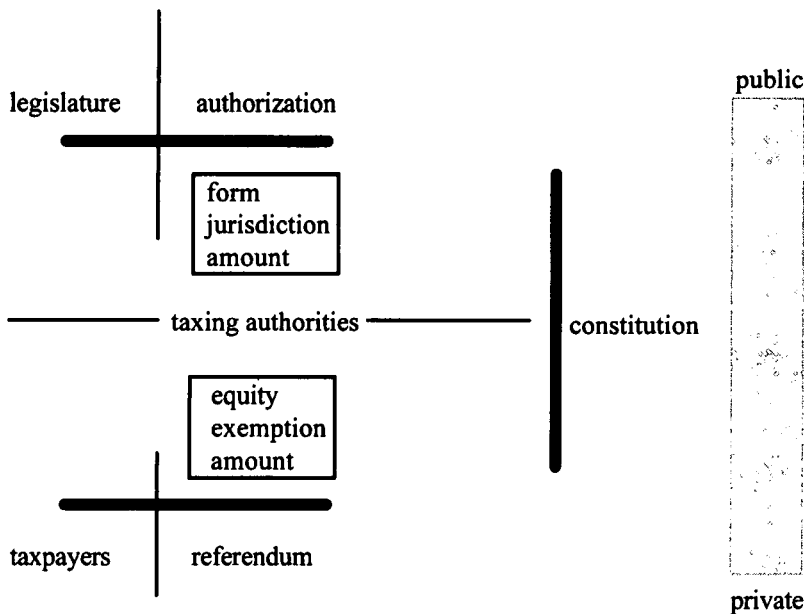
The reader's sense that article VII is misshapen, however, quickly abates if it is assumed that these eighteen constitutional provisions are concerned as much with the politics of government fund-raising as with the details of taxation and debt financing *per se*. From this perspective, article VII depicts a complex but comprehensible scene:

153. See FLA. CONST. art. 7, § 1(a).

154. See *id.* § 3(a) (exemption for some municipal property and property used for educational, literary, scientific, religious, or charitable purposes).

155. See *id.* § 2.

156. *Id.* § 5.



Article VII defines an interaction of regulatory authorities—the constitution itself, the legislature, and the taxpayers. Within this interaction, taxing authorities work out their strategies. Note that the legislature figures twice—as regulator and as taxing authority; the constitution figures twice—defining the overall interaction and directly resolving particular issues; and the taxpayers also figure twice—as the ultimate revenue source and, sometimes, as the ultimate decider of whether a tax is to be levied. Taxpayers actually have a more complicated role in all this. There is the “homestead” effort to identify some quantum of taxpayer resources that exist outside taxing jurisdiction altogether. There are implicit taxpayer concerns with equity that explain constitutional emphases on legal form and equal treatment. Conversely, there are also taxpayer efforts to differentiate themselves, sometime recognized in the constitution itself, sometimes left to the legislature to validate, and sometimes left to referendum to decide. These differences in treatment seem to turn on public benefit (as limits on the homestead exemption turn on private benefit). Public/private seems, indeed, to be a primary fold. The constitutional provisions appear to alternate between a governmental perspective, preoccupied with jurisdiction, revenue obligations, and ongoing choices, and the taxpayer perspective described above.¹⁵⁷ These perspectives perhaps supply semantics, suggest a

157. Article VII, section 2 of the Florida Constitution declares that tax rates for intangible property taxes levied by the state may differ from other property tax rates (although the provision also sets a cap on intangible property tax rates). Given that the intangible property tax is levied by the state, and the other property taxes are the work of local governmental institutions, why is this

vocabulary within which the interactive possibilities that the constitution structures might be characterized (or justified).

Plainly, the proposed amendment at issue in *Fine* would have none of this. Reagan-incisive, it sees government revenue need and taxpayer revenue protection as linked—cap revenue and taxpayer risk is limited. All else fades into the background: formal and equality concerns, inter-governmental haggling. The problem thus is not that the *Fine* amendment is not unitary; it plainly is. Rather, if there is a problem, it must derive from the fact that the constitution is not unitary in its characterization, and the *Fine* amendment would treat it as though it were, implicitly addressing too many (constitutional) subjects. But why value the constitutional multiplicity? Why not respect *Fine*'s alternative characterization?

Perhaps the key is the constitution's model of itself—as only one part of the process it creates, as an incomplete vocabulary, more intervention than resolution.¹⁵⁸ The *Fine* amendment rejects this model, and substitutes the familiar alternate model of the constitution-as-resolution. Why reject this latter model? There must be substance to the interaction whose significance the *Fine* amendment diminishes, or, rather, there must be both substance to the interaction, and a disruption of the interaction if the *Fine* amendment were added to the constitution, or more precisely, disruption itself without content, disrupting therefore both the constitution as it stands before the amendment and the workings of the amendment itself after its addition. It is this sort of disruption (we might think) that the single-subject requirement prohibits.¹⁵⁹

The doubling of public and private perspectives within article VII suggests a relevant substantive gloss on the constitutional structure. From the taxpayer (private) perspective, taxes appear as an *expense*, ideally to be minimized, and in any case to be equally borne by all, with exceptions to equality only for good reasons. From the government

constitutional provision necessary? Perhaps the norm of equality is so plainly addressed from the perspective of taxpayers that what would be obvious from the jurisdictional perspective of government institutions themselves needs to be spelled out. From the perspective of taxpayers, absent some specific constitutional provision, all taxes (roughly similar in type) are equated, and thus ought to be similar in content.

158. The constitution is thus a model that represents itself as not the model.

159. There are, therefore, two sorts of constitutional incompletenesses—those occasioned because the constitution stops short, and those occasioned because overlapping constitutional texts cancel each other out. It is not necessary that a constitution include no canceling incompletenesses. The United States Constitution, for example, includes many important overlaps, most notably those occasioned by the adoption of the Bill of Rights and the Civil War Amendments. But it is also not necessary that a constitution, especially a constitution as easily amended as Florida's, treat the risk of such overlaps as simply natural, a matter of plate tectonics as it were. Single-subject requirements are one means of regulation. This issue is discussed further at the close of the essay.

(public) perspective, however, taxes present themselves as a *resource*, in need of definition and allocation, to be put to use for public needs. These two views are linked if "public needs" is read as "expenses"—the government has expenses, and therefore levies taxes, and therefore shifts these expenses to taxpayers. Thus, one way to control taxpayer expenses is to control government expenses. This is the logic of the proposed amendment at issue in *Fine*. But what if the "public needs" include the generation of additional (private) wealth through the generation of additional economic activity? Then taxes are only "expenses" on the private side to the degree that benefits generated by government expenditures per taxpayer are less than taxes paid. On the public side, whether particular programs should be undertaken may turn sometimes on an expense view, and sometimes on a wealth-generating view.

Taxes thus are "expenses" for taxpayers, in the sense that they are something to be minimized, only if they are viewed apart from the value of government services. If services and taxes are juxtaposed, it may be that taxpayers will prefer more services, and thus more taxes, because of the value of the services. If this juxtaposition seems artificial, as it must have seemed to the drafters of the amendment at issue in *Fine*, it must be because individuals, in assessing their own well-being, do not count governmental services. Instead, they treat such services as part of a background, and focus instead on other sources of well-being (their own efforts, luck). At the other extreme, from the government perspective, individual well-being might be understood conversely as entirely a product of governmental services, a government-created resource to be (partly) reclaimed through taxation. A more moderate government view might simply treat services as additions to private well-being, and charge appropriate prices via taxation. Either of these latter views starts by bringing from out of the background benefits ignored in the "expense" account.

B.

Arguably, there may be no reason to choose conclusively one perspective, either public or private. Indeed, it is easy to see that one feature of the Florida constitutional scheme, absent the *Fine* amendment, is the space structured to allow both perspectives to work themselves out, a space open to be most likely filled by a mixed set, instances of both viewpoints. In a full account, all of article VII would be set in context. It is not just the two views of government finance that Florida authorities are free to alternate. Substantive views arising from other government agendas, views that treat finance as a means to achieve some otherwise defined policy, views permitted by other parts of the constitu-

tion, are also available and are additional starting points for government action. The *Fine* amendment would have introduced into the constitution itself a budget procedure that, within its own terms, resolved these pluralities, plainly giving priority to the private "expense" view. But the amendment did not, within its own terms, erase other constitutional provisions which left room for the opposing views. A directive to maintain revenues, and therefore expenditures, at a certain level does not address the question of which particular expenditures should or should not be undertaken. Substantive agendas or commitments to fostering economic growth must be invoked in order to give content to the constrained budget. These latter perspectives can no longer unequivocally install themselves, even in particular cases. Calculation of past expenditures fixes an extrinsic limit. But more importantly, the "expense" view also cannot, within the limits of the *Fine* proposal, fully install itself.¹⁶⁰

Legislators would have been obliged to aggregate the three perspectives outlined above: tax minimization and therefore revenue needs minimization (the perspective of the *Fine* initiative itself); maximization of substantive governmental agendas; and maximization of economic growth. Legislators, in other words, would evaluate the relative attractiveness of these three programs, judging substantive agendas versus economic growth against the backdrop of the revenue limit, weighing the salience of the revenue limit (pursue it aggressively here or elsewhere) vis a vis the claims of agendas and growth. Individually, each of these orientations has its political attractions. The first (T_1) identifies legislators with the present interests of taxpayers (within *Fine*'s terms); the second (L_1) maximizes present governmental activity (an alternate present interest of legislators); the third (L_2) maximally simplifies the circumstances legislators would need to address in the next relevant time period (the next legislative session). Absent the *Fine* initiative, legislators were (and are) free in particular cases to adopt one perspective or another and ignore the rest, even if only momentarily. The aggregate was and is not itself, as a whole, the subject of the legislative process.

160. The problem is not so specific as the bond financing concern Justice Overton raised. See *Fine v. Firestone*, 448 So. 2d 984, 990-92 (Fla. 1984). The fact that the *Fine* proposal substituted pure voter approval for the mix of voter- and legislature-authorized bond issues extant in article VII was simply a matter of substitution. One scheme replaced another, with no residual conflict. The use of voter approval reveals a limit on the revenue limitation idea. A special district could not look to past revenue in order to calculate the appropriate initial outlay for servicing bonded indebtedness and therefore the amount of bond debt itself. To allow the district carte blanche, however, would subvert the tax limitation objective, and leaving the matter to the voters sidesteps the problem. There is also the question of how the voters will decide. If voters are tax minimizers, they will always vote down bond issues. If voters would sometimes act on other agendas, a hint of the pluralism of the status quo constitutional scheme intrudes within the terms of the *Fine* proposal.

Given the *Fine* initiative, however, the whole would have mattered, and aggregation itself would have become the responsibility of individual legislators and the legislature as a group.

The difficulty becomes easy to see if we assume that legislators must choose among three options *a*, *b*, and *c*—*a* minimizing revenue needs, *b* maximizing substantive agendas, and *c* maximizing economic growth. In the absence of the *Fine* amendment, we may think, the Florida Constitution permitted, but was indifferent to, pursuit of all three agendas:

(C₀): *a I b I c*

The proposed amendment took a clear tax minimization stand. Give priority to *a*, freely trade-off between *b* and *c*:

(T): *a P (b I c)*

But the other two agendas, from their individual perspectives, also state priority rules:

(L₁): *b P (c I a)*

(L₂): *c P (b I a)*

If we assume that, after adoption of the *Fine* amendment, the two constitutionally permitted agendas could claim equal status with the now constitutionally required agenda, aggregating the priority rules yields (not surprisingly):

(C₁): *a I b I c*

In other words, giving full effect to T subordinates L₁ and L₂; giving equal effect to L₁ and L₂ deprives T of its significance; either choice denies effect to constitutional provisions.

There seems to be an obvious objection. L₁ and L₂ are not literally included in the text of the Florida Constitution; given the *Fine* amendment, T would have been. Unlike the United States Constitution, however, Florida constitutions (like most state constitutions) have uniformly rejected the drafting strategy of individually identifying (enumerating) legislative powers. "Our state constitution is a limitation upon power and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid."¹⁶¹ Implied powers—gaps in the constitutional

161. *Chapman v. Reddick*, 25 So. 673, 677 (Fla. 1899). In his commentary on the 1968 Florida Constitution, President D'Alemberte writes: "[T]he state government has all powers not prohibited in the state constitution and not inconsistent with the powers given the federal government." TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 17 (1991). Although the idea that state constitutions leave legislative power unlisted is an old one, its premises (now mostly unexamined) are not easy to elaborate persuasively. The first Florida case to take up the question distinguished between federal and state constitutions in terms that seem to blend Calhoun and Rousseau: "While the one is simply a confederation of separate and independent political sovereignties, each striving for the mastery—the other is the pure

text—are therefore as much a part of the constitution as its express provisions. As a result, narrow definitions of legislative power incorporated in the constitutional text are not ordinarily understood by Florida courts to preempt other bases for legislative action not literally addressed.¹⁶² The *Fine* amendment on its face did not address substantive legislative agendas. Against the backdrop of the usual reading of the Florida constitution, therefore, it did not deconstitutionalize these agendas. Nor did it purport to deconstitutionalize this usual reading. The *Fine* initiative, we can now see, was not too broad; rather, it stopped short. Its underinclusiveness created a constitutional multiplicity: the *Fine* amendment took priority—or it counted equally with other constitutional objectives. After adoption of the *Fine* amendment, users of the Florida constitution would have encountered an unresolved overlap, a plurality irreducible with the constitution's own terms.

C.

The possibility that the *Fine* amendment failed to address—that constitutionally-unnamed legislative agendas might push out to the margin or otherwise limit constitutionally explicit restrictions—was and is not merely theoretical. Indeed, we can trace the characteristic pattern of push and give in the organizing form of the opinion in one of the great cases in Florida constitutional history, *Martin v. Dade Muck Land Co.*¹⁶³ Notably, we will see, the conflict in that case, like the conflict occasioned by the *Fine* amendment, involved a legislative agenda aimed at promoting economic growth and a constitutional restriction on the means of government finance.

Martin v. Dade Muck Land Co., handed down in 1928, held that the indirect benefits of a drainage project were sufficient to justify the levying of a property tax by a special district. This bare holding is not itself what is crucial. The significance of the case derives from the details of

embodiment of the will of the people, and constitutes a unit." *Cotton v. Leon County Commissioners*, 6 Fla. 610, 631 (1856). The leading early opinion nationally seems to echo Montaigne:

The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. . . . There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do. . . . But to take away the power from the legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be *imagined* to be as corrupt and as wicked as legislators.

Sharpless v. Mayor of Philadelphia, 21 Pa. St. Rep. 147, 161, 162 (1853) (Black, C.J.) (emphasis in original).

162. The leading case is *State ex rel. Lamar v. Jacksonville Terminal Co.*, 27 So. 225, 232-33 (Fla. 1900).

163. 116 So. 449 (Fla. 1928).

the drainage project, the organization and history of the special district, the argument asserted by the landowner to establish the absence of benefit, and the explanation offered by the state supreme court recognizing the necessary benefit.

The drainage project at issue addressed "more than 4,000,000 acres of public and private lands in the southern part of the state,"¹⁶⁴ taking as its more particular focus "the swamp and overflowed lands" of the Everglades,¹⁶⁵ defined in 1903 as an "estimated area of two million eight hundred and sixty-two thousand, two hundred and eighty . . . acres,"¹⁶⁶ although subsequently remapped as a smaller region.¹⁶⁷ The long-standing project dated from an 1850 act of Congress granting to the state government "the whole of the swamp and overflowed lands" in Florida for "the purpose of reclaiming said lands by means of . . . levees and drains"¹⁶⁸

The Florida legislature created the Everglades drainage district in 1913. The 1913 district took as its commissioners the state officials who were trustees of the internal improvement fund, an institution dating to 1855.¹⁶⁹ Those officials were "the Governor and four other state officers,"¹⁷⁰ and it was therefore in his capacity as trustee that Florida governor Martin was party to the suit. Notwithstanding the long lineage of the drainage district, however, the particular dispute in the *Muck Land Co.* case concerned the application of recent Florida legislation, a 1927 statute authorizing the district to issue \$20 million in bonds "in order to complete the work for which said district was created," authorizing also "[a]s further security for the sole purpose of paying or redeeming bonds authorized by this act" an ad valorem tax on all real property in the district "in such amount or amounts as shall be necessary for the payment of such bonds."¹⁷¹ This statute departed from the pattern of prior acts in not exempting from the tax property that was located in organized municipalities established within the district.¹⁷²

The principal plaintiff in *Muck Land Co.* owned land in both Coral Gables and Hialeah subject to the district tax, but in challenging the tax focused more attention on its Coral Gables property. Notwithstanding the implications of its own name, the Dade Muck Land Company argued

164. *Id.* at 468.

165. *Id.* at 466.

166. *Id.* at 460.

167. *See id.* at 461.

168. *Id.* at 460 (quoting 43 U.S.C. §§ 982-84).

169. *See* 1855 Fla. Laws ch. 610.

170. 116 So. at 461.

171. *Id.* at 457 (quoting 1927 Fla. Laws ch. 12016).

172. *See* 116 So. at 455.

that its holdings would not immediately benefit from the drainage of the Everglades because its land was not subject to flooding as it was located in Coral Gables upon a ridge, which is "the highest uniform elevation of land in Dade county," ranging from 9 to 16 feet higher than the Everglades proper, and which is naturally "drained by gravity" and thus in no need of the "artificial drainage" financed by the district tax.¹⁷³ Nor would its land derivatively benefit from whatever increased economic activity would follow the draining of other land within the district.

[T]he lands located upon said elevation have been the subject of extensive and costly development and improvement, designed to increase their value and desirability . . . , and are now populated by more than 10,000 people; . . . upon the said elevation there are located several thousand buildings completed and in course of construction, including homes and large hotels, apartment buildings, churches, store buildings, office buildings, municipal structures, theaters, a coliseum, university, and preparatory school buildings and public and private schools, power plants, street car lines, railroad lines, parks, paved streets, avenues, and boulevards, and every kind of modern improvement usually found in populous cities¹⁷⁴

The value of the Muck Company's holdings, therefore, derived from "their location and the population of the cities in which the same lie, peculiarly suited and desirable for use as sites for homes and business buildings."¹⁷⁵ Indeed, insofar as the Everglades district tax would prevent Coral Gables (and Hialeah) from levying similar taxes in support of municipal bonds, the Everglades project would block the municipalities "from being able to borrow money sufficient to accomplish municipal improvements, and thereby greatly depreciate, instead of add to, the value" of the Muck Company's lands, "which are mainly valuable because of, and dependent upon, the action of said municipalities in making improvements around and about the same."¹⁷⁶ The actual purpose of the tax, the Muck Company alleged, was to tax valuable, developed land like its holdings in order to finance a project of actual benefit only to holders of now-worthless undeveloped land.¹⁷⁷

Justice Whitfield's opinion for a unanimous Florida Supreme Court began by construing ambiguous provisions of the 1927 statute to be consistent with the strict separation of monies available to the Everglades district and the internal improvement fund from monies available for

173. *Id.* at 453, 454.

174. *Id.* at 454.

175. *Id.*

176. *Id.* at 455.

177. *See id.*

free appropriation by the legislature.¹⁷⁸ The latter funds could not be used to support the Everglades project given the constitutional prohibitions on debt obligations falling directly on the state.¹⁷⁹ Whitfield quickly excised as unconstitutional other provisions that were not open to narrow reading and that seemed to implicate general governmental processes in the project, pronouncing these provisions as peripheral to the overall scheme.¹⁸⁰ The main body of the opinion dealt with the Muck Company's claim that it received no benefit from the district and therefore should not be subject to the district's tax. Noting that "[t]he validity of the drainage district is not in question," Whitfield declared that the legislature's judgment that a benefit did indeed fall upon property owners in the Muck Company's circumstances should not be overturned unless "an abuse of power or purely arbitrary and oppressive action is clearly shown."¹⁸¹ This test allowed for differences in the kind and quantity of a benefit. "[N]o land in the district is exempt from a just special assessment merely because it may not receive a direct or an exactly equal benefit from the drainage"¹⁸² The existence of at least indirect benefit to the plaintiffs, Whitfield wrote, was clear. His explanation is worth quoting at length:

The drainage of the Everglades is not a local undertaking initiated by interested parties merely to relieve the overflowed lands of surface water for the sole benefit of the lands to be drained; but the drainage being done in the Everglades drainage district is by a state agency, under statutory authority. The drainage removes surface water, reduces the level of subsurface percolating water, and makes the lands all over the district more useful for high development. The public improvement is designed for the immediate and potential permanent general benefit to the entire statutory district containing mil-

178. *Id.* at 463.

179. *Id.* Article 9, section 6, of the 1885 Florida Constitution declared (as of 1928): "The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, at a lower rate of interest." Article 9, section 10, added: "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." This latter provision derived from an amendment to the 1868 constitution adopted in 1875. See FLA. CONST. of 1868, art. VII, § 12 (1875). Notably, the 1875 amendment's language granting authority to the legislature was more expansive than its 1885 successor. "The Legislature shall have power to provide for issuing State bonds bearing interest for securing the debt of the State, for the erection of State buildings, and for the support of State institutions. . . ." *Id.* The original 1868 provision was broader still. "The Legislature shall have power to provide for issuing State bonds bearing interest, for securing the debt and for the erection of State buildings, support of state institutions, and perfecting public works." FLA. CONST. of 1868, art. VII, § 12.

180. See 116 So. at 463-64.

181. *Id.* at 464.

182. *Id.* (emphasis omitted).

lions of acres, by making the lands both public and private that are affected by surplus water fit for improvement and development by growing thereon fruit, vegetables, and staple crops, live stock and other products, by the erection of commercial, residential, and other structures, by establishing business enterprises, transportation facilities, better flood control, sanitary, health, and general welfare conditions, and by making the lands in the district that are not overflowed more accessible from and over lands to be drained, and more valuable for all useful purposes. Such development and improvement will certainly be an indirect, if not also a direct, benefit to all the lands in the district, in that the enhanced utilization of the vast area of drained lands will inevitably result in an increase of population, commercial activities, pleasure and health resorts, and varied products of the entire district, with a great increase in the values of the lands and in the business conducted in the district, which increases in values and uses, with better health, transportation, and general welfare conditions, will extend to residential as well as to business, producing and other properties in the district, whether some them actually need draining or not.¹⁸³

Given this general benefit, allegations that the plaintiff's property was not in danger of flooding were beside the point.¹⁸⁴

To a greater degree than this summary suggests, the *Muck Land Co.* opinion reveals a considerable effort to fit its conclusions within a large body of caselaw. The question of whether and what sort of benefits were necessary to justify special district taxes was one that the United States Supreme Court and other state courts had repeatedly addressed.¹⁸⁵ Justice Whitfield emphasized, through a long string citation, that the "arbitrary action" test was consistent with a large number of federal and state supreme court decisions.¹⁸⁶ He also acknowledged, however, that in a significant number of cases, all relatively recent, this test was used to strike down taxes.¹⁸⁷ He dealt with these cases in part by drawing a distinction between two sorts of taxing districts to fix the contexts for evaluating arbitrariness:

In a street or other similar public improvement or facility, where abutting or contiguous property only is specially assessed to pay for the public improvement or facility, the special assessments should not

183. *Id.* at 467.

184. *See id.* at 468-70. Whitfield's conclusion seems straightforward, but because of the procedural posture of the case, on demurrer, some fairly complex analysis became necessary. *See also id.* at 470 (per curiam) (denying petition for rehearing).

185. For a discussion of nineteenth century views on special assessments, see Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth Century America*, 12 J. LEGAL STUD. 201 (1983).

186. *Muck Land Co.*, 116 So. at 465.

187. *See id.* at 465-66.

exceed the benefits resulting directly, specially and peculiarly to the property specially assessed, and the special assessments should be fairly apportioned as between those who should pay for the public improvement, and the improvement contemplated should be reasonable, in view of all pertinent conditions affecting its use.

Where a special taxing district is formed for local improvements, the special assessments may extend throughout the district, and are usually much less burdensome, and the benefits are more general and indirect. . . . Good faith and substantial justice and not exact equality of benefits and burdens are required.¹⁸⁸

In this way, Whitfield effectively limited the relevance of *Norwood v. Baker*,¹⁸⁹ the leading United States Supreme Court decision striking down a special district tax, by pointing to the facts of that case (a street improvement district sought to tax a landowner to pay the cost to the district of acquiring the landowner's own property), rather than *Norwood's* analysis, which grounded strict scrutiny of alleged benefits on assumptions about the constitutional primacy of private property and on a corollary need to protect the integrity of takings/just compensation jurisprudence.¹⁹⁰ At the same time, the *Muck Land Co.* opinion, by continuing to emphasize the salience of the benefit requirement, stopped short of adopting the approach outlined by the United States Supreme Court in *Houck v. Little River Drainage District*,¹⁹¹ the then-leading case supporting special district taxation.¹⁹² *Houck*, an opinion written by Justice Hughes, addressed a preliminary tax levied by a drainage district organized on a smaller scale but otherwise similar to the Everglades district. Hughes found it enough that the district was organized "to secure . . . recognized public advantages," without stopping to elaborate on those benefits or their relationship to particular taxpayers.¹⁹³ The district was no different from the state legislature itself in seeking funds for legitimate governmental expenses.¹⁹⁴ The only relevant limit was jurisdiction, the existence or nonexistence of a relationship between the

188. *Id.* at 464-65.

189. 172 U.S. 269 (1898).

190. Professor Diamond explores both dimensions of *Norwood*. See Diamond, *supra* note 184, at 227-30.

191. 239 U.S. 254 (1915).

192. See, e.g., *Valley Farms Co. v. County of Westchester*, 261 U.S. 155, 163-64 (1923); *Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage Dist.*, 256 U.S. 129, 130 (1921); *Myles Salt Co. v. Board of Comm'rs of the Iberia & St. Mary Drainage Dist.*, 239 U.S. 478, 481 (1916). In some opinions, citations to *Houck* were accompanied by citations to *Spencer v. Merchant*, 125 U.S. 345 (1888), and *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901), decisions bracketing and limiting the significance of *Norwood*. See Diamond, *supra* note 184, at 229-32.

193. 239 U.S. at 261.

194. See *id.* at 262, 265.

expenses and the district's purposes.¹⁹⁵

If any one United States Supreme Court opinion marks the starting point for Justice Whitfield's discussion, it would seem to be *Fallbrook Irrigation District v. Bradley*,¹⁹⁶ the only federal decision from which he quoted.¹⁹⁷ *Fallbrook* affirmed the constitutionality of the Wright Act, a California statute providing for the organization of irrigation districts, which at the time of the decision allegedly already regulated water use in some one million acres in California, as well as an additional two million five hundred thousand acres in other Western states with similar laws.¹⁹⁸ In theory, such districts were of use throughout a 600 million acre area.¹⁹⁹ Writing for a majority of the United States Supreme Court, Justice Peckham observed that the constitutionality of the statute was thus a matter of "really great practical importance."²⁰⁰ Lawyers attacking the Act argued that insofar as district taxes fell on lands not in need of irrigation, the absence of direct benefit to the owners of these lands, combined with the clear benefit that the irrigation districts conferred on owners of otherwise arid lands, rendered the statutory scheme an unconstitutional redistribution of wealth. Peckham and the six Justices joining his opinion disagreed. Irrigation districts did indeed serve a public purpose:

To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use.²⁰¹

As in the case of swamp reclamation projects, usual private property rights were beside the point.

If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a

195. See *id.* at 265-66. *Houck* thus brought constitutional analysis of special district taxing within the general framework of equal protection arbitrariness testing, rather than the eminent domain inspired quid pro quo inquiry that *Norwood* had evoked. Within this equal protection model, it was still possible for state law to founder. See, e.g., *Thomas v. Kansas City Ry.*, 261 U.S. 481, 485 (1923) (Brandeis, J.) ("the tax levied is grossly discriminatory"); *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U.S. 55, 59 (1916) (Holmes, J.) ("an ordinance that is a farrago of irrational irregularities throughout").

196. 164 U.S. 112 (1896).

197. See *Martin v. Dade Muck Land Co.*, 116 So. 449, 468 (Fla. 1928).

198. 164 U.S. at 152.

199. *Id.*

200. *Id.* at 153.

201. *Id.* at 161-62.

certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.²⁰²

Landowners whose property was included within, and taxed by, an irrigation district must still be "substantially benefited."²⁰³ But the question of the extent of the benefit was, within the terms of the California statute as Justice Peckham read it, a matter for the district commissioners to resolve when they fixed the district boundaries.²⁰⁴ At least in the absence of fraud or bad faith, benefit was not itself a constitutional issue, so long as a hearing was provided, and Justice Peckham read the California statute to so provide.²⁰⁵

The *Muck Land Co.* opinion, however, even as it borrowed from *Fallbrook*, remained importantly different. There is nothing in Justice Peckham's opinion remotely like Whitfield's celebration of the benefits of draining the Everglades. *Fallbrook* was written by the United States Supreme Court in a manner that conspicuously blocked a detailed discussion of benefits. It was enough to show the irrelevance of private property rights, as though anticipatorily distinguishing *Norwood*. Alternately, it was sufficient to evoke respect for state processes, a jurisdictional approach foreshadowing *Houck*. Perhaps one should set aside all of the United States Supreme Court decisions of the era as jurisdictionally limited, able to develop only themes included within the corpus of federal constitutional law. At that time, ample conceptions of "benefit" were not part of the canon. But one would still have to explain the significance of "benefit" in Florida constitutional law. Perhaps Justice Whitfield listed benefits so elaborately in order to counter the parallel list put forward by counsel stressing the importance of municipal developments like Coral Gables in bringing about rising property values. The question then becomes: why would both counsel and Whitfield assume that such lush associations of public projects and private benefits were decisive?

Irony and allegory—consequences of the almost seventy year distance—stand in the way as obstacles to any answer. We know that, at

202. *Id.* at 163. Justice Whitfield quoted this passage. *Muck Land Co.*, 116 So. at 468.

203. 164 U.S. at 167.

204. *See id.* at 166-67.

205. *See id.* at 167-68, 172-73.

the time the *Muck Land Co.* case was argued and decided, parts of Coral Gables remained in ruins as a result of the hurricane of 1926. We also know that, partly because of the hurricane and the on-coming Great Depression, the Coral Gables development would never retrigger the self-contained chain reaction of ascending property values that counsel in *Muck Land Co.* seemed to believe to be the natural result of municipal development. The Everglades drainage project was similarly doomed. Its completion would have been a disaster. The Everglades is not currently thought of as a "swamp" or "muck" but something much more complex and dynamic, like a "river of grass," a natural phenomenon whose disruption may create more harm than good. Parts of the earlier drainage effort have been undone. But all of this is only part of what we notice. It is as though *Muck Land Co.* shows in microcosm two main themes of Florida history. There has been, especially in the twentieth century, a sequence of efforts to stimulate economic growth through artistic constructions. These concentrations of activity are not so much the products of long-term economic patterns or natural features of the environment, but rather largely the results of imaginative efforts (akin to theater) substituting new settings more attractive to large numbers of people: Coral Gables, Miami Beach, Disney World, Seaside, etc. There is also the parallel effort, conceived of in the nineteenth century, literally to remake large parts of the state's land mass. These efforts are equally imaginative and artificial, but they reshape rather than supplant the natural environment in order to establish a setting more conducive to settlement and economic activity. The Everglades became the primary focus of one such effort, with much of South Florida's agricultural economy resulting.²⁰⁶ *Muck Land Co.* marks a collision of these two movements.

Justice Whitfield, his opinion suggests, brought organizing preoccupations of his own to the *Muck Land Co.* case. The caselaw, especially *Houck* and its successors, left him considerable room to uphold the tax. Yet Whitfield wrote with sufficient care and elaborateness to suggest that, in some sense, the decision in *Muck Land Co.* was not easy. By emphasizing the bountifulness of the benefits of Everglades drainage, it may seem that he narrowed the reach of his ruling. Less manifest benefits, Whitfield might have been implying, might mean the invalidation of the tax. His distinction between large and small cases also restricted the application of *Muck Land Co.*; it seems not to have been part of prior law (at least as revealed in the cases cited by Justice Whitfield). What worried Whitfield? The distinction between the activities

206. Concerning the spectacular failure of early efforts to transplant settlement strategies successful elsewhere, see BERNARD BAILYN, *VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLING OF AMERICA ON THE EVE OF THE REVOLUTION* 430-74 (1986).

of the Everglades District and ordinary government process was plainly important for him, and that distinction was emphasized in the link between the district and the original improvement fund that he documented at length in the statement of the case, and insisted upon in the opinion itself in his initial statutory and constitutional analyses. But why? Perhaps the constitutional ban on government borrowing was a more important factor in explaining the content of the *Muck Land Co.* opinion than I have so far suggested. The improvement fund, the predecessor of the Everglades District, both plainly predated the 1885 constitution's elaboration of the ban and (if the district were identified with the state) equally plainly was inconsistent with the ban's literal language.²⁰⁷ The prohibition against state government borrowing had its origins in adverse reactions to the risks of governmental corruption, taxpayer burdens (especially in cases of business failure), and state refusals to honor contractual obligations (again in cases of business failure).²⁰⁸ The improvement fund, by contrast, seems to have been premised on the assumption that it was precisely the business of government to take risky steps that private actors by themselves would not take in order to make possible greater private wealth.²⁰⁹ Based upon this reading, Justice Whitfield needed to organize his opinion in *Muck Land Co.* in a way that would enable him to deal with the tension between the initial statutory response to the federal grant, as well as the subsequent course of legislation, which treated the internal improvement fund as basic, and the 1885 constitution.²¹⁰

207. See *supra* note 179.

208. The constitutional language is itself suggestive in this regard. See also *Holland v. Florida*, 15 Fla. 455, 536 (1876) (finding that state government financial support of private enterprise "would be a fund to tempt her officers, and if it resulted in loss, would be a burden to her people, unless they hoisted the flag of repudiation behind the shield of sovereignty"). On the difficulties that railroad financing schemes in particular created in Florida in the post-Civil War period, see JERRELL H. SHOFNER, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION, 1863-77* 243-57 (1974). See generally Barton H. Thompson, *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 *STAN. L. REV.* 1373, 1405-12 (1992) (discussing postbellum "repudiation" and its consequences from the national perspective with references to larger literature).

209. See *Holland*, 15 Fla. at 530-31.

210. This tension would have been one that Whitfield himself appreciated. Beginning in 1927, the Compiled General Laws of the State of Florida incorporated, as an accompanying reference, *Whitfield's Notes*—an extraordinary collection of materials that Justice Whitfield had accumulated, on the premise that it was "helpful, in construing and applying [the State's] laws, to have at hand pertinent historical data." *Helpful and Useful Matter*, in *FLA. STAT.* p. 81 (1941). These notes, almost Jeffersonian in their ambition, were divided into two main parts (a third division added a bibliography). The first, entitled *Legal Historical Background of the State of Florida*, compiled all documents relevant to the development of Florida governmental institutions, beginning with *Prerogatives Granted Christopher Columbus*. See *id.* at 85 (table of contents). Florida's constitutions occupied the great bulk of the materials, along with an elaborate table charting the presence and absence of particular provisions in particular constitutions. *Id.* at 194-

The focus on benefits precisely met this need. The potential for substantial benefits justified accepting risk. Rhetorically, at least, Whitfield asserted a present value analysis, subordinating uncertainty and therefore reducing the salience of the concerns prompting the constitutional borrowing ban.²¹¹ The description of the distribution of potential benefits localized the project (a repeated adjectival emphasis in the latter part of Whitfield's opinion) and therefore drew a geographic distinction between the district and the Florida government itself. Perhaps most importantly, the emphasis on benefit privatized the governmental involvement in the sense that it explained government action in terms analogous to private motivations. This ascribed to the district a readily understandable purpose of its own, thus reducing the salience of the fear of spoliation, government action at one private actor's behest at the expense of another.²¹² Thus, the constitutional restriction moved to the margin, formally displaced by the justification Whitfield framed for the legislatively-created special district.

IV.

Single-subject analysis of the amendment at issue in *Evans*²¹³ is considerably simpler than but ultimately similar to that triggered by the challenged amendment in *Fine*.²¹⁴

The functional analysis employed by the Florida Supreme Court in *Evans* begs the question: Why are "substance" and "procedure," or

210. The second, called *Governmental, Legal, and Political History of Florida*, addressed at greatest length *Land Grants and Land Titles*. See *id.* at 228-40. In turn, the subject receiving the greatest attention within this part was *The Internal Improvement Fund*. See *id.* at 232-35. Whitfield stated his own view of the Improvement Fund in a straightforward manner. "The policy of encouraging railroad and canal building by legislative land grants secured the construction of the transportation facilities that so materially contributed to the development and progress of the state to its present prominent position in the union." *Id.* at 233.

211. On this view, counsel had urged the benefits of municipal development in order to set up the argument about increasing municipal bond risk and to play off the constitutional fear of governmental debts. See *supra* note 174 and accompanying text.

212. Government motives were not equated with private motives in the case. The government interest in economic development was an aggregate concern, not an interest in the success or failure of particular individuals. The coexistence of this aggregate focus along side of the individual perspective is, of course, a chronic problem in constitutional law. It is captured, for example, in the juxtaposition of the Bill of Rights and the 1787 text in the U.S. Constitution. For a recent effort to manage the problem, that in the end opts for the individual perspective, see Rubenfeld, *supra* note 26. A discussion of possible independent agendas of government actors as a solution to the problem of arbitrary wealth redistributions is notably absent from, or at best skeptically judged in, Professor Epstein's well-known takings analysis. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE POWER AND THE POWER OF EMINENT DOMAIN 286-89 (1985) (special district taxation).

213. *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

214. *Fine v. Firestone*, 448 So. 2d 954 (Fla. 1984).

"legislative" and "judicial," the relevant categories? To be sure, the terms that the court used are constitutional. The Florida Constitution itself identifies procedure as a judicial responsibility.²¹⁵ The Florida legislature probably could not have enacted the substantive provisions of the amendment given the access to courts provision in the Florida Declaration of Rights.²¹⁶ The fact that the *Evans* amendment addressed matters falling within the scope of these two constitutional provisions, however, is not itself decisive. The amendment simply provided a constitutional resolution of issues that the Florida Constitution declared to be beyond the reach of the Florida legislature. There was thus no conflict occasioned by the coexistence of the *Evans* amendment and these two constitutional provisions and thus no reason (within the framework of the analysis I developed in the discussion of *Fine*) to set aside the unifying characterization of the *Evans* amendment that its proponents gave it—as aimed in all its parts at "citizens' rights in civil actions."²¹⁷

Admittedly, the *Evans* amendment possessed some curious features. Because its damages limitations were relevant only in tort cases, it is unclear why the amendment stated a summary judgment standard applicable in all cases and not just those sounding in tort. Perhaps the drafters sought to frustrate in advance plaintiffs' attorney (or hostile court) efforts to recharacterize tort actions as actions for breach of contract (for example, warranty, or duty of good faith and fair dealing). More fundamentally, the purpose of the summary judgment clause is unclear if, as the Florida Supreme Court supposed in *Evans*, that clause simply "elevat[ed] the summary judgment rule currently contained in Florida Rule of Civil Procedure 1.510."²¹⁸ Perhaps the drafters were more ambitious. There are different versions of summary judgment law, even if all make use of the same ultimate formula. It would make sense to suppose that the *Evans* amendment was an attempt to introduce into Florida law a more pro-summary judgment standard than would otherwise obtain. But how did the amendment provision accomplish this? The framers must have thought that elevating the summary judgment standard to the level of a constitutional right, would lead courts, attempting to take the right seriously, to give it sharper content.²¹⁹

215. FLA. CONST. art. V, § 2(a); see, e.g., *Timmons v. Combs*, 608 So. 2d 1, 3 (Fla. 1992); *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).

216. FLA. CONST. art. I, § 21; see *Kluger v. White*, 281 So. 2d 1, 3-4 (Fla. 1973).

217. See *Evans*, 457 So. 2d at 1353.

218. *Id.* at 1354.

219. However successful it might have been as a means of encouraging summary judgments, and notwithstanding its textual separation of summary judgment from other procedures, the *Evans* amendment would have raised important interpretive questions regarding its interaction with the surrounding procedural environment. Summary judgment's effectiveness in part turns on the degree to which other processes facilitate (or frustrate) its implementation. For example, absent

The central question in summary judgment law concerns the perspective that the judge adopts in reviewing the record. The general formula requiring that no genuine dispute exist concerning the material facts of the case marks as sensitive two terms: "genuine dispute" and "material facts." "Material" refers to the legal requirements of the cause of action—the elements each of which must be established for the plaintiff to prevail.²²⁰ If no dispute exists with respect to the facts pertinent to a particular element, and if those facts cut against the plaintiff's claim, summary judgment for the defendant is proper even if genuine disputes encompasses all other elements. "Genuine dispute" is the more complex term. The formula implies that there are some "disputes" that are not "genuine," that parties might contest points that others would regard as clear. There is therefore an important assumption about point of view carried by the idea of "genuine". In federal law, at least after *Celotex Corp. v. Catrett*²²¹ and its companions,²²² point of view acquires content from the burden of proof at trial. Whether there is a genuine dispute turns on how the record stands given whose responsibility it is to prove particular elements identified as decisive by the cause of action.²²³ By contrast, under Florida law it appears that the pertinent bias runs straightforwardly against the moving party. The party seeking summary judgment must conclusively demonstrate the nonexistence of issues of material fact, with the court drawing every possible inference in favor of the party against whom summary judgment is being sought.²²⁴ On

interlocutory appeal, denials of summary judgment, even if erroneous, are often decisive as a practical matter, given subsequent trial costs. Settlement will occur in some number of cases notwithstanding the "merits" of plaintiff's case. The standards that Florida courts use, however, in deciding whether to allow interlocutory appeals were not directly addressed by the *Evans* amendment, and thus seemingly would have remained open to judicial management. These standards treat summary judgment denials as only very rarely appealable. Would the amendment have obliged courts to adjust interlocutory appeal rules to the new summary judgment regime in order to assure the meaningfulness of the summary judgment right?

220. A discussion of the elements of affirmative defenses would transpose plaintiffs and defendants but otherwise would make no difference in the analysis.

221. 477 U.S. 317 (1986).

222. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). See generally William M. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992).

223. See *Celotex*, 477 U.S. at 322 (1986). *Celotex* is notable in many respects. For example, its linkage of civil procedure with the contours of substantive law is one which some academic commentators have regarded as generally pernicious. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989). Its result is also strikingly pro-defendant. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990). These dimensions are outside of the scope of this essay.

224. See *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30 (Fla. 1977); *Green v. CSX Transp., Inc.*, 629 So. 2d 974, 975 (Fla. 1st DCA 1993); *Ress v. X-tra Super Food Ctrs., Inc.*, 616 So. 2d 110, 111 (Fla. 4th DCA 1993); *Graff v. McNeil*, 322 So. 2d 40, 43 (Fla. 1st DCA 1975).

appeal, the slightest reasonable doubt as to the possibility of factual disputes requires a reversal of the summary judgment.²²⁵ It is possible to imagine still other points of view. For example, a judge ruling on a summary judgment motion might ask herself, as a representative outside observer, whether the record taken as a whole clearly supports the positions of the party bringing the motion.

The key question is which point of view to adopt.²²⁶ Put another way: Is there any reason not to adopt a summary judgment standard that makes summary adjudication readily obtainable? If summary judgment is a "right," this would seem to be the proper way to frame the issue. In fact, the United States Supreme Court, in explaining the federal standard, adopted precisely this "rights" perspective.

Rule 56 [governing summary judgments] must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the *rights* of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.²²⁷

Celotex raises a new question, however: at what point does summary adjudication become inconsistent with jury trial rights?²²⁸ Before *Celotex*, the United States Supreme Court, then adhering to a considerably more wary approach to summary judgment,²²⁹ directly acknowledged the possible conflict with the federal constitutional jury trial guarantee in formulating the prior standard.²³⁰

The Florida Constitution expressly guarantees the right to jury trial in civil actions.²³¹ The sorts of cases that the *Evans* amendment addressed were classic common law actions, and therefore paradigmatic jury cases within the terms of the Florida Constitution.²³² The summary judgment standard in Florida, as worked out by courts interpreting rule

225. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Dorez Elec. Corp. v. Fleet Credit Leasing Corp.*, 623 So. 2d 1254, 1255 (Fla. 3d DCA 1993); *Braidt Trading Co. v. Anthony R. Abraham Trading Enters.*, 469 So. 2d 955, 956 (Fla. 3d DCA 1985).

226. Obviously, the idea of "genuine dispute" does not itself answer this question.

227. *Celotex Corp.*, 477 U.S. at 327 (emphasis added).

228. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 268 (1986) (Brennan, J., dissenting).

229. "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

230. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 (1973) (dictum); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

231. FLA. CONST. art. I, § 22.

232. See, e.g., *B.J.Y. v. M.A.*, 617 So. 2d 1061, 1069 (Fla. 1993); *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 435 (Fla. 1986).

1.510, is quite similar to the pre-*Celotex* federal test.²³³ Why give priority to the jury trial right vis a vis the summary judgment right? The United States Supreme Court seems to have reconciled its new summary judgment jurisprudence with the Seventh Amendment.²³⁴ In any case, both summary judgment and jury trial, within the hypothesis of the *Evans* amendment, would have been able to claim Florida constitutional recognition. Ultimately, however, Florida courts would have faced the question of fixing priority. For single-subject purposes, it is this constitutional overlap that is the source of the problem. It creates a dissonance like that associated with the *Fine* initiative, although easier to apprehend. Cases that the amendment could reasonably be understood to mark as "summary," could, within article I, § 22 (left untouched by the *Evans* proposal), be equally reasonably labeled "jury."

V.

*In re Discrimination Laws Restriction*²³⁵ is a harder case. It is not sufficient for present purposes simply to show, as Justice McDonald did in his majority opinion, that the proposed restraint on the reach of antidiscrimination legislation redefined the scope of law-making author-

233. Compare cases cited in *supra* notes 224-225 with standard stated *supra* note 229.

234. It may have been enough for the Court to equate summary judgment and directed verdict standards. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The constitutionality of directed verdict standards, from the Seventh Amendment perspective at least, is long-established. See *Galloway v. United States*, 319 U.S. 372, 388-96 (1943). The equation is nonetheless not straightforward, at least for purposes of evaluating jury trial rights, even if it is a familiar figure in academic civil procedure writing. See, e.g., David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748 (1974). Justice Rutledge's majority opinion in *Galloway* is not easy to parse, but it appears to rest on the proposition that the Seventh Amendment is not inconsistent with "the essential requirement . . . that mere speculation be not allowed to do duty for probative facts." 319 U.S. at 395. This formula seems to derive from the dissent of Justice Hughes in *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), which treated "the settlement of disputes of fact" as the constitutionally-guaranteed province of the jury. *Id.* at 402 (Hughes, J., dissenting). These starting points make a good deal of sense in the context of judicial rulings undertaken *after* the presentation of evidence. At that stage, it may indeed be possible to separate "speculation" from "disputes of fact." Summary judgment rulings, however, occur before the presentation of evidence. Thus, for Seventh Amendment purposes, the Supreme Court has treated summary judgment as an adjunct of pleading rules, as a "means of making an issue." *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902); see also *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."). Burdens of production may be relevant in matching pre-trial compilations of possible evidence with the requirements of the causes of action. But conclusions about what constitutes "speculation," perhaps properly influenced by the allocation of the burdens of persuasion, seem to presuppose an entirely different setting.

235. 632 So. 2d 1018 (Fla. 1994).

ity at all levels of state government.²³⁶ Limits on legislative power are constitutionally commonplace. Some special reason must have existed to invalidate the amendment suggesting that the proposed qualification would not have been able to install itself as part of the larger constitutional text, that is would have been blocked by (and therefore also blocked) some other equally pertinent constitutional provision. Similarly, no constitutional equivalent of cognitive dissonance would have resulted from the potential juxtaposition that McDonald observed, placing in parallel the proposed limit on antidiscrimination legislation and the Florida constitutional guarantee of the right of employees to bargain collectively.²³⁷ The process of collective bargaining does not presuppose the existence of an altogether open set of bargaining subjects. Finally, the constitutional statement that "[a]ll natural persons are equal before the law"²³⁸ is hardly inconsistent with a definition (by exclusion) of legally irrelevant differences.²³⁹

A.

This last proposition may be too pat. The proposed amendment did not mean to leave Florida lawmakers, considering legislation of all types, with only ten constitutionally available distinguishing categories. The amendment restricted its focus to "any law regarding discrimination against persons."²⁴⁰ The question is which laws are those "regarding" discrimination against persons. Like similar terms in the Florida Constitution, such as "pertaining to" or "relating to,"²⁴¹ "regarding" would seem to be a broadly encompassing term, much like "necessary and proper" as Chief Justice Marshall understood it in *McCulloch v. Maryland*.²⁴² "Discrimination against persons" is not much less inclusive.

236. *See id.* at 1020.

237. *See id.*

238. FLA. CONST. art. I, § 2.

239. *But see* 632 So. 2d at 1020. Within the perspective of this essay, Justice Kogan's discussion of the collateral effects of the proposed amendment on several Florida and federal statutory schemes, *id.* at 1022 (Kogan, J. concurring), is also not dispositive. It is clear both that Florida constitutional provisions override Florida statutes and that, given the Supremacy Clause of the United States Constitution, inconsistent federal statutes would trump Florida constitutional provisions. Thus, these collateral effects create no unresolved conflicts of the sort emphasized here.

240. *See* 632 So. 2d at 1019.

241. "Regarding" is used only once in the Florida Constitution. *See* FLA. CONST. art. III, § 4(e). Articles III, § 11, and IV, § 4(f), however, use the phrase "pertaining to." Article V, § 3(b)(2) uses "relating to." Article VII, § 3(c) uses "related to." Article II, § 8(f) and article V, § 12(h) both use "concerning." Article V, § 12(h) also uses "with respect to," as does article IV, § 9, which also uses "in aid of." Article V, § 3(b)(7) and article V, § 4(b)(3) use "necessary to." Article V, § 5(b), and article V, § 20(c)(3) use "necessary or proper to." Article V, § 20(h) uses "relative to." This is not an exhaustive list.

242. 17 U.S. (4 Wheat.) 316 (1819). *See also* *Lee v. Weisman*, 112 S. Ct. 2649, 2672-73

Purposefully biased acts causing injury would, of course, be one predicate for laws "regarding discrimination." Equally obviously, whatever their purpose, acts whose effects significantly disadvantage persons possessing certain characteristics are also triggers for antidiscrimination legislation.²⁴³

The most helpful part of the amendment's text might be its instruction that the new constitutional language should be added as a second subsection to article I, section 10, of the Florida Constitution, which otherwise parallels article I, section 10, of the United States Constitution, barring bills of attainder, ex post facto laws, and laws impairing the obligation of contracts.²⁴⁴ The constitutional ban on bills of attainder, in particular, works well as a model. If legislators may not impose burdens on "specifically designated persons or groups"²⁴⁵ disproportionate to any more general, and therefore nonpunitive, purpose, legislators also may not grant benefits (except in ten identified cases) to "specifically designated persons or groups" disproportionate to any more general purpose.²⁴⁶ If it is not the business of legislators to judge "the blameworthiness of . . . specific persons,"²⁴⁷ it is also not the business of legislators to evaluate the special worthiness of particular individuals or groups. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."²⁴⁸ On this reading, the proposed amendment fixed the limits of its applicability by evoking a distinctive mode of evaluating challenged legislation, a mode that looked through general surface language to

(1992) (Souter J., concurring) (discussing the meaning of "respecting" in first amendment Establishment Clause).

243. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Shifting attention from liability rules to remedies does not clarify matters. Antidiscrimination legislation may afford aggrieved individuals with a legal means of claiming compensation from or altering the conduct of individuals or organizations in violation of statutory norms. Such legislation, however, may also simply confer entitlements on individuals legislatively determined to be victims of discrimination. It is legislation of this last sort that triggers the so-called "reverse discrimination" debate.

244. "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." FLA. CONST. art. I, § 10; see U.S. CONST. art. I, § 10, para. 1 (including same three prohibitions within a longer list of powers denied to state governments).

245. *United States v. Brown*, 381 U.S. 437, 447 (1965).

246. For discussions of proportionality in the bill of attainder context, see, e.g., *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 853-56 (1984); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-78 (1977). The central place of "special legislation" arguments in the analysis of opponents of civil rights protections for gay or lesbian individuals is described and criticized in Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 293-94, 300-07 (1993).

247. *Brown*, 381 U.S. at 445.

248. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810), quoted in *Brown*, 381 U.S. at 446.

glimpse particular individuals or groups affected, that measured the degree to which those individuals or groups received special treatment, and that asked whether this "singling out" was nonetheless justifiable from a general perspective.

Bill of attainder analysis of this sort is the opposite of another mode of constitutional inquiry. That other method proceeds by reading even seemingly specific references to individuals or groups in legislation as shorthand descriptions of general characteristics, characteristics whose joint attributes (coherence, completeness, precision, etc.) become the ultimate focus of judgment.²⁴⁹ The difference in the two approaches is well-illustrated by supposing the existence of a statute utilizing the beginning language of article I, section 2, of the Florida Constitution ("All natural persons are equal before the law"), but appending a subject matter qualification ("with respect to [x]"). The bill of attainder investigation that is associated with the proposed amendment at issue in *Discrimination Laws Restriction* would begin by identifying the individuals or groups that would specifically benefit from equalized access to *x*. The opposite investigation would begin by elaborating composite attributes of *x*, such as purposes and consequences. Is it possible to take both tracks? Plainly, it is not possible to attach priority to both.²⁵⁰ If the criteria used to judge the interaction of disaggregated attributes demand relatively little, but also figure prominently in drawing the ultimate constitutional conclusion, the salience of "singling out" diminishes.²⁵¹ Conversely, if the "fact" of "singling out" changes the demands that general considerations must meet (for example, heightening scrutiny), the "general" inquiry becomes importantly derivative.

249. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 82-88 (1961). This mode of analysis may lead as easily to the invalidation of legislation as to affirmation, depending upon the standards used to judge the extracted joint attributes. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

250. For a successful effort to work with something similar to both these starting points, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). The difficulties of reconciliation are explored in a discussion of the analogous distinction between personal and impersonal standpoints in THOMAS NAGEL, *EQUALITY AND PARTIALITY* (1991).

251. The effect of this shift in emphasis is evident from a comparative reading of *Brown*, 381 U.S. at 437 (1965), in which the Supreme Court acknowledged little if any place for judging potentially general considerations underlying the prohibition of "Communist" union officers given the obviousness of the congressional "singling out," *id.* at 456-61, and *Minnesota Public Interest Research Group*, 468 U.S. at 841 (1984), and *Nixon*, 433 U.S. at 425 (1977), in which "singling out," however conspicuous (for example, the statute in *Nixon* applied only to Nixon), receded into the background given the Supreme Court's appreciation of the seeming plausibility of congressional "general" aims.

B.

If we associate article I, section 2, with the "general" approach above, the proposed amendment in *Discrimination Laws Restriction* appears to create the same sort of constitutional conflict that the proposals at issue in *Fine* and *Evans* would have occasioned. It becomes an important question, therefore, whether the proposition that "[a]ll natural persons are equal before the law" indeed carries a distinctive methodological charge. At first glance, the language itself seems little more than a familiar slogan. To be sure, a version of this proposition seems to underlie the restrictions on "special laws," as opposed to "general laws" found in article III, sections 10 and 11. But "special" and "general" seem no more elaborate than "equal."

There is more with which to work, however. The formulas in article I, section 2, and in article III, sections 10 and 11, are not original to the 1968 Florida Constitution. "All men are equal before the law" is the opening phrase of section 1 of the Declaration of Rights introducing the Constitution of 1885. Section 1 of the Declaration of Rights of the Constitution of 1868 began: "All men are by nature free and equal"²⁵² Clearly, the 1968 formulation combines these two predecessors. By contrast, the 1838 and 1861 constitutions began their declarations of rights with the words: "all freemen, when they form a social compact, are equal"²⁵³ The 1865 constitution was even more cautious: "all freemen, when they form a government, have certain . . . rights"²⁵⁴ Similarly, the distinction between "special" and "general" laws was put to use in sections 20 and 21 of article III of the Constitution of 1885. The same distinction appears in article IV, sections 17 and 18, of the 1868 Constitution. In both constitutions, although the details differ, the assumption is evident (as in the case of the 1968 Constitution) that "general" laws describe the legislative norm. Again in contrast, the 1865, 1861, and 1838 constitutions, although they use the "general" and "special" locutions, draw the distinction only in specific settings.

The Constitution of 1868 thus marks a divide. At first glance, however, it might also be dismissed as idiosyncratic. Read fully, it reveals passages closely associated with Reconstruction—"the paramount allegiance of every citizen is due to the Federal Government";²⁵⁵ "[n]either slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this State";²⁵⁶ "[t]his State shall ever remain a

252. FLA. CONST. Declaration of Rights § 1 (1868).

253. *Id.* (1861); *id.* (1838).

254. *Id.* (1865).

255. *Id.* § 2 (1868).

256. *Id.* § 18.

member of the American Union";²⁵⁷ "[e]very male person of the age of twenty-one years and upwards, of whatever race, color, nationality, or previous condition . . . shall . . . be deemed a qualified elector";²⁵⁸ "[i]t shall be the duty of the courts to consider that there is failure of consideration . . . upon all deeds or bills of sale given for slaves; upon all bills, bonds, notes, or other evidences of debt, given for or in consideration of slaves . . . and no action shall be maintained thereon";²⁵⁹ "[t]here shall be no civil or political distinction in this State on account of race, color, or previous condition of servitude, and the Legislature shall have no power to prohibit, by law, any class of persons on account of race, color, or previous condition of servitude, to vote or hold any office" ²⁶⁰ Indeed, the magnitude of the Reconstruction project is everywhere apparent. Twelve provisions (including the slave transaction section quoted above) address legal transitions—who may hold office, which acts of which prior legislatures remain law, and which transactions remain good and which are void or voidable. Constitutional passages, moreover, repeatedly describe reforms of a piece with Reconstruction agendas narrowly defined, but also a step beyond—*inter alia*, the constitutionalization of married women's property rights, homestead exemptions, an elaborate provision for public education "without distinction or preference," "[i]nstitutions for the benefit of the insane, blind, and deaf," as well as a "State Prison," and the authorization of legislation abolishing sovereign immunity.

There are also notable absences. For example, article I, section 21, of the 1968 constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."²⁶¹ This language slightly compresses a similar provision included in the 1885 constitution.²⁶² With small variations, the 1885 formula also appears in the 1838 constitution,²⁶³ the 1861 constitution,²⁶⁴ and the 1865 constitution.²⁶⁵ There is no equivalent provision in the 1868 constitution.

I think that this departure, the Reconstruction program, and a particular gloss on equality and generality are in fact all linked. Any exploration of these connections, however, confronts a significant difficulty.

257. *Id.* § 21.

258. FLA. CONST. art. XIV, § 1.

259. *Id.* § 26.

260. *Id.* § 28.

261. FLA. CONST. art. I, § 21 (1968).

262. FLA. CONST. Declaration of Rights § 4 (1885).

263. FLA. CONST. art. I, § 9 (1838).

264. *Id.* (1861)

265. *Id.* (1865)

There are no Federalist Papers for the 1868 Florida constitution. The best glimpse of the organizing assumptions of the Reconstruction constitution, instead, is afforded by a sequence of opinions of the Florida Supreme Court that was appointed after the constitution took effect. These opinions reveal a strong opposition on the part of the court to important provisions of the constitution. This opposition, in effect, serves as our window. Its intensities reveal what was distinctive about the 1868 constitution, and therefore mark the starting points for a positive gloss as well.²⁶⁶

C.

Walker v. Gatlin,²⁶⁷ a case which predated the 1868 constitution itself, introduces the jurisprudential conflict. Decided by the Florida Supreme Court under the 1865 constitution, *Walker* upheld the enforceability of a note given jointly by the purchaser and Walker (in effect a guarantor) in 1861 in order to secure part of the price of a slave, ownership of whom transferred at that time, but whose full cost was not to be paid until 1862. The purchaser failed to make timely payment, and the seller, Gatlin, sued Walker on the note, and obtained judgment in 1864. In 1866, Walker sought an injunction to restrain enforcement of the judgment on the ground that

Gatlin warranted said slave to be a slave for life; that said slave is still living; that since the making said note, and rendition of said judgment, the Government of the United States has destroyed slavery in this State, and the people of this State, in convention assembled, have declared in their Constitution that all the inhabitants of this state . . . are free, and that slavery shall not in future exist in this State.²⁶⁸

Upholding the decision of the trial judge denying the injunction, Chief Justice Dupont concluded that the standard warranty term that Walker invoked was not intended by the parties to address the question of the effect of some future abolition of slavery. He noted that the date of the contract was about one month subsequent to Florida's adoption of the Ordinance of Secession:

Can it for a moment be imagined, that at that interesting period, when all hearts were aglow with buoyant hopes of national independence, it

266. For present purposes, I emphasize the constitutional document and not the history of its origins. The complexities of the origins of the 1868 constitution—difficult to work through and in important ways deeply troubling—are therefore not explored here. For a revealing contemporary account, see JOHN WALLACE, *CARPET-BAG RULE IN FLORIDA: THE INSIDE WORKINGS OF THE RECONSTRUCTION OF CIVIL GOVERNMENT IN FLORIDA AFTER THE CLOSE OF THE CIVIL WAR* 49-76 (1964) (facsimile of 1888 edition).

267. 12 Fla. 9 (1867-68).

268. *Id.* at 10.

ever entered into the mind of either party that the warranty given in the bill of sale was *intended* to provide against the possible contingency, which has since happened—the defeat and overthrow of the Confederate Government, and the consequent abolition of the institution of negro slavery?²⁶⁹

“Such an assumption is repelled by the well known character of the parties to this contract”²⁷⁰ It seemed to Dupont that “the *loss of property* is effected, not by the act of the vendor, but by an act entirely beyond his control, and for the consequences of which he ought not to be held responsible.”²⁷¹ Explaining, he drew a sharp distinction between political questions and civil transactions:

[I]t must be manifest that the vendor and vendee—the one giving and the other accepting the warranty, that the negro was “to be a slave for life,” contracted with each other in the full understanding that their contract was subservient to any change in the political status of the negro contracted for, which the supreme authority of the State might at any time see proper to decree. . . . This right of sovereignty has been applied to and exercised over the negro involved in this controversy, so as to alter his political status, as it existed at the date of the contract, from that of slavery to freedom, and we do not think that the vendor should be held responsible for the act; it is one over which he could exercise no control.²⁷²

Because the intention of the parties at the time of contracting governed, the note was therefore judicially enforceable.

As though directly responding to *Walker v. Gatlin*, the 1868 constitution provided:

It shall be the duty of the courts to consider that there is a failure of consideration, and it shall be so held by the courts of this State, upon all deeds or bills of sale given for slaves, with covenant or warranty of title or soundness, or both; upon all bills, bonds, notes, or other evidences of debt given for or in consideration of slaves which are now outstanding and unpaid, and no action shall be maintained thereon; and all judgments and decrees rendered in any of the courts of this State since the 10th day of January, A.D. 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt based upon the sale or purchase of slaves, are hereby declared set

269. *Id.* at 13.

270. *Id.* This emphasis on intention and character, on personal choices and qualities as keys to obligation, brings to mind the analysis of Bertram Wyatt-Brown, who in discussing the antebellum southern legal system observed that “honor was a medium or filter through which specific cases were often decided.” BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* 364 (1982). See also STEVEN M. STOWE, *INTIMACY AND POWER IN THE OLD SOUTH: RITUAL IN THE LIVES OF THE PLANTERS* 49 (1987).

271. 12 Fla. at 14.

272. *Id.* at 16-17.

aside, and the plea of failure of consideration shall be held a good defence in all actions to said suit; and when money was due previous to the 10th day of January, A.D. 1861, and slaves were given in consideration for such money, there shall be deemed a failure of consideration for the debt: *provided*, that settlements and compromises of such transactions made by the parties thereto shall be respected.²⁷³

As a source of law, if not of personal honor, contract was rendered irrelevant. Absent legal consideration, no justification existed for judicial involvement. The abolition of slavery, in effect, obliterated transactions in slaves as a matter of law.

Nonetheless, in *McNealy v. Gregory*,²⁷⁴ the Florida Supreme Court, although its membership was reconstituted after the adoption of the 1868 constitution, set aside a lower court decision reopening a prior judgment enforcing a promissory note issued in connection with the purchase of a slave. The court held that article XVI, section 26, was unconstitutional. Justice Westcott concluded that this provision, understood as legislation, violated the Contracts Clause of the United States Constitution. "If you destroy the consideration, you destroy the obligation."²⁷⁵ Counsel had asked: "What distinction is there in common sense or equity between a slave and a note given for a slave? Why should the rights of the creditor be the only property insured against loss or injury?"²⁷⁶ Westcott's response analytically separated the various relevant legal rights and reached a conclusion similar to that Dupont drew in *Walker* despite starting methodologically opposite:

The sovereign thus disposing of the property of a vendee, does not affect the right of the vendor against the vendee. The abolition of slavery, or the emancipation of the slave, does not destroy the right of action which the vendor of the slave so emancipated has against the vendee who owned the slave at the time of his emancipation, and any action of a convention of this character which directs the courts to hold otherwise is void, as it impairs the obligation of the contract.²⁷⁷

273. FLA. CONST. art. XVI, § 26 (1868).

274. 13 Fla. 417 (1869-71).

275. *Id.* at 441.

276. *Id.* at 431. Counsel argued at length that, because the government that existed at the time of the prior judgment enforcing the note was illegal, no court possessed jurisdiction to enforce the judgment. *See id.* at 428-29. Counsel also contended that the Florida constitutional provision should be understood as federal law, and therefore falling outside the scope of the Contracts Clause, since no state existed at the time of the adoption of the constitution, and since the terms of the constitution were in part dictated by Congress and in total ratified by Congress. *See id.* at 429-31. Justice Westcott concluded that these related arguments were inconsistent with the language of the constitutional provision itself (as well as other provisions) which, precisely because it addressed the merits of the contract question, treated prior governments and their courts as legally extant. *See id.* at 434-37.

277. *Id.* at 442. Dupont, we have seen, treated dealings among individuals as primary, locating government, and therefore law, clearly in the background except in extraordinary circumstances.

The larger part of Westcott's opinion, however, took up the question of whether the constitutional convention could be understood to have acted judicially in adopting article XVI, section 26. Understanding the provision as a species of adjudication, Westcott thought that the constitutional declaration violated due process of law as protected by the Fourteenth Amendment of the United States Constitution.

The judgment is made without either notice, hearing or trial. In other words, property is lost without due process of law, and the right of possessing this particular property is absolutely destroyed and denied. According to all theories of government in this country, while property may be subject to many burdens, and the owner's right of controlling and using it may be properly subject to regulations necessary, as matters of internal police and for public benefit, yet such an exercise of power as this is pure despotism. It pertains to no known attribute of government in a republican system. This convention was not an assembly of delegates representing a people in a state of nature, with no higher title to their possessions than occupancy, or with no better protection than their strong muscle and individual physical power. They represented persons whose right to property was then a right ascertained and fixed by law, whose rights of property were secured by law, made by authority equal to that which this convention possessed. These rights were secured by rules prescribed by delegates possessing like authority to these delegates, for, in the very nature of things, some organic law was operative at the time, and whether it was the constitution of 1861, 1865, or 1839, is immaterial, as they each contain provisions adequately protecting rights of property. . . . These delegates did not exercise original powers, but a delegated authority. . . .

This convention was called to frame a government republican in form, to delegate or distribute the powers of government to legislative, executive and judicial departments, according to a recognized republican system. For all the purposes of *exercising the powers of government*, there was a body of magistracy, at the very time that this exercise of judicial power took place, to which the trust of *exercising the judicial powers of government* was confided by the people of the

Westcott's analysis took place entirely within law, and thus within government. Interestingly, in a case which did not involve a now-illegal slave transaction, but rather contractual dealings against the background of a Confederate Florida statute plainly in furtherance of the war effort, the Florida Supreme Court made precisely the same point that counsel argued in *McNealy*:

But the statute being null from the beginning for the reasons stated, no bond or agreement based upon it will be considered valid for the purpose of enforcing it. It is tainted with the illegality of its origin and cannot be enforced in any court bound by a sacred pledge to observe the constitution of the Union.

Garlington v. Priest, 13 Fla. 559, 567 (1869-71). Justice Westcott concurred, passing over the question of whether the transaction in question was void, arguing instead that the Confederate statute by its terms did not apply. See *id.* at 570 (Westcott, J., concurring).

State, by the Congress of the United States, and by the President of the United States.²⁷⁸

In agreement with regard to results, *Walker* and *McNealy* are otherwise obviously very different opinions. In the first case, Chief Justice Dupont depicts a world of individual choice, of subjective aspiration and expectation, first with respect to the parties to the contract for the sale of the slave, and second with respect to sovereign legislative decisions. A normative universe emerges in which individual responsibility encompasses only choices actually made, with the obvious corollary that responsibility for unexpected and thus unintended circumstances is excused. Legislative decisions would naturally figure as distant, arbitrary, and outside the scope of individual responsibility, in the abstract imaginable but not part of the realm of individual planning. Those decisions are assertions of hierarchy, seemingly fundamental redefinitions of "status" that nonetheless appear to individuals as matters of "contingency," for which individuals should not be held to account, much like the outcome of battle. By contrast, Justice Westcott gave priority to "law" which he understood as an organizing framework authorizing, enforcing, and limiting individual and legislative choices alike.²⁷⁹ Within the resulting tableau, with its careful differentiations of individual, legislative, and judicial spheres, the focal figure is the judge, whose office is precisely concerned with the articulation and enforcement of the overall arrangement, and whose office therefore is not (cannot be) open to ready assumption by others, either legislators or individuals

278. 13 Fla. at 443-44, 445. See also *id.* at 442-43 (similar analysis of constitutional provision as punitive in aim and thus as violative of the Bill of Attainder Clause).

279. Civil disorder, therefore, did not excuse individuals from responsibilities founded in established law. Chief Justice Randall wrote in *Columbia County Commissioners v. King*, 13 Fla. 451 (1869-71):

That the political action of the people of the State or of the government of the United States, or that the occurrence of a general commotion had the effect to abolish slavery and thus destroy a species of property hitherto recognized as valuable merchandise, and thus impoverish a large number of individuals to the extent and value of that property, cannot, upon any recognized principle of law or equity, have the effect to relieve the community of their pecuniary obligations. As well may it be said that the misfortune of any business man in the destruction of his property would relieve him and discharge his liabilities, however much he might be embarrassed, and perhaps rendered unable to meet them.

Id. at 472-73. See also *Garlington v. Priest*, 13 Fla. 559 (1869-71) (suspension of collection remedies and substitution of bonds decreed by Confederate legislature in 1861 are legal nullities). In general, it might be said that this post-1868 perspective reversed the polarities of the predecessor jurisprudence, treating social order as without fixed content and vulnerable to intervention and rearrangement and legal order as relatively stable. See, e.g., *Conn v. E. Chadwick & Co.*, 17 Fla. 428, 437-38 (1880) (Westcott, J., concurring) (beliefs about society characterized as "prejudices" "independent of the abstract question of right and wrong").

momentarily assembled in convention.²⁸⁰

Notably, article XVI, section 26, standing alone appears to be entirely proper within the perspective of the *Walker* opinion. A revision in prior law would simply mark an exercise of the "right of sovereignty" in the face of which "subservient" contracts must give way, leaving the parties free from a charge of wrongful breach since the failure of the contract was due to events over which they could exercise no control. Is this the only perspective within which article XVI, section 26, was defensible? I will return to this question later. It is important first to note that *McNealy* was not an isolated case. The Florida Supreme Court that assumed office under the 1868 constitution repeatedly invalidated or otherwise limited constitutional or statutory provisions like article XVI, section 26, that revised rather than respected prior law.

In *Forcheimer v. Holly*,²⁸¹ for example, Justice Westcott again wrote for the court, this time considering article XVI, section 25 of the 1868 constitution, which declared that notes given in consideration of Confederate treasury notes were "null and void, and no action shall be maintained thereon in the courts of this State."²⁸² Invoking the Contracts Clause of the United States Constitution, Westcott stressed the difference between the 1868 resolution of the consideration question and that which general common law would have suggested.

If the fact that the consideration upon which this contract was based

280. See also *In re Secession Convention*, 12 Fla. 651 (1868) (advisory opinion) (members of Secession Convention not per se barred from holding state office under article XVI, section 1, of the 1868 constitution since convention "members were not 'executive' officers, nor 'judicial' officers of the State, but merely and strictly delegates"). Within this perspective, the key was not the judge as an individual, but adjudication as an office, the separated-out responsibility to bring law to bear. See, e.g., *Smith v. Gibson*, 14 Fla. 263, 265 (1873) ("The Judge of one circuit cannot act in place of the Judge of another circuit except in the cases provided by law . . ."); *Conn v. E. Chadwick & Co.*, 17 Fla. 428, 435-36 (1880) (Westcott, J., concurring) (absurdity of permitting disqualification of supreme court justices because of knowledge of governing law). Thus, with respect to simple questions at least, the Florida Supreme Court did not regard the legislature as acting unconstitutionally in granting authority to clerks of court to issue judgments. For example, clerks granted default judgments when the judge before whose court the case was brought was literally not present. See *Gamble v. Jacksonville, P. & M. R.R.*, 14 Fla. 226 (1872). "One who understands plain English language and the rudiments of arithmetic, may correctly execute the simple directions of the law, though he may never have heard of Puffendorff." *Id.* at 234. "Simple directions" was the key term. The Florida Supreme Court for all practical purposes, nullified article VI, section 17, of the 1868 Constitution, which on its face gave attorney referees, with the consent of the parties, the authority to act as trial judges in all cases, in large part because of the overly simple model of adjudication the court thought that the constitutional provision presupposed. See *Chambers v. Savage*, 13 Fla. 585 (1869-71). See also *State ex rel. Scott v. Jefferson County Comm'rs*, 17 Fla. 707, 721 (1880) (dictum) (statute unconstitutional insofar as it authorizes voting inspectors "in their discretion" to judge whether voter whose name is omitted from list of eligible voters may or may not vote).

281. 14 Fla. 239 (1872).

282. FLA. CONST. art. XVI, § 25 (1868).

was a loan of Confederate notes, did not render the note void . . . anterior to this action of the State Convention, but on the contrary the law gave him the right to enforce the contract, then this clause of the Constitution denying the right of action upon this note impairs its obligation and is void.²⁸³

As a matter of "the plainest principles of natural justice," the "consideration was lawful, being a thing of value capable of use and exchange for commercial commodities."²⁸⁴ Indeed, "Confederate notes during the war were the only medium of exchange or representative of values then in general use by the people inhabiting a large portion of the country."²⁸⁵

Notwithstanding the reference to "natural justice," it is clear from *Forcheimer* that Justice Westcott did not mean to ground his analysis in simple equity, the seeming unfairness of denying legal effect to obligations fabricated from the only materials at hand. He indicated his disagreement with Ordinance VII of the Constitutional Convention of 1865, which authorized the legal enforcement of contracts contemplating payment in Confederate notes, but also authorized juries to distinguish between "nominal values" and "real value" when fixing contract damages.²⁸⁶ More dramatically, after holding that the Florida constitution could not validly declare Confederate notes not to be legal consideration, Westcott rejected a defense to the breach of contract claim based on an attempted tender of Confederate notes by defendant to plaintiff during the war. "These notes were never a legal tender in contracts between individuals under the regulations prescribed by the powers actually occupying the territory in which they were a medium of exchange, nor have they occupied any such position under the laws of the United States."²⁸⁷ The inconsistency diminishes only on the assumption that the *applicability* of usual contract law is what is really at stake in the constitutional part of the *Forcheimer* opinion. The seemingly pragmatic approach used to identify legal consideration was a by-product of an effort to define the field of contract broadly. Within the field of contract analysis, there remained room (precisely because the room was defined by contract analysis) to incorporate and justify formalisms like the "per-

283. 14 Fla. at 245.

284. *Id.* at 246.

285. *Id.* at 245.

286. "I am now and always have been of the opinion that it in effect destroyed the contract of the parties and made a new one, directing as it did that the party holding the obligation should receive *what a jury thought was the value of the consideration* . . . instead of the amount, or value of the amount, fixed and agreed upon by the parties themselves . . ." *Id.* at 244. The distinction between "nominal values" and "real value" was drawn in *Randall v. Pettes*, 12 Fla. 517, 532 (1868-69). Justice Westcott, because he was counsel in proceedings below, did not sit in *Randall*. See *id.* at 531.

287. *Forcheimer*, 14 Fla. at 246-47.

fect tender" scrutiny of the Confederate notes that Westcott undertook in the end.

McNealy and *Forcheimer*, thus, do not simply show a penchant for contract, or (more generally) private ordering. The ultimate conclusions Justice Westcott drew in *Forcheimer* implicated legal conventions at least as much as individual intentions. A different sort of commitment seems to have been felt, to have been provoked by a more general concern that (to use a characteristically mid-nineteenth century formulation) the civil, political, and social orders precisely required ordering, an enforced or restored stability. "Stability" itself appears to have been associated with the realization of either or both of two variables: continuity and hierarchy. The Florida Supreme Court seems to have thought that the legal institution best positioned to articulate, maintain, and impose order defined in those terms was the judiciary, the branch of government most likely to value continuity and hierarchy. It was judge-made law that the Contracts Clause protected in *McNealy* and *Forcheimer*; it was the attempt to equate the decisions of the constitutional convention with the process of judging that occasioned the most elaborate dismissive response in *McNealy*.²⁸⁸

*Dickerson v. Acosta*²⁸⁹ reinforces this reading. In *Dickerson*, the Florida Supreme Court, reviewing a land title contest between the prior holder and a purchaser of the land at a wartime tax sale instituted by United States Direct Tax Commissioners, addressed article XV, section 6, of the 1868 constitution, which declared that "[a]ll proceedings, decisions, or actions accomplished by civil or military officers acting under authority of the United States" during the period of the war and subsequent military government were "valid and shall not be subject to adju-

288. It seems to have been the ad hoc character of the constitutional convention, its one-time nature, that made its claim to judicial office improper. By contrast, in *In re Executive Communication* filed April 17, 1872, 14 Fla. 289 (1872), the Florida Supreme Court, refusing to address impeached Governor Reed's request for an opinion regarding the effect of the state senate's failure to try him before adjourning, relied precisely on its identification of the senate with a court, and on the senate's continuing existence to reach its holding (rather than framing the sort of political question explanation one might expect to see today).

The conflict here threatened is not between co-ordinate departments of the government. It is between two courts of high and transcendent jurisdiction. . . .

. . . .
 . . . Because Senators may die or change, the Senate does not cease to exist nor do its functions as a court cease. The court co-exists with the Senate. . . .

. . . We should not suggest to that court how it should determine a question to come before it in a case now pending. With the circumstances reversed, we should not be very much obliged to that or any other tribunal should it suggest to us how we should determine a case pending before this court

Id. at 297, 298, 307.

289. 15 Fla. 614 (1876).

dication in the courts of this State.”²⁹⁰ Chief Justice Randall, writing for the court, understood counsel to be arguing that article XV, section 6, “was intended to close the door to all inquiry into the legality of the acts of officers of the United States, civil or military”²⁹¹ By this reading, Randall thought, the constitutional provision was either equivalent to legislation transferring “the property of one . . . to another otherwise than by due course of law,” or a constitutional “judicial determination of the rights of the parties” notwithstanding “the want of power in the convention . . . to determine the rights of parties who were not before the tribunal, and who had no notice of the contemplated adjudication.”²⁹² It was therefore better understood as a kind of comity rule:

The provision . . . is a prohibition to [Florida] courts against taking cognizance of any suit or proceeding for the object and purpose of reversing or setting aside such acts and proceedings, as, for instance, . . . reversing or annulling any act of the Direct Tax Commissioners . . . by a judgment or degree of the State courts directed against the proceeding itself.²⁹³

In *Dickerson*, suit “was not brought for the purpose of setting aside or ‘adjudicating’ any act or decision of the United States Tax Commissioners, but to recover possession of land”;²⁹⁴ article XV, section 6 was thus inapposite. The significance of the tax deed became a matter free for the Florida Supreme Court to consider.²⁹⁵ Chief Justice Randall ultimately concluded that, because military conflict continued in the county in which the property at issue was located at the time the tax commissioners levied the federal tax, federal statutory conditions for the assertion of jurisdiction by the commissioners were not met, and the tax deed was therefore without effect.²⁹⁶

On its face, *Dickerson*’s gloss on article XV, section 6, is hard to accept. There was no need for state constitutional protection of the integrity of federal judgments (to the extent that Congress declared that these judgments should be respected) given the Supremacy Clause of the United States Constitution. Indeed, in the companion case *Soutter v.*

290. FLA. CONST. art. IV, § 6 (1868).

291. 15 Fla. at 617.

292. *Id.* at 617, 618 (citing *McNealy v. Gregory*, 13 Fla. 417 (1869-71)).

293. 15 Fla. at 618.

294. *Id.*

295. Counsel’s suggestion that the federal statute granting power to the tax commissioners sharply limited the subject of judicial inquiry into the details of commission actions triggered a response similar to that provoked by counsel’s earlier reading of article XV, section 6: “Is the auctioneer’s hammer made more potent than constitutions and laws, and may the land of one man be transferred to another by force of an act of legislation which precludes inquiry?” *Id.* at 621.

296. *See id.* at 621-24. Randall emphasized that the court’s decision on statutory jurisdictional grounds made it unnecessary for any further inquiry into the specifics of the acts of the tax commissioners. *See id.* at 624.

Miller,²⁹⁷ Chief Justice Randall ignored article XV, section 6, and relied exclusively on the language of section 8 of the federal Act of June 7, 1862 in explaining why the Florida Supreme Court could not decide for itself whether the proofs necessary to obtain a two year extension from the tax commissioners had in fact been made: "We cannot judge of that, because the commissioners are made the judges of the sufficiency of the application, and of the proofs, and we have no appellate power to review their judgment. The district court is authorized, upon appeal, to review their judgment"²⁹⁸ Pre-war property rights prevailed in both *Dickerson* and *Soutter*. But Randall was quite clear in the former case in emphasizing the legitimacy, in principle, of tax sales, and signaled no doubt whatsoever in the latter opinion about the governing force of federal law.²⁹⁹ The attractive quality of the substantive law that Randall brought to bear seemed to have derived not simply from the results to which it pointed, but from the judicial "inquiry" it allowed and indeed, required. Both the *Dickerson* and *Soutter* opinions luxuriated in the process of elaborating applicable law, in the process of interjecting the Florida Supreme Court itself into the disputes at issue. The association of legal order and adjudication, the picture of judges as ordering that we saw in *McNealy* and *Forcheimer*, reappears.

This jurisprudence finds its apotheosis, I think, in *Fairchild v. House, by her next Friend, Knight*.³⁰⁰ Article IV, section 26, of the 1868 constitution declared that "all property, both real and personal, of the wife owned by her before marriage, or acquired afterward by gift, devise, descent or purchase, shall be her separate property and not liable for the debts of her husband."³⁰¹ *Fairchild* concerned an action for injunctive relief, originally brought by Lucinda M. House in her own name. She alleged that the furnishings of a boarding house that she operated in St. Augustine were her property and not her husband's and therefore that the county sheriff had acted illegally in attempting to execute a judgment against her husband by seizing the boarding house fur-

297. 15 Fla. 625 (1876).

298. *Id.* at 629.

299. The effect was a familiar local positivism. Legislative power was depicted as absolute within its sphere, *if properly brought to bear*. Individual rights dropped out of the analysis. Justice Westcott would write a few years later in a county tax sale case:

The matter of duty to the sovereign is fixed by the legislative enactment imposing the tax. The matter of obligation to individuals arises from the legal or equitable relation of the parties. In neither case is the measure of the obligation fixed by the mere fact of an interest or estate in the land.

Spratt v. Price, 18 Fla. 289, 305 (1881).

300. 18 Fla. 770 (1882).

301. FLA. CONST. art. IV, § 26 (1868). See generally Suzanne D. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. SOUTH HIST. 195 (1977).

nishings. Justice Westcott concluded that House's failure to publicly register the property as hers and not her husband's within the time period specified by the 1845 Married Woman's Property Act did not bar the action since the Act's mere conditional recognition of a wife's separate property was inconsistent with article IV, section 26.³⁰² But the constitutional provision, according to Wescott, did not amount to legal recognition of House's capacity to sue in her own name. The 1845 Act had not altered the common law distinction between a *feme covert* and a *feme sole*, leaving a wife's property still the managerial responsibility of her husband despite the new protection of the wife's personal property *vis a vis* her husband's creditors. The Act, therefore, did not change the corollary common law rule that a wife could not sue in her own name to protect her property rights; only her husband could sue. In cases involving creditors of a husband, in which the husband's and wife's interests conflicted, equity jurisdiction would lie, but only if a wife proceeded through a "next friend" who purported to call to the attention of the equity court the plight of the legally dependent wife.³⁰³ Standing alone the 1868 constitution "might be held to invest the wife with [independent] rights."³⁰⁴ Nonetheless, "[t]he Constitution must be interpreted in view of the then existing law."³⁰⁵ There was no necessary opposition dividing article IV, section 26, from the 1845 Act and the common law. "It is not inconsistent with the general nature of a separate property in the wife that the husband should manage it . . ."³⁰⁶ House could invoke equity jurisdiction, therefore, not in her own name, but only through the name of a next friend.³⁰⁷ *Continuity and hierarchy*—the passive *feme covert* defines the paradigm. In law, a conceptualization of judges, not statutes or constitution; in civil society, protected by the active intervention of judges (courts of equity in general and the Florida Supreme Court

302. *House*, 18 Fla. at 782-84. In this respect at least, the constitutional provision did more than merely codify the 1845 Act. *But see* Lebsock, *supra* note 301, at 204.

303. One consequence of this conceptualization was that a wife seeking the aid of equity to block a husband's creditor need not post a bond, the usual requirement imposed on third parties asserting that creditors were attempting to seize their property and not that of debtors. "[T]he wife not being a *feme sole*, cannot make a bond which would bind her personally at law or in equity." *Id.* at 785.

304. *Id.* at 786.

305. *Id.*

306. *Id.*

307. Justice Wescott treated the equity jurisdiction issue as resolved, given the possibility of amendment. *See id.* at 788; *see also id.* at 774 (Knight added as party to the case as next friend). Wescott held that a preliminary injunction, at least, was in order, *id.* at 787, although he declared that "strict and full proof" would henceforth be required of House, noting that "certain irregularities of a character usually adopted to accomplish the fraudulent purpose of screening property from debts to which it is subject are apparent upon the face of the bill." *Id.* at 787, 787-88; *see also id.* at 772-73 (first documented assertion of ownership dated the same day sheriff alleges was date of attempted levy).

in the case at hand) who restore and impose order.³⁰⁸

D.

In several senses, none of this is surprising. The use of common law and equity as sources for conceptual systems glossing or marginalizing statutory or constitutional provisions is a hallmark of the classicizing mode of judicial opinion-writing commonly taken to be the dominant form for American legal thought in the period encompassing the last half of the nineteenth century and the first decades of the twentieth. Historians do not usually associate classicism with Reconstruction contexts (even though the *Slaughterhouse Cases*³⁰⁹ frequently serve as a principal exemplar). But the appeal of this jurisprudence to the conservative lawyers who served as members of the Reconstruction Florida Supreme Court should be easy to understand. It is enough to read W.E.B. DuBois or Jerrell Shofner to become aware of a brutal environment of terrorism and assassination, of legal order always at risk in the face of repeated secessionist or racist outrage, of personal danger (perhaps different in kind but equally real) threatening both black freedmen and white unionists.³¹⁰ We are left with an image of the judge creating order, at once

308. Prior to *Fairchild*, the Florida legislature had already moved beyond the assumptions that the supreme court acted upon in that case, adopting in 1879 a statute authorizing "free dealer" status for married women—in effect, equal economic status with unmarried women and men (including standing in court)—conditional upon grant of a license by a circuit judge. Not surprisingly, given the central role the statute left for the judiciary, the Florida Supreme Court affirmed the constitutionality of the act. *Martinez v. Ward*, 19 Fla. 175 (1882). *Martinez*, I should note, is also an interesting opinion for reasons independent of the themes of this essay. Nineteenth century married women's property reform is usually understood as a species of debtor protection legislation akin to homestead laws. See, e.g., Richard C. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983); Lebsock, *supra* note 301. Reva Siegel has shown, however, that the feminist agenda of the mid-nineteenth century included a jurisprudential commitment to joint property also important (at minimum) as a part of the backdrop of legislative action and judicial response. E.g., Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994). In *Martinez*, Chief Justice Randall, clearly writing within the debtor protection frame, also clearly evidenced (in this opinion, at least) no preference for husbands or wives as heads of family businesses—not quite "joint property" perhaps, but close. See 19 Fla. at 187, 189-90.

309. 83 U.S. (16 Wall.) 36 (1872).

310. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 517, 521 (1935) (1962 ed.). DuBois includes the following statement of Harrison Reed, the first Reconstruction governor of Florida:

In several counties organized bands of lawless men have combined to over-ride the civil authorities, and many acts of violence have occurred; but these have been incidental to the State in all its past history, and arise less, perhaps, from special enmity to the present form of government than from opposition to the restraints of law in general.

Id. at 517. Shofner's work is especially elaborate in its account of political violence in Florida. See JERRELL H. SHOFNER, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION, 1863-1877*, at 81-107 (1974) (chapter entitled "Custom Has Become the Law"); *id.* at 225-42 (chapter

stabilizing Reconstruction legal politics and insisting upon the continuities linking those politics with their antebellum predecessor. However unreciprocated gestures in the direction of Bourbon sympathies would prove to be, however racist and thus destructive of the incipient order that common law anti-constitutionalism was in fact, we can nonetheless sense the felt need that classicist adjudication might have seemed to address.³¹¹

At the same time, it remains a remarkable fact that the Florida Supreme Court repeatedly invalidated or otherwise blunted part after part of the 1868 Constitution. What are we to make of this sequence of decisions? The provisions at issue in these cases shared a common assumption. All of them took for granted the status of constitutional texts as law in the strongest possible sense, as entirely capable of revising (or fixing) the content of bodies of law defined by other sources. From the perspective of judges like Justice Westcott, unbounded constitutional supremacy was the equivalent of arbitrariness, a grant of legislative authority to a small group of individuals—the constitutional convention—whose formation and deliberations appeared at best ad hoc, at worst illustrative of continuing differences rather than consensus and certainly not a signal of a compact that was constitutional in any fundamental sense. On this view, the implicit jurisprudence of the 1868 Constitution was of a piece with the presuppositions evident in Chief Justice Dupont's opinion in *Walker v. Gatlin*.³¹² Within this jurisprudence, law was, in principle, free to disregard ordinary expectations,

entitled "Assassination Is Not a Pleasant Fate"). See also Peek, *Lawlessness and the Restoration of Order in Florida, 1868-1871* (1964) (unpublished Ph.D. dissertation, University of Florida).

311. The fragility of legal order and the role of the judiciary in protecting that order at times became an explicit theme in Florida Supreme Court opinions.

[h]owever the military power may have divested or created rights by the decrees of force, or into whatever confusion the affairs of men may have been throw by popular tumults, if there can be found a safe guide and a sure foundation upon which the sacred rights of individuals may rest secure, it is the duty and the high province of the judicial tribunals, so far as in them lies, to mete justice without violating these rights and in accordance with established principles of law and the common principles of justice.

Bradford v. Shine, 13 Fla. 393, 410-11 (1869-71). In *Florida v. Johnson*, 13 Fla. 33 (1869-71), the vulnerability of legal order seemed especially apparent when the Florida Supreme Court held a railroad receiver in contempt of court. Justice Hart wrote in a concurring opinion:

Whatever some men may choose to think of others as men, the *tribunal* must be everywhere respected by at least implicit obedience to its process. Without this, the fabric of jurisprudence, erected by the experience of ages, the best constituted safeguard of human rights, must fall. Great, beneficial and beautiful it is, it is a delicate structure, and cannot maintain its usefulness under frequent shocks of disrespect. It has its enemies, as is patent in this case, so also has everything that is beautiful and good.

Id. at 55 (Hart, J., concurring).

312. 12 Fla. 9 (1867-68).

usual patterns of individual judgment and preference; legal instruments (constitutions prototypically) were simply expressions of will, at once accidental and decisive. This juxtaposition, however, is problematic. Grouping Dupont and the members of the Reconstruction constitutional convention draws no distinction between the working assumptions of one of the authors of Florida's Black Codes and the casualties-in-chief of the social order the Codes recalled.³¹³ Is there an alternative? It is easy enough to understand (and to sympathize with) the immediate purposes behind the constitutional provisions against which the Florida Supreme Court reacted.³¹⁴ The objective here, however, is something different. We must be able to glimpse in the 1868 Constitution a conception of constitutional limitation (as it were), a sense of the proper domain of the constitutional text per se, sufficient to distinguish the constitution from a simple aggregate of otherwise unrelated pronouncements, but also capable of informing a vocabulary (defining an agenda) different from the familiar categories and assumptions that the Florida Supreme Court brought to bear.

One point of departure, ironically, may be decisions of the Florida Supreme Court itself that were concerned less directly with the Florida Constitution. The Reconstruction-era supreme court was not in possession of (or possessed by) a single, coherent jurisprudence. The opinions from this period displayed a mix of attitudes, preoccupations, and reflex responses. Classicism was only one of these several jumbled-together modes of thought. For example, the cases repeatedly show signs of a tension that statutory construction induced in judicial rhetoric, a tendency to separate out statutory questions, to depict a kind of competition between judge-made law and the work product of the Florida Legislature.³¹⁵ Interpretations of the Code of Procedure, Florida's Field Code enacted in 1870 and repealed in 1873,³¹⁶ epitomized this tension. The supreme court responded variously; particular cases treated the Code as reiterating traditional judicial approaches to civil procedure,³¹⁷ or as

313. On Dupont's role in the drafting of the Black Codes, see SHOFNER, *supra* note 308, at 44, 51.

314. For example, the legal status of married women in the antebellum period seems to have been similar enough to the status of nominally "free people of color," see, e.g., *Budd v. Long*, 13 Fla. 288, 311-12 (1869-71), to motivate a postwar constitutional effort to put married women on an equal footing with legally fully emancipated black Floridians. See FLA. CONST. art. IV, § 26 (1868).

315. E.g., *Johnson v. Pennsacola & P. R.R.*, 16 Fla. 623, 664-65 (1878); *Bushnell v. Dennison*, 13 Fla. 77, 91 (1869-71) ("the courts are not responsible for the language of the written law").

316. See *Order of the Supreme Court*, 14 Fla. 63 (1873).

317. E.g., *Fagan v. Barnes*, 14 Fla. 53, 58 (1872); *Robinson v. Hartridge*, 13 Fla. 501, 508-12 (1869-71).

leaving room by not expressly altering prior statutory rules,³¹⁸ while other cases treated the Code as truly codifying, supplying an exhaustive set of propositions within whose terms concrete issues might be resolved.³¹⁹ A similar pattern (or absence of pattern) is evident in decisions reacting to statutory arguments across a wide range of subject matter.³²⁰ The overall effect of these cases was anti-classical—a suggestion that the legal order was unresolved, that neither particular statutes nor usual judicial understandings could claim priority.³²¹

Another group of decisions calls attention to a third characteristic feature. In a very large number of cases, the court proceeded by highlighting attributes of legal instruments as such, treating those documents themselves (or rather the question of their formal sufficiency) as dispositive of questions of power, right, or responsibility. Decisions emphasizing the record below as the basis of appellate jurisdiction, or the preconditions for recognizing the negotiability (or other attributes) of commercial paper, provide obvious examples, but the “instrumental” tendency (once recognized) is widely evident in the Florida Reports of the period.³²² Arguably, this mode of analysis evoked an older style of

318. *E.g.*, *Robinson v. Jones*, 14 Fla. 256, 259-60 (1873); *Schultz v. Pacific Ins. Co.*, 14 Fla. 73, 92 (1872). Counsel in *Schultz* precisely captured the mood of decisions treating the Code as leaving unchanged prior statutory or judicial practice: “[T]he framers of this new system of practice have deemed it important to change the names of things without changing their character or nature.” *Id.* at 82.

319. *E.g.*, *Barkley v. Russ*, 13 Fla. 589 (1869-71).

320. *See, e.g.*, *Sherlock v. City of Jacksonville*, 17 Fla. 93 (1879) (constitutional grant of jurisdiction to supreme court to issue writs of prohibition interpreted to encompass only cases in which prohibition would be proper at common law notwithstanding more expansive statutory definition); *Florida v. Rushing*, 17 Fla. 223 (1879) (statute generally requiring bond in connection with filing of writ of error does not apply to the State as party because other statutes show the procedural obligations of the State to be a subject for particular, State-specific legislation).

321. Justice Westcott’s opinion in *Conn v. Chadwick & Co.*, 17 Fla. 428 (1880), is especially vivid evidence of the unsettled state of statutory construction. Westcott concluded that a statute requiring justices of the supreme court to recuse themselves in cases where parties claim “prejudice” supposed a specific allegation of judicial prejudice vis a vis the party in particular. *Id.* at 441. This conclusion, he thought, found no direct support in common law practice because the common law did not recognize disqualification simply by reason of motion. *See id.* at 439-40. Ordinary language suggested no clear meaning: “The term ‘prejudice’ used in this statute, accepting it in each and every of its significations, is very comprehensive and varied in its character.” *Id.* at 434-35. Westcott was left to reason from absurdity, arguing that all readings except the narrow sense of prejudice as prejudice against the party per se would allow disqualification of justices on the ground of their familiarity with legal principles relevant to the case at hand. “Giving this signification, we would have as a legislative axiom—the greater the fool, the better the judge.” *Id.* at 435.

322. The cases illustrating this emphasis are too numerous to catalog in any exhaustive way. For present purposes, examples are drawn from a single volume of the Florida Reports and even these examples are selective. *See, e.g.*, *Huot, Kelly & Co. v. Ely*, 17 Fla. 775, 782 (1880) (maker of negotiable instrument cannot be charged as garnishee unless note remains in maker’s possession or control); *Gallaher v. Florida*, 17 Fla. 370, 379 (1879) (exceptions not to be considered if “separate pieces of paper” rather than included “in the body of the bill of exceptions

legal thought (especially evident, for example, in *Marbury v. Madison*).³²³ Emphasis on legal literacy, however, also seems prototypically modernizing—indeed, downright Weberian in its identification of legal order with standardized written forms. Interestingly, this version of legal order is a pluralist “composite,” markedly in contrast with both the claims to unity of classical analysis and the disequilibrium revealed in the statutory construction cases.³²⁴

Statutes, of course, are themselves legal documents. “Instrumental” preoccupations occasionally surfaced in statutory construction cases, at times serving as a principal means for organizing analysis. Two 1878

in their proper and appropriate place”); *Hyer’s Executors v. Caro’s Executrix*, 17 Fla. 332, 350-51 (1879) (rehearing) (whether evidence is part of record); *Webster v. Barnett*, 17 Fla. 119 (1879) (failure to file record of proceedings below mandates dismissal of appeal); *Bellas v. Keyser*, 17 Fla. 100, 108-110 (1879) (memorandum of agreement not self-contained enough to constitute merchantable paper within meaning of statute). See also, e.g., *Bellamy v. Hawkins*, 17 Fla. 750 (1880) (testimony about accounts and court records not substitute for documents themselves); *McGahigan v. Florida*, 17 Fla. 665, 668 (1880) (indictment improperly “charges two distinct offenses in one count”); *Mathews v. Hillyer*, 17 Fla. 498, 500 (1880) (filing of affidavit obliges judge to hear claim); *Coons v. Harlee*, 17 Fla. 484 (1880) (various documentary failures in connection with default judgment); *Robinson v. Dibble’s Administrator*, 17 Fla. 457 (1880) (requirements for admissibility of account books). Volume 17 contains several cases dealing with whether jury instructions should be in writing. E.g., *Potsdamer v. Florida*, 17 Fla. 895, 900-02 (1880); *Sherman v. Florida*, 17 Fla. 888, 889-91 (1880); *Southern Express Co. v. VanMeter*, 17 Fla. 783, 792-96 (1880).

323. 3 U.S. (1 Cranch) 137 (1803). Cases of this sort, like opinions written in the classicizing mode, referred to common law to resolve questions of constitutional or statutory interpretation. The difference lay in the expectations brought to the common law analysis. Classical investigations worked to identify unifying conceptual vocabularies; instrumental investigations sought to identify the traditional formal requirements for legal documents in long-standing use. See, e.g., *King v. Florida*, 17 Fla. 183 (1879). (1879) (formal requirements for information). I do not mean to suggest that either the classicizing mode or the instrumental mode are in some sense “old-fashioned.” Instrumental preoccupations in particular have provided an important point of departure for modern jurisprudential writing. E.g., H.L.A. HART, *THE CONCEPT OF LAW* 26-48 (1961).

324. For a particularly clear illustration of the differences in approach distinguishing the classical and documentary (in this sense “instrumental”) modes, compare *Florida ex rel. Bisbee v. Drew*, 17 Fla. 67, 72-73 (1879) (Randall, C.J.), with *id.* at 86-87 (Westcott, J., dissenting). The capacity of the instrumental mode to aggregate legal questions without raising issues of unity or consistency is especially well-illustrated in *Emerson v. Ross*, 17 Fla. 122 (1879) (considering inter alia requirements for letters of administration, petitions invoking probate jurisdiction, and recording requirements for deeds). See also, e.g., *Green v. Florida*, 17 Fla. 669, 681-82 (1880) (notwithstanding contrary common law rule, state statute authorizes indictment charging two separate and distinct offenses in two distinct counts); *Sanchez v. Hart*, 17 Fla. 507 (1880) (statutory powers of administrator, however temporary, tantamount to right to assert title of intestate, thus to exercise possession and control, and thus to bring action for ejectment, notwithstanding common law rule granting ejectment right to heir); *Baker v. Florida*, 17 Fla. 406, 408-09 (1879) (constitutional homestead exemption defining property in terms of use makes homestead property irrelevant for estate administration purposes since administration statute defines property as assets). The term “composite order” is taken from S. CURRAN, *POETIC FORM AND BRITISH ROMANTICISM* 180-203 (1986).

decisions, both dealing with the then-important question of railroad expansion, reveal an illuminating contrast.

*Internal Improvement Fund v. St. John's Railway*³²⁵ involved a railroad's claim to state lands seemingly granted to it by its 1858 charter. The state agency charged with administering the lands opposed that claim. The agency understood its originating statute, passed in 1850, as setting aside all such lands as collateral for bondholders who invested in an initial sequence of railroad projects, and in any case as setting conditions for land grants that the railroad had failed to meet. Judge White, writing for the Florida Supreme Court,³²⁶ ruled for the railroad. White noted that the Florida Legislature, in granting the 1858 charter, was free to amend or waive requirements of the 1850 act.³²⁷ But this proposition, seemingly fundamental to statutory interpretation, figured only secondarily in the opinion. The fact of extant bondholders triggered concern about the impairment of contract rights. The 1850 act included a reservation clause explicitly raising the possibility of land grants to subsequently-chartered railroads.³²⁸ The 1850 requirements that the railroad in this case did not meet were plainly imposed to deal with inter-connecting railroads, while the railroad in this case was entirely independent.³²⁹ These conclusions, in White's analysis, were also not by themselves decisive. The opinion, rather, constructed an over-arching, manifestly classical framework, initially conceptualizing the 1850 act as itself an assumption of contractual responsibilities by the state in accepting land conditionally granted by an 1850 federal statute,³³⁰ and finally conceiving the 1858 charter as one of series of state efforts to discharge the duties it had assumed.³³¹ The existence of the contractual burdens that the state had undertaken, and the consequent need to harmonize the two contractual regimes affected by new railroad construction, seemed to White to justify the close look at whether creditor rights were in truth affected by the departures in the 1858 charter from the 1850 model.

*Gonzales v. Sullivan*³³² presented a more difficult case—and a very different kind of opinion. The Escambia County tax collector sought to levy against property of the Pensacola & Lousiville Railroad, whose

325. 16 Fla. 531 (1878).

326. White, a circuit court judge, sat in place of Justice Westcott, who was disqualified. See *id.* at 541.

327. *Id.* at 552-53.

328. *Id.* at 543.

329. *Id.* at 552.

330. *Id.* at 541-44.

331. *Id.* at 545-46, 549.

332. 16 Fla. 791 (1878).

owners claimed immunity on the basis of a December, 1855 statute that allegedly brought the Railroad's predecessor, the Alabama & Florida Railroad, within the tax immunity conferred by a January, 1855 statute. The proceedings below did not disclose precisely how the present owners of the railroad had acquired the property, a seemingly relevant consideration given the claim of successorship. Moreover, the December, 1855 statute did not, by its terms, make any reference to a tax immunity, but simply provided that a railroad line constructed north from Pensacola towards Montgomery, Alabama "shall be considered as proper improvements to be aided from the Internal Improvement Fund in the manner provided by . . . [the January, 1855] act."³³³ Arguably, this language conferred a right to state land if statutory conditions were met, but nothing more, since the Fund dispensed only land, and not tax exemptions. The Florida Supreme Court nonetheless held that the tax immunity controlled.

Justice Westcott initially emphasized that statutory language, which derived from the 1838 constitution, did not confer benefits on particular railroad companies as such:

In no one of these sections do we find any company named as one to receive the benefits of the act. If the charters of any companies then existing covered any portion of the *lines ascertained and named as part of the system*, then, without reference to any incidental benefit which might accrue to these companies, and only because a line or route embraced within their charters came within the system, such companies became entitled to the benefits of the act upon complying with whatever, under its terms, were the conditions upon which a right to such benefits, grants, or exemptions enured or vested. They became entitled to these benefits only through the accidental fact that they had legal rights and franchises vested in them as to certain lines and routes of railway which the Legislature had, in conformity to constitutional duty, declared "proper objects of improvement."³³⁴

Several conclusions followed:

Acceptance of the provisions of the internal improvement act by these companies constituted such act, its requirements and benefits, a portion of their several charters, that such requirements became the law of their being, and that the grant of exemption by the State was a contract between the State and the companies owning the road. . . . We think also that the right and privilege of exemption is annexed by the terms which create it to the property.³³⁵

The jurisprudence here was obviously complex. As in *St. John's Rail-*

333. *Id.* at 793.

334. *Id.* at 811.

335. *Id.* at 812 (citations omitted).

way, the contractual model appeared; however, the point was now not so much the distribution of benefits and risks, the quid pro quo organizing the parties' dealings, but rather contract as simply the means by which the statutory regime impressed itself. The statute dominated. The "right" to exemption was understood to be a matter of legislative judgment and thus a "privilege." Because of the focus of statutory language on the "*lines ascertained and named as part of the system*,"³³⁶ and not on identified companies themselves, "the right and privilege of exemption"³³⁷ was not the property of the company contractually assuming the obligation, but was "annexed by the terms which create it to the property"³³⁸—the "*lines*" as such. The common law contract model of transacting individuals gave way to a statutory description concerned only with objects.

A precise transactional history of how ownership of the railroad line passed from the Alabama & Florida Railroad to the present owners was thus beside the point.³³⁹ In addition, the statutory use of general language made it clear why the Pensacola line fell within the scope of the tax exemption. The December, 1855 act was not freestanding; it was, rather, an amendment of its January, 1855 predecessor, and thus operated upon its predecessor (and not the world directly, as it were). The phrase "proper improvements to be aided from the Internal Improvement Fund in the manner provided by [the January, 1855 act]"³⁴⁰ identified (or defined) the Pensacola line as a constituent element of the "liberal system of internal improvements in this State"³⁴¹ initially defined by the January act itself. Justice Westcott invoked no extrinsic definition of "system"; the meaning of the term was a legislative matter.

If the one provision made a road a part of the system, how can it be that the other does not? Going back to the Constitution itself, it is clear that what was to constitute a particular work an improvement belonging to the system, was a legislative declaration that it was "a proper object of improvement."³⁴²

336. *Id.* at 811.

337. *Id.* at 812.

338. *Id.*

339. *See id.* at 821-23 (treating the issue as simply one concerning the sufficiency of the pleadings).

340. *Id.* at 793.

341. *Id.* at 814.

342. *Id.* at 815.

Notions of inter-relationship (like "system") often appeared problematic, or otherwise difficult to work with, in cases from this period because of the tendency (most evident in classicizing opinions) to perceive legal analysis as concerned chiefly with taxonomy, with clear distinctions. Thus, in *Howse v. Moody*, 14 Fla. 59 (1872), a fraudulent conveyances case, a

The December act, like the January act, established conditions of eligibility for companies which might obtain the tax exemptions promised by the January statute by agreeing to assume the obligations that the statute fixed. "These two acts are *in pari materia*. They concern the same subject-matter."³⁴³

Justice Westcott emphasized that his statutory construction rested on the assumption that no creditor rights were at stake in the case.³⁴⁴ This limitation was important. The *Gonzales* opinion treated statutory language as legally independent, as free to fix meanings derived solely from legislation itself. Within this perspective, statutes, in principle, operate apart from common law and are seemingly capable of rejecting common law definitions and conclusions. A constitutional order that identified legality with respect for common law rights needed to relegate the possibility of independent statutory language to the periphery, to cases in which common law rights themselves were not pertinent—hence Westcott's qualification.

The idea that statutory language ought to be taken on its own terms surfaced in other cases that the Florida Supreme Court decided during

passage in Justice Westcott's opinion addressed a "same transaction or occurrence" question in this way:

It is apparent from the case stated that all of the defendants were not jointly and equally concerned in each distinct fraudulent act charged. There was a series of acts in this well conceived net-work of fraud, all terminating in the deception and injury of the plaintiff. The defendants performed different parts in the drama. These acts affected the property of the debtor—some the personal property, others the real estate. The object of the plaintiff in this complaint is to get the assistance of this Court in unraveling this net-work of fraud in respect to each species of property, and to have a due application of the same to the payment of the claims of the creditors.

The right of the plaintiff is against the whole property, and his right against all portions of it is of the same nature. The decree in chancery and the sale thereunder are but acts of fraud, which are sought to be set aside in order to enforce this general right. In fact, the right to set aside these proceedings can only co-exist with an equity affecting the property which was the subject of them. There can be no such thing as an equity or right to set aside these proceedings distinct and independent of rights and equities attached to the subject-matter that they affect. The result is that these are not several causes of action, but are acts which, connected with the debt due plaintiff, constitute a ground for one action alone.

Id. at 63-64. The language in the first paragraph was self-consciously metaphorical (note the artifice of "net-work"). The second paragraph was thoroughly technical. But there was also a second shift. In the first paragraph, the emphasis was on defendants, on the concerted nature of their acts as the indicator of unity. In the second paragraph, the point was now the unity brought about because the plaintiff as a judgment debtor had a right to all of defendant's property. It was a judgment being subverted by the manipulated auction that was now key, and not the manipulation itself. Thus, the analysis started out as a "same transaction or occurrence" inquiry, but ended up squarely within the framework of cause of action pleading, of the conceptual analysis of rights that one associates with pre-1937 jurisprudence.

343. *Gonzalez*, 16 Fla. at 816.

344. *See id.* at 821.

this period. In these cases, the separate status of statutory language was supposed for purposes of restricting legislative jurisdiction. Once again, the subversive implications of the notion of statutory independence could be ignored. Importantly, though, in many of these latter cases the court enforced provisions of the 1868 constitution addressing prerequisites for legally effective statutory action. The decisions thus raised (despite the jurisprudential commitments of the Florida Supreme Court itself) the possibility of a constitutional order within which the priority of common law terms need not figure as a fundamental proposition.

The constitutional provisions in question addressed statutes as legal instruments. They defined requirements that statutes must meet as a matter of form in order to count as law. Article IV, section 14, new to the 1868 constitution, imposed single-subject and title requirements, as well as limits on the use of titles as shorthand in the process of statutory revisions.³⁴⁵ Article IV, sections 17-19 and 21-22 greatly expanded prior constitutional uses of the distinction between "general" and "special" or "local" laws, establishing "general" laws as the norm for state legislation.³⁴⁶ The Florida Supreme Court decisions interpreting these provisions, read as a group, highlighted the purposes that these requirements served (in that period, at least) as constraints on legislative diction. The linked requirements that legislative bills address only a single-subject, that the subject be summarized in a bill's title, and that amendments take the form of a full quotation of the statute as revised, not only focused the legislative process but facilitated the organization of statutes in relation to each other, a recurring adjudicatory problem.³⁴⁷

345. "Each law enacted in the Legislature shall embrace but one-subject, and matter properly connected therewith, which subject shall be briefly expressed in the title, and no law shall be amended or revised by reference to its title only; but in such case, the act as revised, or section as amended, shall be reenacted and published at length." FLA. CONST. art. IV, § 14 (1868).

346. "The Legislature shall not pass special or local laws in any of the following enumerated cases" FLA. CONST. art. IV, § 17 (1868). "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." *Id.* § 18. "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating." *Id.* § 19. "The Legislature shall establish a uniform system of county, township, and municipal government." *Id.* § 21. "The Legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining, and other useful companies or associations as may be deemed necessary." *Id.* § 22.

347. *See, e.g., Carr v. Thomas*, 18 Fla. 736, 747 (1882) (single subject requirement violated by statutory provision sufficiently dissimilar from subject summarized in title, finding the process "mischievous" and "hardly be said to have been deliberate legislation"); *Lake v. Palmer*, 18 Fla. 501, 509-12 (1882) (question of whether statute is a "revision" for constitutional purposes used to define relationship of statute at issue to another statute); *Gibson v. State*, 16 Fla. 291, 299 (1877) (point of single subject requirement was "to avoid the confusion incident to the evil which has grown out of 'omnibus' legislation"); *Doggett v. Walker*, 15 Fla. 355, 369 (1875) (amendment restatement requirement as key to divining statutory organization).

The generality rules not only regulated the legislative process, but also (again from the judicial perspective) worked to organize Florida law (insofar as Florida law was statutory in origin) into a single, unified body rather than an amalgam of local regulations.³⁴⁸ The doubled legislative and judicial contexts within which the provisions operated is notable. It suggests simultaneous normative and epistemological concerns implicit in the idea of legality—to be law, statutes must take forms inconsistent with recognized abuses of the legislative process and consistent with judicial requirements for recognition and use.³⁴⁹ The constitutionally-mandated syntax defined a regime of censorship, a “system of oblique communication,” “strategies of indirection” precluding “direct confrontation” with immediate legislative aims by legislatures themselves, courts or other readers.³⁵⁰ But censorship, in an important sense, was also arguably liberating. Compliance did not, within the constitutional terms, require usage of common law vocabulary. Legislation, as a matter of substance, was apparently free to take its own stands.³⁵¹

The juxtaposition of these various constitutional efforts to supply a proper grammar for legislation invites speculation about the ambition of the 1868 constitution itself. We might emphasize the *break* as such with the common law—envision a program seeking to constitute law in terms not only relatively definite in reference, but also always potentially newly made, terms derived somehow from the subject at hand. Perhaps the key notion is better put negatively—as criticism of the content of common law, seeking to avoid terms not newly made, to avoid preconceived, reflex responses. But both of these formulations seem too abstract, too general. Perhaps the point is the very idea of abstractness (the constitution means what it says), the censorial insistence upon the manifestness of the legislative subject as discerned behind or across its particular provisions, a subject properly characterizable generally rather than through reference to particular individuals or situations. Why value abstractness? Perhaps abstractness was a mechanism for imposing rigorous judicial vocabularies upon the legislative process. But judicial rigor also followed from respect for common law categories. Alternatively, it might be that judicial language, the lexicon of the common law,

348. See, e.g., *McConihe v. State ex rel. McMurray*, 17 Fla. 238, 268, 269-70 (1879) (reading uniformity requirement as demanding “a fixed rule” rather than local option as a means of defining classes of municipalities; “uniformity” equated with “system”).

349. The notion of generality, indeed, was understood as part of the idea of due process, and of thus legality itself.

350. ANNABEL M. PATTERSON, *CENSORSHIP AND INTERPRETATION: THE CONDITIONS OF WRITING AND READING IN EARLY MODERN ENGLAND* 53 (1984).

351. In this regard, we might also note the absence in the 1868 constitution of any provision similar to prior constitutional guarantees of open courts for the enforcement of common law rights.

was itself suspect, and statutory abstractness its cure. From this perspective, common law, like too particular legislation, simply supplied the force of law for some individuals momentarily triumphant over others, re-enacting a state of nature of private violence. Revealingly, Justice Westcott (of all people), dissenting in *Busnell v. Dennison* defended American state legislative revision of the English law of descents in strikingly radical terms:

It cannot be doubted that a system of descents which was created to foster and perpetuate an aristocracy, itself an element of power in the government, is not suitable for a republic, in which the existence of such a privileged class is inconsistent with the essential principles upon which such a government is founded. While, therefore, upon the success of the American revolution it was entirely proper for the several States of the Union to adopt the principles and rules of the common law controlling ordinary commercial transactions between its citizens, it became the duty of their jurists and statesmen to devise a system of descents conforming to the genius of our government, and to abandon, in a great measure, rules obtaining in England, which were the off-spring of the feudal system, adopted at the behest of a landed aristocracy to perpetuate their wealth and preserve the privileges of their class.³⁵²

Perhaps anti-aristocratic criticism of English inheritance rules had become formulaic by the time Westcott wrote. Notably, he carefully distinguished the arguably more often relevant "common law controlling ordinary commercial transactions" from the law of descents.³⁵³ Proceeding even this far along the path of radical critique, however, probably sufficed to differentiate sharply Westcott's social vision from the views of Bourbon opponents of Reconstruction. The vector, in any case, is key. The 1868 constitution plainly moved further in the same direction, repeatedly calling into question and replacing common law formulations. It is this repeated reformation, we have seen, that (at least when directly confronted) Westcott and his colleagues resisted. Article XVI, section 26 (the provision with which we began), barring enforcement of contracts in which slaves served as consideration, we can now see, becomes precisely emblematic—bringing together in its terms both anti-slavery and jurisprudential transformation.³⁵⁴

352. 13 Fla. 77, 102 (1869-71).

353. See *id.*

354. The Florida Constitution of 1868, at least as represented in this Essay, raises interesting questions about the larger jurisprudence of Reconstruction that are not addressed here. For example, there are clearly affinities linking the system of legislative censorship and Justice Harlan's famous notion of "colorblindness." See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The relationship of common law and legislation depicted by this Essay as one important matrix within which the Florida Supreme Court sought to come to grips with the

E.

Restated as operating procedures, the formal norms that the 1868 constitution imposed as conditions limiting legislative independence are plainly of a piece with the working conception of legal equality that begins the analysis of challenged statutory, administrative, or judicial differentiations by seeking to articulate considerations explaining the choices made in terms independent of the immediate gains and losses imposed on particular individuals or groups. Yet, the seemingly straightforward statement found in section 1 of the 1885 Declaration of Rights—"All men are equal before the law"³⁵⁵—is literally missing from the 1868 constitution. Instead, there are two propositions. Section 1 of the Declaration of Rights begins: "All men are by nature free and equal . . ."³⁵⁶ Section 11 adds: "All laws of a general nature shall have a uniform operation."³⁵⁷ On its face, the second statement leaves open the question of whether laws must be general. This caution is readily understood as a drafting response to the exception recognized in the restatement of the generality requirement in article IV, section 18: ". . . in all other cases where a general law can be made applicable . . ."³⁵⁸ But the question of when laws must be general remains. It is difficult to see how the notion that "[a]ll men are by nature free and equal"³⁵⁹ adds anything in this respect—there is no effort to specify the consequences of taking this formula seriously, no sign (for example) of the relevant institutional context.

Each of the Florida constitutions has a provision somewhat like the first sections of the 1868 and 1885 declarations of rights. The entire sequence (through 1885) is revealing:

1838: "That all freemen, when they form a social compact, are equal; and have certain inherent and indefeasible rights . . ."³⁶⁰

1861: "That all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights . . ."³⁶¹

1868 constitution also defined a familiar context within which much late nineteenth and early twentieth century legal debate might be located. The possible overlap of Reconstruction controversies and (for example) the arguments of Roscoe Pound bears investigation. It may be that so-called "classical legal theory" was a less well-established and more contested apparatus than it is now sometimes thought. I discuss questions of these sorts in *Legal Freedom*. See *supra* note *.

355. FLA. CONST. Declaration of Rights § 1 (1885).

356. *Id.* (1868).

357. *Id.* § 11.

358. *Id.* art. IV, § 18.

359. *Id.* Declaration of Rights § 1.

360. *Id.* (1838).

361. *Id.* (1861).

1865: "That all freemen, when they form a government, have certain inherent and indefeasible rights" ³⁶²

1868: "All men are by nature free and equal, and have certain inalienable rights" ³⁶³

1885: "All men are equal before the law, and have certain inalienable rights" ³⁶⁴

The first marked changes occurred in 1865, when "government" replaced "social compact," and "equal" disappeared. We may suspect that both revisions reflected the peculiar circumstances of the postwar period. The manifest absence of consensus might have suggested that, at that point, compact was a weak basis for grounding rights. "[G]overnment," whose own origin is left unaddressed (if not consent, circumstances? congressional mandate? force of arms?), becomes a more plausible point of origin. If "freemen" now included the newly-freed slaves, and if the 1865 constitution was supposed to leave open the possibility of the relentlessly hierarchical Black Codes that were soon to be enacted, elimination of any idea of "equal" freemen obviously followed. The 1868 constitution replaced the idea of "freemen" (which might have been too closely associated with the organization of slave society) with the idea of "free" "men" who are also "equal." "Nature" replaced "government" or "social compact" as the source of "equal" status or (in the case of the 1865 constitution) simply "rights."

Is the 1868 constitution therefore a "natural law" document? It is easier to apply this label to the 1838 and 1861 constitutions, which not only invoke "social compact" (renunciation of the state of nature) as the origin of the propositions found in their respective first sections, but preface the larger list in their declarations of rights with the formula: "That the great and essential principles of liberty and free government may be recognized and established, we declare" ³⁶⁵ Not only the particular statuses and rights recognized in the first sections, but also the declarations of rights as wholes have their origins constitutionally recognized as outside the constitution. The 1865 constitution's reference to "government" as the origin of rights seems altogether positivist, but that constitution carried over the introductory formula of its predecessors. The 1868 constitution, however, deleted the invocation of already-established "great and essential principles." Whatever propositions this constitution asserted owed their existence to the constitution itself. If "men" were "by nature" "free and equal," for example, it was because

362. *Id.* (1865).

363. *Id.* (1868).

364. *Id.* (1885).

365. *Id.* (1838).

the 1868 constitution so states. This constitution thus claimed for itself the free-standing status as legal instrument that it conditionally allowed legislation. If so, the illocutionary ambiguity of the proposition "[a]ll men are by nature free and equal" resolves: within the constitution, it plays the role not of a statement of fact (which might be judged right or wrong by reference to some resource that is independent of the constitution), but of an instruction, a command to readers (legislators, judges, administrators) to act on the basis of the proposition (to treat it as true). "[E]qual before the law"—the 1885 wording—becomes "equal before the constitution [and therefore before the law]."

Perhaps, therefore, the 1868 constitution did not leave the Florida legislature quite so substantively unconstrained as I suggested earlier. The "inalienable rights" mentioned in section 1 of the Declaration of Rights encompassed "those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness."³⁶⁶ They served as limits on legislative discretion, as did the list making up the rest of the declaration. The particular anxiety apparent in *McNealy v. Gregory* and its successors does not therefore disappear. The Declaration of Rights was not a declaration of common law rights. The 1868 constitution itself, in the details of its organization, declared as well its own freedom, its own capacity to rework rather than respect prior law.

This claim to emancipation contrasts notably with the more limited authority that the 1885 constitution asserted. Importantly for present purposes, article III, sections 16, 20 through 22, and 24, retained the gist of the 1868 censorship of legislative syntax. The new declaration of rights restored prewar (and 1865) protection of common law rights, in effect subjecting the Florida legislature to two systems of constraint.³⁶⁷ Against that backdrop, the statement that "[a]ll men are equal before the law" suggests a partial constitutional retreat. The 1885 constitution was no less positive law than the 1868 constitution (there was no invocation of extraconstitutional "principles of liberty and free government"). But the 1885 constitution's instruction to its readers plainly differed. Its message was now as much a reminder about the source of authority—"the law" (before which "[a]ll men are equal")—as a statement concerning that authority's limits—act only according to "the law." "[T]he law" presumably included not only the constitution's own limits on legal language, but (in the language of the access to courts guarantee) a

366. *Id.* (1868).

367. "All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay." FLA. CONST. Declaration of Rights, § 4 (1885).

requirement to abide by "the due course of law," the usual legal vocabulary that included most conspicuously, the common law. The 1885 constitution thus announced its coexistence with a body of law not of its own making. This doubling did not simply put common law terms to use within the system of constitutional restraint. It legitimated those terms (there were no provisions like the 1868 slave consideration provision in the 1885 constitution), and therefore marked them as privileged vis a vis the constitution's own constraints. In other words, common law categories became sufficiently general. Constitutional apologetics replaced constitutional critique.

It is also relatively easy to extend the sequence to include the 1968 constitution. Single-subject and significant general law restrictions on legislative action appear for the third time.³⁶⁸ There is also the following progression:

1868: "All men are by nature free and equal"³⁶⁹

1885: "All men are equal before the law"³⁷⁰

1968: "All natural persons are equal before the law"³⁷¹

The 1968 version follows the 1885 formula for the most part, but the substitution of "natural persons" for "men" is disruptive. The distinction drawn between "natural" and "non-natural" (presumably corporate) persons leaves open at least the possibility that "the law" possesses a freedom in dealing with non-natural persons to draw distinctions (to treat such persons as not equal) that it does not possess in dealing with natural persons.³⁷² The corollary, of course, is that the idea that natural persons "are equal before the law" is restrictive, that it imposes a constraint upon "the law" that would be missing absent the constitutional language. In some sense, "the law" is now subject to scrutiny, its terms are open to challenge concerning whether "natural persons" are indeed treated equally.³⁷³ In other words, "the law" cannot take as its own starting point distinctions among natural persons per se. The 1968 constitution thus imposes itself upon "the law" in a way more like the 1868 man-

368. FLA. CONST. art. III, §§ 6, 10-11.

369. FLA. CONST. Declaration of Rights § 1 (1868).

370. *Id.* (1885).

371. FLA. CONST. art. I, § 2 (1968).

372. On the relevance of the distinction between corporations and natural persons in connection with article I, section 2, see TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 22 (1991).

373. There is textual basis, as a result, for the proposition that article I, section 2, is the functional equivalent of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Shriners Hospitals v. Zrillic*, 563 So. 2d 64 (Fla. 1990); *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567 (Fla. 1983).

date.³⁷⁴ The continuing association of legal equality with Reconstruction generality seems clear.

VI.

Proposed constitutional amendments might have any one of three relationships with the extant constitution. In some cases, the proposed amendment is an *addition*. It addresses matters not otherwise taken up in the constitution. The proposed amendment might alternatively function as a *substitution*. It replaces the previous constitutional treatment of a given matter. Finally, a proposed amendment might *overlap* existing constitutional terms. It takes up a matter already the subject of another provision. Within the terms of the approach that I have developed in the preceding case studies, only overlaps are sources of "single-subject" difficulty, since only overlaps introduce into the constitution competing constitutional approaches to particular questions. The application of these categories, of course, is by no means automatic or mechanical. It should be clear, however, that in the three cases I have discussed the proposed amendments that the Florida Supreme Court invalidated could all be plausibly characterized as creating constitutional overlaps. What of other cases? This section will briefly discuss the other pertinent Florida Supreme Court decisions.

A.

The cases that the Florida Supreme Court decided after *Fine* and *Evans* and before 1994 present little difficulty within the perspective of this Essay. The 1986 lottery, 1991 homestead valuation, and 1993 net fishing limitation proposals sought to add to the Florida Constitution authorizations (in the first case) or restrictions that the Florida legislature might have incorporated within Florida law without resort to a constitutional amendment.³⁷⁵ No provision in the Florida Constitution, however, marked these subjects as reserved for legislative address only, and no provision was otherwise directly relevant either.

Two decisions require more analysis. In 1988, the Florida Supreme Court upheld a proposed amendment declaring English to be the official

374. Within the 1968 context, therefore, the access to courts guarantee carried over from the 1885 constitution might properly acquire a different meaning.

375. See Advisory Opinion to the Attorney Gen.—Limited Marine Net Fishing, 620 So. 2d 997, 997-98 (Fla. 1993); *In re* Advisory Opinion to the Attorney Gen.—Homestead Valuation Limitation, 581 So. 2d 586, 587 (Fla. 1991); *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986). The net limitation proposal seemed to Justice McDonald to be so legislation-like as to be inappropriate for constitutional inclusion. Nevertheless, he conceded that the proposal satisfied the single-subject test. See *Limited Marine Net Fishing*, 620 So. 2d at 999-1000 (McDonald, J., concurring).

state language.³⁷⁶ Opponents argued that the implementing legislation for the provision might conflict with constitutional guarantees of freedom of speech, due process, or privacy rights. The court thought that the argument was "premature" given that no implementing legislation, obviously enough, had yet come into existence.³⁷⁷ After ratification of the amendment and legislative implementation, however, single-subject inquiry would be too late.³⁷⁸ Ripeness per se, thus, seems a hard ground for the court's decision. The court may be understood as concluding, however, that the language of the proposed amendment did not necessarily require, if the amendment were to have any real effect, the adoption of implementing legislation inconsistent with other constitutional provisions.³⁷⁹ Constitutional conflict (and therefore unconstitutional multiplicity) would then be lacking.

The 1991 term limitation proposal presented another "false" constitutional conflict. It prohibited persons who had already served in office for eight consecutive years from seeking re-election to the Florida House of Representatives and Senate, the lieutenant-governorship, cabinet offices, and the United States House of Representatives and Senate.³⁸⁰ The Florida Supreme Court noted that the proposal "affects officeholders in three different branches of government,"³⁸¹ but it nonetheless operated simply "as a further disqualification on holding office,"³⁸² leaving unmodified other constitutional restrictions on eligibility for elected office.³⁸³ The proposal was inconsistent with what might have been an aim of the existing constitutional scheme—to permit extended office-holding (excluding the governor's office). But the proposal also simply substituted its own vision for that aim, thus occasioning no conflict. Of course, the proposal could not similarly oust any conflicting view with respect to term limits on United States congressional and senatorial offices (the third branch of government addressed by the proposal) if

376. *In re* Advisory Opinion to the Attorney Gen. English—The Official Language of Florida, 520 So. 2d 11 (Fla. 1988) (per curiam).

377. *Id.* at 13.

378. Article IV, section 10, of the Florida Constitution, enacted after *Fine* and *Evans*, directs the state attorney general to seek an advisory opinion from the Florida Supreme Court regarding the validity of any initiative-proposed amendment in light of the article XI, section 3, single-subject requirement. Implementing legislation for that section expanded the scope of the advisory opinion to include statutory title requirements. See FLA. STAT. ch. §§ 16.061, 101.61 (1993). This advisory opinion procedure preempts other modes of raising single-subject challenges.

379. "[T]he proposed amendment does not mandate any legislation." 520 So. 2d at 12.

380. See Advisory Opinion to the Attorney Gen.—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 226 (Fla. 1991). The Florida Constitution already included a two-term limit for the office of governor. FLA. CONST. art. 4, § 5.

381. 592 So. 2d at 227.

382. *Id.* at 228.

383. See *id.*

that conflicting view were incorporated within the United States Constitution.³⁸⁴ Because the perspective of the United States Constitution would be preemptive, no cross-constitutional inconsistency (and therefore multiple constitutional subjects) could exist in fact.³⁸⁵

B.

Three of the cases decided by the Florida Supreme Court in 1994 also seem easy from the perspective of this Essay—although with respect to one this Essay draws a conclusion opposite from that reached by the court itself.

The trust fund framework defined by the proposal at issue in *In re Criminal Justice Funding*³⁸⁶ did little more than fix a sales tax cap and protect against the switching of tax revenues (rather than actual additional expenditures) in case the Florida Legislature chose to increase criminal justice funding. As such, the proposal would partially substitute constitutional specification for the legislative discretion that the Florida constitution otherwise recognized in this context. Substitution, however, did not generate constitutional conflict, and thus no single-subject issue arose. The casino gambling initiative that was upheld by the court in *In re Limited Casinos*³⁸⁷ substituted its own provisions or legislation that it authorized for existing state or local law or left the gaming establishments that it established to be regulated by general law. It was not necessary to decide which legal state of affairs would obtain in order to conclude that one or the other would, and thus there was no serious prospect of irresolution.³⁸⁸

384. See U.S. CONST. art. VI (Supremacy Clause).

385. Justice Overton, author of the majority opinion in *Fine*, dissented in *Limited Political Terms*, but did not dispute the conclusion that the term limitation proposal contained one subject. Instead, he argued that the term limits imposed on federal office-holding violated the U.S. Constitution, and were therefore illegal as a matter of Florida law; thus (given doubts about severability) invalidation of the proposed amendment was required. See 592 So. 2d at 229-31 (Overton, J., dissenting in part). Justice Kogan, however, did find a single-subject problem, concluding that reasonable voters might hold different views with respect to term limits for state and federal legislative offices, thus infringing the guarantee that Kogan thought underlays the single-subject rule: "No person should be required to vote for something repugnant simply because it is attached to something desirable." *Id.* at 232 (Kogan, J., dissenting in part).

386. Advisory Opinion to the Attorney Gen. *re Funding for Criminal Justice*, 639 So. 2d 972 (Fla. 1994).

387. Advisory Opinion to the Attorney Gen. *re Limited Casinos*, 644 So. 2d 71 (Fla. 1994).

388. Although the petition contains details pertaining to the number, size, location, and type of facilities, . . . such details only serve to provide the scope and implementation of the initiative proposal. . . .

. . . Nothing in the petition usurps, interferes with, or affects, the powers and authority of the executive branch of government or of local governments to integrate casinos into existing governmental policies
In re Limited Casinos, 644 So. 2d 71 (Fla. 1994).

Indeed, if *Limited Casinos* is of interest, it is chiefly because the case, at first glance, seems difficult to distinguish from *Save Our Everglades*—the supreme court's decision some three months earlier unanimously invalidating the Everglades restoration initiative.³⁸⁹ The preservation trust proposal at issue in this latter case, like the casinos proposal, described in some detail the steps involved in its implementation. Purporting to be self-executing with respect to its main provisions (for example, a sugar tax to be levied to fund restoration), it nonetheless acknowledged the applicability of general law regulating trust administrative procedures, and the possibility of complementary substantive legislation.³⁹⁰

Justice Shaw's opinion made much of separation of powers and emphasized that the trust would undertake actions usually identified as legislative and executive with a normative edge ordinarily associated with adjudication.³⁹¹ For present purposes, whether or not the proposal conformed to the usual constitutional organization of separated powers is not the point. If the proposal defined its field of application in a way that brought to bear its particular approach exclusively, if it did not implicate as simultaneously relevant other inconsistent constitutional approaches, then the proposal did not generate an unconstitutional multiplicity, regardless of the content of its approach. In this light, it is not easy to defend the *Save Our Everglades* decision. The trust's mode of operation plainly differed from ordinary governmental processes precisely because it took the form of a trust—ironically, it mimicked the pro-development Internal Improvement and Everglades Trusts central to Florida's earlier political history. It is difficult to see, however, how a trust that is geographically limited in its field of operation jurisdictionally overlaps other fields of government operations constitutionally asso-

389. *In re Advisory Opinion to the Attorney Gen.—Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994).

390. *See id.* at 1338-39 (quoting from the proposed amendment).

391. *Id.* at 1340. Shaw framed the governing proposition as follows: "Although a proposal may affect several branches of government and still pass muster, no single proposal can substantially alter or perform the functions of multiple branches." *Id.* (footnote omitted). In establishing a trust, levying a tax, and authorizing the trustees to implement the trust and refine the definition of its boundaries of operation, the proposed amendment exercised "traditionally legislative functions." *Id.* Because of what the trustees would have to do to implement the trust, Justice Shaw concluded, the proposed amendment also "contemplates the exercise of vast executive powers." *Id.* The preamble included in the proposed amendment (but not included by the amendment as part of the new constitutional language per se) stated that "the sugarcane industry . . . has profited while damaging the Everglades" and therefore "the sugarcane industry should help pay to clean up the pollution." *Id.* at 1338 (quoting from the proposed amendment). This assertion, Shaw thought, was "a quintessential judicial function." *Id.* at 1340. "It is as though the drafters drew up their plan to restore the Everglades, then stepped outside their role as planners, donned judicial robes, and made factual findings and determinations of liability and damages." *Id.*

ciated with other modes of acting. Justice Shaw observed that "the initiative creates a virtual fourth branch of government with authority to exercise the powers of the other three on the subject of remedying Everglades pollution."³⁹² Shaw may have been correct, but so long as "the subject" was severable, the initiative was not objectionable.³⁹³

C.

*In re Tax Limitation*³⁹⁴ was the last of the Florida Supreme Court's 1994 single-subject decisions. The court considered four proposals, linked by proponents during the signature solicitation process, and declared three to be invalid given the single-subject requirement. Three out of four of the court's conclusions are easy to defend.

The proposal that the court held to be appropriately unitary itself exempted from the single-subject requirement any "revision or amendment . . . limiting the power of government to raise revenues"³⁹⁵ The exception obviously substitutes for the general rule, so no multiplicity arises. A second submitted amendment added to article I, section 2, a declaration that:

Any exercise of the police power, excepting the administration and enforcement of criminal laws, which damages the value of a vested private property right, or any interest therein, shall entitle the owner to full compensation determined by jury trial with a jury of not fewer than six persons and without prior resort to administrative

392. *Id.* at 1340.

393. Justice Shaw also emphasized logrolling:

One objective—to restore the Everglades—is politically fashionable, while the other—to compel the sugar industry to fund the restoration—is more problematic. . . . [V]oters would be compelled to choose all or nothing. The danger is that our organic law might be amended to compel the sugar industry to pay for the cleanup singlehandedly even though a majority of voters do not think this wise or fair.

Id. at 1341. Within the perspective of this essay, the fact that voters must reconcile their support for some parts and opposition to other parts of a proposal is irrelevant for single-subject purposes. The prospect of hard choices suggests nothing whatsoever about whether an amendment would render a particular subject constitutionally multiple because it would be addressed by overlapping provisions. Notably, in *Save Our Everglades*, the aspects of the proposal that Justice Shaw thought would force compromise judgments by some voters had little direct connection with the separation of powers divisions which Shaw concluded that the amendment crossed.

It may be, of course, that the initiative was defective for other reasons. The *Save Our Everglades* opinion held that the title and summary did not satisfy statutory requirements. *Id.* at 1341-42. Section (a) of the initiative, which was not included in the text of the proposed amendment as such, functioned as a sort of preamble. Justice Shaw regarded this section as improperly performing "a quintessential judicial function." *Id.* at 1340. Arguably, the defect of section (a) was rather that it both duplicated the function of the summary and overlaid argument, in both respects violating statutory specifications.

394. Advisory Opinion to the Attorney Gen. *re Tax Limitation*, 644 So. 2d 486 (Fla. 1994).

395. *Id.* at 495.

remedies.³⁹⁶

The drafting of this proposal was interesting. Use of the term "police power" carefully limited the application of the right of action to government acts that did not violate due process and did not trigger rights to just compensation. In a sense, therefore, the proposal filled a constitutional gap. But it also, within its own terms, created an overlap. It seemed designed to encompass all government activity (with the one exception) having any adverse economic consequences for any individuals. At the same time, it literally applied to no government activity. Exercises of "the police power" cannot infringe "a vested private property right, or any interest therein" because (within the constitutional language in which "the police power" is a working term) no private property rights extend to activity which is properly subject to the police power—this is why due process and just compensation rights are inapposite. The proposal's apparent aim and literal reach were thus inconsistent. The proposal, standing by itself, thus generated an unconstitutional multiplicity (the conclusion that the Florida Supreme Court also reached).

A third amendment would have established that "[n]o new taxes may be imposed except upon approval in a vote of the electors of the taxing entity seeking to impose the tax"³⁹⁷ and would have defined "new taxes" broadly, excepting only emergency taxes applicable for twelve months and adopted by a three fourths vote "of the governing body of a taxing entity."³⁹⁸ If it is assumed (perhaps falsely) that voters would not approve new taxes, then the proffered amendment becomes a version of the tax/revenue cap invalidated in *Fine*. If the possibility of voter approval is recognized, there is a different difficulty, at least with respect to decisionmaking by the Florida legislature. Simply put, the appropriations process as constitutionally defined supposes that legislators are able to specify a definite budget of state government expenditures and therefore are able to fix the amount of state government revenue collections.³⁹⁹ But if government revenues to be obtained from taxes would, within a given budget year, exceed the prior year, the amendment would require voter approval. The actual amount of revenue available for government expenditures would be uncertain pending the vote. It is plausible to assume that legislative preferences for budget allocations are conditional on the total amount of revenue available. Legislators may only be willing to fund activity *a* at level *x* because there is also enough

396. *Id.* at 494.

397. *Id.* at 491-92.

398. *Id.* at 492.

399. *See* FLA. CONST. art. III, § 19.

revenue available to fund activity *b* at level *y*. Given this assumption, the voter approval requirement would freeze the legislative process. The requirement would leave legislators unable to make decisions because they would be constitutionally denied a basis for making judgments that they are otherwise constitutionally obligated to make. The amendment therefore creates an unconstitutional multiplicity (again, also the Florida Supreme Court's conclusion).

The fourth proposal would have prohibited amendments to the Florida constitution adding new taxes or fees unless the amendments were approved by at least two thirds of voting voters. The court held that this constitutional change was improperly multiple "because it combines taxes and fees."⁴⁰⁰ Within the terms of this Essay, however, the amendment would have worked a simple substitution, merely changing a threshold level for vote-counting purposes. The court's conclusion is thus difficult to defend.

VII.

A.

The single-subject requirement protects the formal integrity of the constitutional text. It blocks additions to the constitution that address topics already addressed in the constitution in ways that are conceptually inconsistent with existing provisions that a proposed amendment would not replace. Why provide this protection? Its purpose would seem to be self-evident: minimize constitutional conflicts. But this formulation simply pushes the inquiry back one stage. The value of minimizing conflicts is not itself self-evident. It does not, for example, derive from process concerns associated with amendment ratification. The issue is not whether voters are left uninformed about constitutional conflicts. Title requirements are sufficient to meet this problem. There is no need to ban conflicts to insure responsible voting. Responsible voters might be prepared to tolerate constitutional conflicts as a form of compromise.⁴⁰¹

The appropriate perspective, instead, may be that of the users of the constitutional document. If the constitution itself is to structure the decisionmaking processes of its readers, it ought not to be organized in a way that incorporates strong conceptual conflicts. Such conflicts create zones of discretion, perhaps not entirely unconstrained (one or the other constitutional value must carry the day), but space nonetheless within which oscillating readings of competing constitutional approaches might

400. 644 So. 2d at 491.

401. The point is made more elaborately by Lowenstein, *supra* note 142, at 957-63.

blunt the impact of both competitors.⁴⁰² Such maneuvering spaces, however, are not necessarily bad. Indeed, the Florida constitution permits legislatures to create them—the single-subject requirement does not regulate the form of legislatively drafted amendments. Perhaps the better question is: Why restrict in this way only initiative-proposed amendments? It cannot be that initiative-proposers are perceived as necessarily worse drafters, more likely to create conflicts by mistake. In all likelihood, for example, the drafters of the amendment at issue in *Evans* did not simply make a mistake, unaware of the amendment's potential impact on jury rights. Perhaps the answer may lie in the potentially greater frequency of initiative-proposed amendments. Conflicts might accumulate quickly to the point that the constitution becomes, in an important sense, unreadable. The point, it is sometimes said, is the error-checking capacities of collaborative procedures. Legislatures or legislature-like constitutional conventions, because of their processes of consultation, negotiation, and consensus-building, can catch errors like unresolved constitutional conflicts; amendments that are the product of initiative processes may not benefit from a similar editing process; hence the need for special constitutional limits on initiative-proposed amendments. In one sense, this analysis is obviously unpersuasive. It supposes that the aim of legislative processes is to resolve ambiguity or conflict; it may as often be the case, we all know, that legislative consensus depends precisely upon the maintenance or indeed creation of textual ambiguities or conflicts.

Legislative procedure is nonetheless a provocative starting point. We may plausibly assume, I think, that legislative bodies will take into account impacts on all affected (legislatively-perceived) interests, and ultimately generate constitutional amendments that leave no (big) losers among these interests. Legislative-proposed amendments may well register decisions protective of (because made by) usual decisionmakers—in an important sense, change nothing. Initiative-proposed amendments, by contrast, are potentially capable of challenging legislative consensus.⁴⁰³ The paradigm case, obviously enough, is Governor Askew's use of the initiative process to sidestep entrenched interests in order to introduce ethical norms of public service into the constitution and thus into government practice—the occasion for the Florida Supreme Court's first

402. See *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984); *Discrimination Laws Restriction*, 632 So. 2d 1018, 1020 (Fla. 1984).

403. Richard Briffault makes a similar point in the context of discussing initiative-generated legislation: his emphasis, however, is not so much the potential substantive ambitions of initiative proposals as the role of initiatives (even if unsuccessful) in revising legislative agendas. Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1367-73 (1985) (Book Review).

single subject ruling.⁴⁰⁴ If they are to be, in this sense, revolutionary, initiative-proposed amendments must be decisive. Under-inclusive conflict generating proposals, of necessity, cannot be. On this reading, the single subject requirement protects the initiative's special strength as a form of political and constitutional action. The single subject requirement on this view takes seriously, and requires initiative drafters to take seriously, the initiative's use as a means of thorough-going constitutional change.⁴⁰⁵

B.

Does this Essay, as I promised at the outset, contribute to a "new" appreciation of the role of constitutional texts within constitutional law? It should be clear, at least, that the discussion here has been one that repeatedly pushes constitutional documents to the forefront. Florida's single subject limit on initiative-proposed constitutional amendments, I have argued, in its application draws upon a sense of the mesh or clash of the proposed amendment with other constitutional provisions ostensibly independent. Sometimes a conflict becomes apparent simply by juxtaposing the proposed amendment and an individual constitutional provision, for example the jury trial right in *Evans*. In other cases, it is a large collection of constitutional clauses, as I suggested in discussing *Fine*, that taken together makes a conflict visible. In circumstances in which constitutional provisions acquire definition through recovery of their earlier textual settings, the prominence of constitutional texts within my account increases further.⁴⁰⁶

An objection is obvious, however. It is not the texts themselves that generate conflicts, but readings or interpretations of these texts. Even (or perhaps especially) if these readings evoke earlier constitutional documents, the fact of interpretation is indisputable. The key, I

404. *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976). Askew's efforts and the legislative backdrop are summarized in Elliot H. Henslovitz & Claudia B. Greenberg, *Constitutional Limitations on Florida's Financial Disclosure Laws*, 31 U. FLA. L. REV. 872, 873-83 (1979).

405. The 1994 initiative revision of article 11, section 3, excluded from the scope of the single subject requirement initiative-proposed amendments "limiting the power of government to raise revenue." FLA. CONST. art. 11, § 3 (1994). If this amendment is understood as addressing only amendments whose primary purpose and effect is revenue limitation, the analysis outlined in this essay is largely unaffected. The revenue caps that the Florida Supreme Court invalidated in *Fine v. Firestone* and *In re Tax Limitation* were troubling from my perspective precisely because of their unacknowledged impact on constitutional responsibilities not directly matters of revenue raising. The supreme court's decision in *Tax Limitation* invalidating the proposed two thirds requirement for constitutional amendments authorizing new taxes or fees, because it was based on an assertion of the constitutional separateness of taxes and fees, would have been inconsistent with the new revenue exception. This essay, however, does not defend the taxes/fees distinction.

406. The discussion of the 1868 and 1885 (and other earlier Florida) constitutions in the analysis of *Discrimination Laws Restriction* is the relevant illustration here.

think, is that interpretation becomes interpretation of features of constitutional texts; begins and ends in accounts of the organization, implications, or emphases of constitutional documents, a project formally distinct from glosses on, say, some set of norms stated primarily in non-constitutional language. To be sure, this textual dimension must acquire relevance. It must generate an awareness of preoccupations or commitments different from those nonconstitutional elaborations articulate. For example, it may be that the relevance of the 1868 constitution for discussion of *Discrimination Laws Restriction* is at once jarring and persuasive. Reconstruction evokes deep feeling; if features of the Reconstruction constitution resonate even now, that depth of feeling, perhaps, carries forward also, one measure of what is at stake in the *Discrimination Laws Restriction* case as well. But plainly, it must be text that is made relevant. In the *Discrimination Laws Restriction* discussion, for example, if the analysis is persuasive it is because seemingly bland or technical constitutional provisions appear as elements of a highly-charged politics, a politics indeed implicating the very idea of a written constitution itself.

Whether or not "revelation" occurs of course importantly depends on reader reaction, in this case as in the case of all legal constructions. But precisely because this dependence is global, the predicament in common of all legal arguments, its appearance here is, to the same degree as elsewhere, as much irrelevant as ultimately decisive.⁴⁰⁷ The mistake of traditional thinking about textualism in constitutional law is its assumption that constitutional texts matter only if they *resolve*. Constitutional texts matter only if they are themselves *problems*. The ultimate object must be to make sense of a constitutional text—not read a text to make sense, to bring it into conformity with otherwise-derived expectations, but to find ideas or arrangements of ideas that fit a text, that acknowledge the text, suggest a reading of it that treats the text's form as itself the focus of concern. Why make the text as such the focus

407. There is another objection. In no sense is the discussion in this essay either an explication of, or a replacement for, the opinions of the Florida Supreme Court in the cases that I take as points of departure. It is, of course, true that the single subject opinions of the Florida Supreme Court do not resemble this essay. But in part, the question of whether judicial practice is open to change simply calls attention to the problem of double-textuality that I discussed at the outset. Any judicial opinion is first a construction of itself, deploying its working terms (even if incorporations of other texts) always as elaboration of its own organization. As a result, it may always be difficult to conceive of elaborations of constitutional texts within the "frame" of judicial opinions—frame and picture here, in fact, overlap. John Marshall's work provides classic illustrations: readers, likely, may never agree on whether the written constitution or the written opinion dominates within Marshall's efforts (one measure, indeed, of the genius of these opinions). Ultimately, this difficulty provides a basis for judging (and thus practicing) judicial writing. I do not discuss this dimension of the analysis here. It is the subject of *Constitutional Law and Formal Revolution*. See *supra* note *.

in this way? It seems fetishistic.⁴⁰⁸ If it is to be justifiable, I think, the enterprise must be premised on a double modesty. There should be a refusal, first of all, to claim priority for the textual reading—only an insistence that the reading is textual. And secondly, there should also be a refusal to claim that the normative structures that are the product of the textual arrangement are in some sense definitive. If these structures are persuasive (and therefore if the reading is validated), it is only for other reasons, some extrinsic warrant. What is the point, then? It must be that the effort to build normative structures through textual arrangement somehow facilitates the generation of *persuasive* normative structures. Documents derive their force, presumably, from the stresses to which they give form. If constitutions matter as texts, perhaps, it is because as texts they give form to stresses more intense than the stresses other texts model. Or rather, those parts of constitutions matter which *in-form* stresses, matter in the same way as stressed parts of statutes, sequences of administrative regulations, or lines of cases. It is not necessary that constitutions take priority (as conceptually they have not always).

The constitution is a particular document (or sequence of documents) demanding, like all documents, to be placed, to be accorded authority, to be recognized as a proper subject of interpretation.⁴⁰⁹ It is this pre-interpretive politics, really, that is the key. The priority of constitutions is not automatic; there is always a conflict, a choice to be made among competing legal resources. Of course, this politics is frequently obscure. The subordination of constitutions to other sources often takes

408. If we suppose that otherwise-derived expectations are a flawed resource, because routinely too general or too conflicted, perhaps we have no choice. This is simply an argument against invoking such expectations, however, not an argument in favor of tailoring normative accounts to explicate textual forms.

409. It is this emphasis on the plurality of documents as the defining feature of writing that chiefly distinguishes the approach of this essay from the argument put forward by Professor Rubinfeld. "Human freedom is the freedom to write: to give one's life a *text*." Jed Rubinfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1145 (1995) (emphasis added). Rubinfeld tellingly notes the pervasiveness (and problematic character) of "speech" metaphors in usual theories of constitutional interpretation. *Id.* at 1123-43. He then seeks to frame a very general model of the idea of writing as an alternative basis for constitutional theory. *See id.* at 1143-84. His crucial notions of commitment, paradigm, and precedent, however, seem to be less constituent elements of an account of constitutions per se, and more a description of familiar dimensions of legality generally. Professor Rubinfeld, I think, has succeeded in showing a sense in which constitutional law is *law*, and in showing that the idea of law is closely tied to the idea of writing. These are important accomplishments. An account of constitutions per se, however, supposes a closer engagement with their particular features as writings than Rubinfeld's model allows him to attempt. It is difficult to understand, for example, how his exploration of the interpretive biases implicit in notions of constitutional rights and powers is not simply a study of biases basic to ideas of rights and powers generally. (In what sense are "intent to prohibit" and "intent to permit," *see id.* at 1171-77, peculiarly constitutional questions?) In any case, his analysis does not easily allow any closer reading ("rights" and "powers" are literally only occasionally constitutional terms: should this matter?).

the form of what purports to be a constitutional interpretation. This camouflage is especially common in federal constitutional law, which affords no (or little) basis for invalidating (refusing to read) constitutional provisions outright. But the phenomenon is also evident in state "constitutional" law. In a sense, the most interesting question concerns how we know that it is a constitution, in fact, that we are expounding. Seemingly, we may be most sure if we find judges or other ostensible interpreters (ourselves) confronting questions that appear to derive from the artifice of text *per se*: those features of the document that cannot be explained except in terms of the particular document itself—its language as such, its conflicts, gaps, organization. "True" constitutional law, as some important level, must be formal. Given the availability of other resources, however, why would a judge or other interpreter choose to concern herself with the details of constitutional form? Textual awareness, we have seen repeatedly, supposes a backdrop, some other regime whose ouster, whose critique, is precisely the purpose textual awareness serves. A written constitution, to the extent that (or rather in the ways that) we are aware of its written form, accomplishes such an ouster. If we concern ourselves with the details of constitutional form, therefore, it is because there is some other body of law that we mean to reject, and whose rejection attention to the written constitution makes possible. Constitutional law—in advance of its application, which may validate or invalidate—is always already critical.