Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith

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I. INTRODUCTION

The deliberations of Florida's Constitution Revision Commission have received much attention. Debates have been publicized. Issues have been scrutinized. The careful preparation for proposing constitutional changes to the people has been chronicled in depth and detail. When the people of Florida finally vote in November, 1978, on the recommendations of the revision commission, they will have had every conceivable opportunity to become familiar with those recommendations. And this is as it should be. The people should know precisely what choices they face when they vote on a revision of their state constitution.

Florida's Constitution Revision Commission is "unprecedented and unparalleled." It is unique in all the nation. Nevertheless, the Constitution Revision Commission may not play as crucial or as lasting a role in the continuing process of constitutional change in Florida as will the Florida Legislature. True, the suggested revision in 1978, unlike the revision in 1968, will not require legislative approval before

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*Author James Bacchus served as an aide to Governor Reubin O'D. Askew during the events described in this note.

1. In re Advisory Opinion of the Governor Request of Nov. 19, 1976 (Constitution Revision Commission), 343 So. 2d 17 (Fla. 1977). At issue in the advisory opinion was when the revision commission should be appointed and whether the proposed revision should be submitted to the voters in 1978 or 1980. Article XI, § 2 of the Florida Constitution provides that the proposal shall be submitted to the people in "the tenth year following that in which this constitution is adopted ...." The constitution was adopted in November, 1968. The court advised that the quoted language was "defective if read literally" in that all the terms of article XI could not be carried out within the time limitations established by the various sections of the article. 343 So. 2d at 21.

The court concluded in the advisory opinion that the drafters of the 1968 constitution had "simply failed to adjust the timetable set forth in Article XI, Section 2" when reapportionment inadvertently prevented them from submitting the document for adoption in 1967, as they had originally planned. Id. at 22. Looking beyond the document to the intent of the framers, the court advised that the commission should be appointed in 1977 and that the proposed revision should be completed in time for submission at the 1978 general election. Id. at 23-24. Justices Karl and Adkins dissented. They argued that the commission should not be appointed until 1978 and that the proposed revision should not be submitted to a vote until November, 1980. Id. at 24-29.


submission to the electorate. The legislators will have no chance to revise the proposed revision in advance of the statewide vote. Yet, after 1978, the Florida Constitution will not be revised again by an appointed commission for twenty years. And the members of the Florida Legislature will, in all likelihood, retain their considerable power to propose piecemeal changes in the form of constitutional amendments throughout those twenty years.

The legislative authority to initiate constitutional change in Florida is broad. It has been used frequently. Florida legislators have introduced 695 amendments or revisions since the adoption of the 1968 constitution. Of this total, thirty-one have been placed on the referendum ballot. Twenty have been adopted by the electorate. It has been said that a state constitution “should be a generic document characterized by clarity, brevity, and stability that embodies timeless principles of government.” If this is true, then either the Florida Legislature is exceedingly adept at discerning “timeless principles” or, more likely, some of the legislative proposals for constitutional change fall somewhat short of timelessness.

4. Fla. Const. art. XI, § 2. A joint resolution was introduced in the 1977 legislative session by Representative Frank Williams of Starke which would have amended this section of the constitution to require that the work product of the Constitution Revision Commission be presented to the legislature rather than directly to the electorate. However, the proposal was not enacted. Fla. H.R.J. Res. 1998 (1977).

5. The constitution revision process established by article XI, section 2 “was patently designed to bypass input from the legislative branch.” 343 So. 2d at 23. In contrast, the proposal by the Constitution Revision Commission in 1967 was altered considerably by the legislature before it was placed on the referendum ballot in 1968. The 1965 commission was created by the legislature and had no constitutional status. See Sturm, supra note 3, at 592.


9. Id.

10. Id.


12. For example, one amendment introduced by Senator Pat Thomas of Quincy and endorsed by the 1975 legislature would have added section 10 to article IV of the constitution, creating a “Capitol and Mansion Commission” to “establish and maintain a basic plan or scheme for the furnishing, decorating and alteration of the governor's mansion and the capitol building complex . . . .” Fla. S.J. Res. 999 (1975). This proposal was defeated at the polls in 1976. Florida Secretary of State, Tabulation of Official Votes, Florida General Election, Nov. 2, 1976.

Similarly, a proposal introduced in the 1977 legislative session by Representative Clark Maxwell of Melbourne would have added section 19 to article III of the constitution, establishing legislative salaries constitutionally at the present level of $12,000 for the rank and file and $15,000 each for the Senate President and the Speaker of the
Presumably, these legislative proposals are subjected routinely to the same debate and the same scrutiny that are expected to characterize the work of the current revision commission. Presumably, the people of Florida will be told exactly what they are deciding when they vote on constitutional amendments drafted by the legislature. But often the debate and the scrutiny of legislative proposals for constitutional change are not all that they should be. And legislative efforts to amend the state constitution frequently do not inspire the public attention that accompanies a full-scale revision. There are no real guarantees, constitutional or otherwise, that Florida voters will be sufficiently informed about the potential impact of constitutional changes proposed by the legislature.

This insufficiency is illustrated all too well by the recent decision of the Supreme Court of Florida in Smathers v. Smith.\textsuperscript{13} The Smith decision offers compelling evidence that change is needed in the way constitutional change is pursued by the Florida Legislature. Additional restrictions should be placed on the legislative power to initiate alterations in Florida's fundamental charter. That power should be checked and limited constitutionally so that changes endorsed by the legislature will be more consistent with the timeless purposes of a constitution. And more stringent requirements should be added to the constitution to assure the people adequate notice of the contents and the foreseeable consequences of any constitutional change initiated by the legislature.

Procedures for constitutional revision should allow an orderly accommodation to emerging popular needs. At the same time, such procedures should encourage constitutional stability and discourage the use of the fundamental law for essentially statutory purposes. Timelessness will often lie in the eye of the beholder. And it is difficult at best to maintain the necessary constitutional balance between change and constancy. In Florida, the actions of the legislature are crucial to the preservation of this precarious balance. For this reason, Smathers v. Smith merits careful and considered attention by all those interested in constitutional change.

\textbf{II. The Resolution}

On June 4, 1976, the Florida Legislature passed and sent to

\footnotesize{House of Representatives, Fla. H.R.J. Res. 1252 (1977). This resolution was not adopted by the legislature. Such proposals would seem to be more appropriate for placement in the statutes than in the state constitution. 13. 338 So. 2d 825 (Fla. 1976).}
Governor Reubin Askew eighty-three pieces of legislation. Among the many measures approved on that final day of the annual legislative session was the Committee Substitute for Senate Joint Resolutions 619 and 1398. Passage of this resolution received relatively little attention at the time. Other bills and other issues seemed more important in the clamor which accompanied the conclusion of the session.

Within a few months, however, CS/SJR 619/1398 became a topic of statewide controversy, inspiring a spirited debate about the fundamental nature of Florida’s government that ultimately reached the state’s highest court. In Smathers v. Smith, the Supreme Court of Florida held that the legislature did not exceed its power to propose constitutional changes by enacting the joint resolution. Without dissent, the court reversed a circuit court decision and allowed the constitutional amendment proposed by the resolution to be placed on the referendum ballot.

Three weeks later, the people of Florida rejected the amendment overwhelmingly. But defeat of the amendment did not end the debate which the amendment incited. Even after judicial decision and popular referendum, the divisive constitutional issues raised by the legislative resolution remain essentially unresolved. The decision in Smathers v. Smith only added to the confusion which surrounds legislative efforts to alter the Florida Constitution.

CS/SJR 619/1398 offered an amendment to article I, section 18 of the Florida Constitution. This amendment, generally known as the “administrative procedures amendment,” would have added the italicized language and caused that section of the Declaration of Rights to read:

SECTION 18. Administrative penalties.—No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law. Any administrative rule of any agency of the executive branch may be nullified by concurrent resolution of the Legislature on the ground that the rule is

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15. Among the issues which preoccupied the legislature during the last few days of the 1976 session were education, automobile insurance, medical malpractice insurance, mortgage fraud, water management, and the state budget. Miami Herald, June 5, 1976, at 1-A, col. 4.
16. 338 So. 2d 825 (Fla. 1976).
18. The final vote was 729,400 “For” and 1,210,001 “Against”—a landslide margin of nearly a half million votes. Florida Secretary of State, Tabulation of Official Votes, Florida General Election, Nov. 2, 1976.
without or in excess of delegated legislative authority and may be suspended as provided by law on the same ground; however, by a majority vote of the governor and cabinet the suspension may be deferred until acted upon by the Legislature. Failure of the Legislature to disapprove the suspension at the next regular session shall automatically reinstate the rule. 19

Senators Philip Lewis of West Palm Beach and Tom Gallen of Bradenton initiated the resolution, 20 which also had the support of Senate President Dempsey Barron of Panama City and House Speaker Donald Tucker of Tallahassee. 21 According to its sponsors, this pro-

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19. CS/SJR 619/1398, supra note 14. Florida law provides that:

[W]henever a constitutional amendment or other public measure shall be submitted statewide to the vote of the people, the substance of such amendment or other public measure shall be printed on the ballot one time, after the list of candidates, followed by the word ‘for,’ and also by the word ‘against,’ with a sufficient blank space thereafter for the placing of the symbol ‘x’ to indicate the voter’s choice.

FLA. STAT. § 101.161 (1975). The same statute indicates that “the exact wording of the substance of the amendment or other public measure to appear on the ballot shall be embodied in the enabling legislation . . . .” Id. To this end, the legislative resolution required that the following statement be placed on the November referendum ballot:

Proposing an amendment to the State Constitution to authorize the Legislature to nullify or suspend any rule or regulation promulgated by the executive branch of state government and providing a procedure for the deferral of any such nullification which rule or regulation is without or in excess of delegated legislative authority.

CS/SJR 619/1398, supra note 14.

Plaintiff Smith maintained that this language was vague and contradicted the actual impact of the proposed amendment. The Secretary of State said the language complied with the statute. The amendment itself did not appear on the ballot.

20. Among the other principal supporters of the resolution were Senator John Ware of St. Petersburg, Senator Kenneth Plante of Winter Park, Representative Robert Hector of Miami, and Representative Curtis Kiser of Dunedin. With the exception of Senator Plante, these legislators were all members of the Joint Administrative Procedures Committee, which had originally developed the resolution. Along with Lewis and Gallen, they intervened for the Senate in the Smith proceeding in Leon County Circuit Court. Later, they submitted a brief on appeal to the Florida Supreme Court. Smathers v. Smith, 338 So. 2d at 826.

21. The resolution was passed in its original form by the Senate and certified to the House by a 30-6 vote. FLA. S. JOUR. 457 (1976). This was substantially more than the three-fifths vote of the membership required to propose a constitutional amendment. See FLA. CONST. art. 11, § 1. On June 1, the resolution was read for the first time in the House and then referred to the Committee on Governmental Operations. FLA. H.R. JOUR. 1008 (1976). The following day, the resolution was removed from the Committee on Governmental Operations on a motion by Representative Hector. Id. at 1061. On June 2, the resolution was placed on the special order calendar. Id. at 1080. On June 3, the resolution was read in the House a second time. Id. at 1183. On a motion by Representative Hector, the rules were waived and the resolution was read the required third time. Id. at 1185; FLA. CONST. art. 3 § 7. The House voted for passage, 51-48. FLA. H.R. JOUR. 1183 (1976). This was considerably less than the needed three-fifths vote.
posed amendment was intended as a constitutional safeguard against the power of executive agencies to indulge in "phantom government." 22

In 1974, the legislature sought to dispel “phantom government” with passage of a strengthened Administrative Procedure Act, 23 which established guidelines for appeal and review of executive agency rules and serves as “a legislative check on legislatively created authority.” 24 The provisions of the Administrative Procedure Act limit discretionary actions of executive agencies and provide for public participation in the rulemaking process. 25 The act created a Joint Administrative Procedures Committee of the legislature to review the statutory authority for executive rulemaking and determine whether executive agencies are acting within the scope of the powers delegated to them by the legislature. 26

The impetus for CS/SJR 619/1398 came from the Joint Adminis-

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However, immediately thereafter, Representatives Hector, Kiser, and Barry Kutun of Miami offered an amendment which led to the requisite House approval of the resolution. They sought to add, following the word “ground” in the resolution, the phrase “however, by a majority vote of the governor and cabinet the suspension may be deferred until acted upon by the Legislature.” They also moved to incorporate this proposed addition in the title to the amendment, which would eventually appear on the general election ballot. With these changes, the resolution was submitted to a second vote by the House and was passed, 106–0. Id. at 1183–84. The resolution was then certified to the Senate, where it was passed as amended by the House 29–6. Id. at 654. In addition, on a motion by Senator Ware, the Senator adopted yet another amendment, adding to the title the phrase "which rule is without or in excess of delegated legislative authority." Fla. S. Jour. 669 (1976). This amendment was adopted by the Senate, 25–9, and, after a final certification, by the House, 107–0. Fla. H.R. Jour. 1259 (1976); Fla. S. Jour. 669 (1976). The measure was signed by the officers and filed with the Secretary of State on June 10. Fla. H.R. Jour. 1259 (1976).

22. Miami Herald, Oct. 18, 1976, at 10–A, col. 1. "Phantom government" is a popular phrase used to describe actions by government agencies which are not specifically authorized by legislation.


tative Procedures Committee. Members of the committee were disturbed by the reluctance of some executive agencies to amend rules to which the committee objected. In the committee’s first year of operation, 1975, agencies refused to modify what the committee described as invalid rules in only about five percent of the cases. However, by 1976, the agencies were refusing to change one of every three rules to which the legislators objected. Most of these refusals were made by the Department of Health and Rehabilitative Services and the Department of Environmental Regulation, two agencies which are responsible directly to the Governor and not to the Governor and the cabinet sitting collectively as an executive board.

The adamance of these and other executive agencies may not have been anticipated by some of those who endorsed the Administrative Procedure Act in 1974. But most legislators realized by 1976 that

27. Interview with Carroll Webb, Executive Director, Joint Administrative Procedures Committee (Aug. 3, 1977).

28. Id. Under the present provisions of the Administrative Procedure Act, an agency is given three options when the Joint Administrative Procedures Committee objects to a rule. The agency may withdraw the rule in whole or in part; it may modify the rule to meet the objection; or it may refuse to modify or withdraw the rule. Fla. Stat. § 120.54(10)(a) (Supp. 1976). When CS/SJR 619/1398 was passed, if an agency refused to modify or withdraw a rule, the committee’s only authorized response was to give notice in the Florida Administrative Weekly stating the grounds for the objection. Fla. Stat. § 120.54(12) (Supp. 1976). In addition, the committee could require that a footnote be placed with the rule in the Florida Administrative Code stating that the committee had found the rule to be outside the delegated legislative authority. Id.

29. Memorandum from Carroll Webb to Senator Lew Brantley, at 2 (Oct. 21, 1976). In 1975, 282 objections to agency rules were made by the committee. In 13 instances, or about 4.6% of the cases, the agency refused to modify the rule. Interview with Carroll Webb, supra note 27.

30. “In the first 7 months of 1976 we find of our 108 objections to rules, the agencies have refused to modify or change 58 of these rules or about 52 percent. That alone answers the question why we need this constitutional amendment.” Memorandum from Carroll Webb to Senator Lew Brantley, supra note 29. In all of 1976, the committee objected to 154 executive agency rules. Of this total, the agencies refused to modify 56 rules, or about 36%. Interview with Carroll Webb, supra note 27. This was nearly nine times the percentage of refusals in the previous year. See note 29 supra. Through the first seven months of 1977, the committee had entered objections to 58 agency rules. The agencies had refused to modify 24 of those rules, or about 41%. Interview with Carroll Webb, supra note 27. Thus, while the number of objections decreased slightly, the percentage of refusals continued to increase.

31. Interview with Carroll Webb, supra note 27.

32. When the Act was originally drafted, it was felt that the expressed, publicized disapproval of a joint standing committee of the Legislature would be a sufficient deterrent to protect the people of Florida from the effects of unlawful rules and regulations. In short, it was anticipated that it would be a rare occasion when an agency would refuse to modify a rule to which the Committee had objected and would insist upon continuing to enforce it after having been notified that the rule was without authority and violative of legislative intent. Memorandum from Carroll Webb to all Members of the Legislature, entitled “Changes
the agencies of the executive branch did not always welcome the oversight of a legislative committee. This realization gave rise to the joint resolution. As one supporter of the administrative procedures amendment explained, "It became obvious that unless the Committee's review could be made genuinely meaningful the basic thrust of the [Administrative Procedure] Act would be thwarted."33

The Joint Administrative Procedures Committee depicted the proposed amendment as "simplicity itself."34 "What the amendment does can be stated in a few words," the committee's executive director wrote in a memorandum circulated to all legislators shortly after adoption of the resolution.35

Whenever an agency adopts an illegal rule, that is, a rule which goes beyond its legislatively delegated authority, that rule may be nullified by a Concurrent Resolution of the full Legislature and may be suspended as provided by law in the interim unless the Governor and Cabinet act to defer the suspension.36

Thus, CS/SJR 619/1398 ostensibly would have done little more than write the statutory principles of the Administrative Procedure Act into the Florida Constitution.37 Within the legislature, the resolution had few opponents.38


33. Memorandum from Carroll Webb to all Members of the Legislature, supra note 32 at 4. "The concept of legislative oversight is the cornerstone of the Administrative Procedure Act," Webb said. Id. "If the Committee's review of administrative rules is to have no effect, then the effectiveness of the whole act is so diminished as to make it questionable whether the remaining provisions of the Act can be justified." Id.

34. Id. at 5.

35. Id. No mention was made in the memorandum of the obvious irony in explaining the supposed consequences of a resolution to members of the legislature after they had endorsed it with their votes.

36. Id.

37. "What could be more important than that?" Senator Lewis asked one reporter. "If this amendment does anything different from what it says, I want to know." Miami Herald, Oct. 18, 1976, at 10-A, col. 1. Senator Lewis was then chairman of the Joint Administrative Procedures Committee.

38. The final vote in the Senate was 29-6; there were no opposing votes in the House. See note 21 supra. Voting against final passage in the Senate were Senators Edgar Dunn of Daytona Beach, George Firestone of Miami, Jack Gordon of Miami Beach, Robert Graham of Miami Lakes, Vernon Holloway of Miami, Harry Johnston of West Palm Beach, Kenneth Myers of Miami, Richard Renick of Coral Gables, and Sherman Winn of Miami. FLA. S. JOUR. 654 (1976). One House member, Representative Barry Richard of Miami, voted "nay" after the final roll call vote, which was 107-0. Another, Representative David Lehman of Hollywood, changed his vote from "yea" to "nay" after the final vote. FLA. H.R. JOUR. 1259 (1976).
Outside the legislature, however, opposition to the administrative procedures amendment soon proved formidable. Governor Askew had signed the Administrative Procedure Act in 1974. He voiced no public opposition to the proposed constitutional amendment during the 1976 session. However, several weeks after the session ended, he vetoed Senate Bill 1384, the implementing legislation for the proposed constitutional amendment. This was the first public indication that


40. However, in his opening address to the 1976 session, the Governor had departed from the programmatic tradition of his previous legislative addresses and delivered a sustained lecture on the necessity for separation of powers in the state government. This address was delivered following months of increasing friction between the Askew administration and some members of the legislature. Florida Times Union, Apr. 11, 1976, at B-2, col. 1.

Following his reelection in 1974, the Governor had claimed a “mandate” from the people for full disclosure of personal finances by elected officials, a reform the legislature had resisted for several years. Address by Reubin O’D. Askew, Governor of Florida, to the Florida Legislature (Apr. 8, 1975); FLA. H.R. JOUR. 3, 8 (1975). Senate President Dempsey Barron responded to this, and to other attempts by Askew to influence the legislature, by telling the Governor—from the Senate podium and on statewide public television—to “stay the hell out” of the business of the Senate. Miami Herald, May 24, 1975, at B-2, col. 1. Askew replied the following week: “It is the people’s Senate and the business of the Florida Senate is the people’s business and I’m up here representing the people of Florida.” Florida Times Union, May 24, 1975, at B-2, col. 1. “I don’t intend to let anyone, including Mr. Barron, intimidate me from doing anything that I think I must do for the people of Florida . . . . I’ve been fighting for 17 years and I intend to keep fighting.” Miami Herald, May 24, 1975, at 1-A, col. 1.

The Governor then took the financial disclosure issue, together with other ethics proposals, to the people through use of the initiative provision in the Florida Constitution. See FLA. CONST. art. XI, § 3. The Askew campaign for what the Governor described as the “Sunshine Amendment” began in November, 1975, and continued throughout the 1976 legislative session, adding little to prospects for harmony between the Governor and the legislative leadership. Miami Herald, Jul. 30, 1976, at 1-A, col. 3. Meanwhile, Askew and a number of legislators engaged in confrontations on other issues, ranging from the delivery of social services to the investigative powers of the Florida Department of Criminal Law Enforcement. Florida Times Union, Apr. 11, 1976, at B-2, col. 1. The climax came when Askew used his traditional forum on the opening day of the 1976 legislative session, not to submit specific proposals, but rather to offer what was described as a “civics lesson” in Florida government to the surprised lawmakers. Id. Askew reminded them:

There is a separation of powers in Florida—a separation of powers established by our Constitution . . . . I would never question the right of the Legislature to exercise responsibilities reserved for the legislature by our Constitution. As someone who served in the legislature for twelve years, I know that good government in Florida must rely, in part, on a proper use of legislative authority. But that authority does not extend to unwarranted intrusions and unnecessary invasions into the responsibilities of the executive branch.

FLA. H.R. JOUR. 4, 6 (1976) (Address by Reubin O’D. Askew, Governor of Florida, to the Florida Legislature (Apr. 6, 1976)).

41. FLA. S. JOUR. 122 (1977) (Veto message of Reubin O’D. Askew, Governor of Florida, regarding Senate Bill 1384 (June 29, 1976)). Senate Bill 1384 would have created
the Governor disapproved of the administrative procedures amendment. In his veto message, the Governor maintained that adoption of the proposed amendment "would jeopardize the rights of the individual citizen through an unwarranted intrusion into the province of the executive and judicial branches." He denounced the implementing bill and the companion resolution as "an experiment in government foreign to our tradition of checks and balances . . . ."43

However, while the Governor can veto implementing legislation, he cannot veto proposed amendments to the state constitution.44 This

42. Veto message, supra note 41.

43. Id. The Governor's veto message echoed the concerns he had expressed in his earlier legislative address: "Although the proponents have claimed that this process would protect the citizen from excesses in rulemaking, in my opinion, it would do the opposite." Id. He praised the Administrative Procedure Act, describing it as "a system of administrative law which is viewed as a model by other states" and "already provides a remedy against overreaching by executive rulemaking." Id. But going beyond the Act in the manner described in Senate Bill 1384, he insisted, would do away with an individual citizen's right under the Act to "an impartial, legal hearing before a professional hearing officer or judge . . . ." Id. Instead, the vetoed measure would substitute "the political forum" of a legislative committee and place the rights of the people "in the hands of a growing legislative bureaucracy." Id. In addition, the Governor argued that the constitutional amendment, if enacted, would bypass the established checks and balances of judicial review and gubernatorial veto, and thus was "inconsistent with the basic structure of the Florida Constitution." Id.

44. FLA. CONST. art. XI, § 1. This was also true under the 1885 Constitution. "It is not necessary for the Governor to concur in a proposed amendment to the Constitution." Collier v. Gray, 157 So. 40, 45 (Fla. 1934) (citations omitted). Rather, [the Constitution itself provides for the method for its amendment, modification, or repeal of any particular section. It cannot be modified, amended or repealed in any particular by legislative fiat, executive usurpation, or judicial interpretation or construction. If there is to be modification, amendment, or repeal, it must be in the manner and method provided for in the fundamental law itself. State v. Florida State Improvement Comm'n, 60 So. 2d 747, 754 (Fla. 1952).
is a power reserved to the people.\textsuperscript{45} And Senate leaders promised to override Askew's veto of Senate Bill 1384 following what they expected would be an endorsement of the administrative procedures amendment by the voters in the November general election.\textsuperscript{46} The debate over the power of the legislature to propose changes in the Florida Constitution had begun.

III. The Suit

In the aftermath of the Governor's veto, Lakeland attorney Chesterfield Smith entered the growing controversy. Smith was chairman of Florida's Constitution Revision Commission from 1965 to 1968. He shared with Governor Askew a concern about what seemed to them to be an increasing legislative encroachment on the rightful powers of the executive and judicial branches of Florida's state government.\textsuperscript{47} On September 8, Smith filed suit as a "citizen, taxpayer, and elector of the State of Florida" in Leon County Circuit Court.\textsuperscript{48} He depicted the proposed amendment as an "unlawful, improper, and wasteful expenditure of public funds" and asked for a permanent injunction to restrain Secretary of State Bruce Smathers, the chief state elections officer, from placing the issue on the ballot.\textsuperscript{49}

Smith argued that the administrative procedures amendment was unconstitutional on four separate grounds: it would have altered by "implication and indirection" the separation of powers required by article II, section 3 of the Florida Constitution;\textsuperscript{50} it was not an "amendment" of a single section but rather a "revision" of at least three articles and yet was not portrayed as a "revision" by the legislature;\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{45} The people, of course, exercise the ultimate veto when they cast their votes. \textit{See} FLA. CONST. art. XI, § 5; art. X, § 12(d).
\item \textsuperscript{46} "He has laid down the gauntlet," Senator Lewis said of Askew's veto. Tallahassee Democrat, Jul. 11, 1976, at 10-A, col. 2. "One of the biggest problems we face today is a Phantom Government interfering with our lives," declared Senator Brantley, who claimed the amendment would help prevent such interference. Miami Herald, Oct. 18, 1976, at 10-A, col. 1. Likewise, Senator Ware described the proposal as "a legislative response to the growing trend of the executive department to write laws not authorized by statute." Tallahassee Democrat, Jul. 11, 1976, at 10-A, col. 2.
\item \textsuperscript{47} Address by Chesterfield Smith, Ivy League Club, Sarasota, Florida (Feb. 3, 1976).
\item \textsuperscript{48} Smith v. Smathers, No. 76-1931 (Fla. Cir. Ct. Leon County Sept. 14, 1976).
\item \textsuperscript{49} Complaint at 4.
\item \textsuperscript{50} Complaint at 5. FLA. CONST. art. II, § 3 provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."
\item \textsuperscript{51} Complaint at 5, 18. Article XI, section 1 of the Florida Constitution, concerning legislative proposals for constitutional amendments, reads: Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of
it violated article I, section 2 of the Florida Constitution and the fourteenth amendment to the United States Constitution by delegating legislative powers to a malapportioned legislative committee and, thus, denied equal protection of the laws; and it threatened "misunderstandings and conflicts" by including a confusing double negative in the second of the two sentences that would have been added to article I, section 18.

52. Complaint at 5. Article I, section 2 of the Florida Constitution, entitled "Basic Rights," reads:

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

53. The second sentence reads as follows: "Failure of the legislature to disapprove the suspension at the next regular session shall automatically reinstate the rule." CS/SJR 619/1398, supra note 14. In his complaint, Smith observed, "Whether or not this double negative is the result of unfortunate draftmanship is not evident. The statement is, however, unintelligible and can lead to absurd results." Complaint at 21-22. He then attempted to illustrate what those results might be:

Suppose an agency of the executive branch enacts a rule. The Administrative Procedures Committee, or whatever entity has been delegated the authority to suspend rules, then suspends the rule. The Governor and Cabinet take no action and the rule remains 'suspended' until the next regular session of the legislature. Must the legislature resolve to approve or disapprove the suspension? Must the legislature fail to disapprove the suspension by a vote on a concurrent resolution resolving to disapprove the suspension? Suppose the legislature does nothing at its next regular session. What if the legislature, in fact, approves of the suspension but does not pass a concurrent resolution nullifying the rule? According to the wording of the proposed amendment, the legislature having failed to disapprove the suspension, the rule is automatically reinstated. What happens if the legislature resolves to approve the suspension? The legislature thus has exhibited its approval of the suspension and its disapproval of the rule, which by the opening words of the amendment would seem to nullify the rule. But by failing to disapprove the suspension, the rule is automatically reinstated. There, therefore, would be produced a rule which is nullified and reinstated at the same time.

Id. (emphasis in original). Later, in argument before the supreme court, the defendant conceded that the amendment was flawed by "vagueness" and "poor draftsmanship" and was "contradictory" in places. Miami Herald, Oct. 6, 1976, at 16-D, col. 5. The defendant maintained, however, that "the court would be hard pressed to find a fatal defect to keep it from the people . . . who in their wisdom . . . will vote it down if they find it contradictory." Id.
Smith also maintained that the notice of the amendment's contents which would actually appear on the ballot violated Florida law by not accurately depicting the amendment's true effect. And, finally, he argued that the wording of both the ballot notice and the administrative procedures amendment itself was inadequate to inform the public of what he perceived as the substantial shift in governmental power that would result from adoption of the amendment. According to Smith, "[T]he proposed amendment, without giving notice thereof to the electorate, would constitute a wide-ranging revision of the Constitution, fundamentally altering the carefully constructed constitutional separation of powers among the legislative, judicial and executive branches of government of the state."

Smith did not contend that the separation of powers in Florida could not be changed. Instead, he argued that the state constitution provides that the separation of powers can only be changed "expressly." And Smith argued that the proposed constitutional amendment would authorize "the exercise by the legislative branch of power..."
appertaining to the judicial and executive branches, without expressly so providing."58 "On the contrary," Smith said, "the proposed transfer of powers . . . , far from being express, appears designedly to be cast by the amendment in a form to avoid calling attention to this fact."59 Furthermore, the amendment was "not even germane" to the section of the constitution to which it would have been added.60

Specifically, Smith maintained that adoption of the administrative procedures amendment would transfer inherent judicial power from the judiciary to the legislature. The judiciary would no longer have the exclusive and traditional right "upon appropriate presentation of the issue, to pass judgment on the meaning, scope, and application of a legislative enactment . . . ."61 Moreover, "[b]y the proposed amendment the legislature would be granted the right to make the entirely judicial determination as to whether an administrative rule, enacted under purported legislative authority, was in fact authorized by law."62 In addition, the language of the amendment "would empower the legislature to delegate to a committee of the legislature, or some legislatively designated entity, the right to make this judicial determination . . . ."63

Smith argued that the proposed amendment would infringe on inherent executive powers by transferring most of the rule-making authority from the executive to the legislature.64 This would supposedly have included not only rules implementing legislation, but also rules related solely to the internal administration of the executive branch.65 As Smith described it, "The proposed amendment would empower the legislature to accomplish by indirection what the constitution forbids directly."66 That is, traditionally, a legislature dissatisfied with a rule enacted by an executive agency would enact legislation removing rule-making authority from that agency. Under the Florida Constitution, such legislation would be subject to an executive veto.67 Smith believed that the administrative procedures amendment would permit the legislature, or conceivably a single legislative committee, to circumvent the veto power of the Governor and, "[f]or an executive veto of the legislation (subject to override), there would be substituted

58. Complaint at 7.
59. Id.
60. Id.
61. Id. at 8.
62. Id.
63. Id.
64. Id. at 12.
65. Id. at 11.
66. Id. at 13.
a legislative veto of executive action not subject to override or re-
view." \(^{68} \)

In his complaint, Smith acknowledged the legitimacy of legislative
fears of "phantom government." \(^{69} \) He conceded that CS/SJR 619/1398
had been conceived "in good faith and in an attempt to meet this
governmental concern." \(^{70} \) Even so, he insisted, this legislative attempt
to eliminate "phantom government" would only substitute a more
objectionable form of government for Florida by upsetting the balance
of power among the legislative, judicial, and executive branches. The
voters would be revising the constitution when they thought they were
merely amending it. And they would be given no indication of the
possible results of their votes at the polls. \(^{71} \)

Smith did not deny that the legislature could have proposed a
revision of one or more articles of the constitution or even a revision
of the entire constitution had the legislators so desired. He admitted
that those alternatives were clearly available to the legislature under
the broad terms of article XI, section 1. \(^{72} \) However, he argued that
the administrative procedures amendment could not be submitted
to the voters "[i]n the manner in which it has been proposed." \(^{73} \)
What posed as an "amendment," he declared, was actually a "revision." The
legislative proposal was "constitutionally defective and unauthorized
because it is styled as an 'amendment' to a section when in actuality
it is a 'revision' of the Florida Constitution which would amend,
modify, change or otherwise affect multiple provisions of the Florida
Constitution, as well as substantially change established constitutional
principles of government." \(^{74} \) The administrative procedures amend-
ment was "innocently worded." \(^{75} \) But Smith insisted that it would
have the "extraordinary effect . . . of revising the constitutional system
of checks and balances between the separate branches of government,
of fundamentally altering the existing separation of powers between
the three branches, of transferring the powers of two of the branches

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68. *Complaint* at 13.
69. *Id.* at 17.
70. *Id.*
71. Smith suggested that instead of seeking passage of constitutional amendments,
the legislature should "control 'phantom government' by careful oversight . . . , by
lobbying the agencies, by legislative investigations, by the enactment or repeal of laws,
by controlling the expenditure of funds through the appropriation process, by publicity
campaigns, by instituting judicial review of agency rules and decisions, and by numerous
other actions . . . ." *Id.* at 18.
72. *Id.*
73. *Id.* at 8.
74. *Id.* at 18.
75. *Id.* at 19.
to a third, and of compromising the right to judicial review." To Smith, this was reason enough to conclude that the legislature had exceeded its powers to propose constitutional changes.

The suit proceeded quickly. Secretary of State Smathers moved to dismiss Smith's complaint, alleging that Smith did not have standing to invoke the equitable jurisdiction of the court. The motion was

76. Id. at 19-20.
77. Jurisdiction in the suit was based on a constitutional provision giving the circuit courts "the power of direct review of administrative action prescribed by general law." FLA. CONST. art. V, § 5(b). The administrative action in question was the ministerial duty of the Secretary of State to place the proposed amendment on the ballot. See Crawford v. Gilchrist, 59 So. 963, 967 (Fla. 1912). Smith claimed this would result in the unlawful and unauthorized expenditure of public funds. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 2. The defendant argued that Smith could not sue because he had alleged no injury particular or special to himself, but merely an injury that he shared in common with the other taxpayers in the state. Defendant's Motion to Dismiss at 1. The defendant relied on Rickman v. Whitehurst, 74 So. 205 (Fla. 1917), in which the Supreme Court of Florida held that, in order to sue the state in an equitable proceeding, a citizen and taxpayer must demonstrate a special injury particular to himself and different from the injury to all other citizens and taxpayers. See Defendant's Memorandum of Law in Support of Motion to Dismiss for Lack of Standing.

In reply, Smith maintained that his suit represented an acknowledged exception to the "special injury" rule established by Rickman. He noted a long series of decisions by the supreme court to the effect that a taxpayer has standing to sue without special injury to enjoin the unlawful expenditure of public funds and to protect tax funds against illegal disbursements which would result from unauthorized or illegal actions of public officials: Wester v. Belote, 138 So. 721 (Fla. 1931); Crawford v. Gilchrist, 59 So. 963 (Fla. 1912); Anderson v. Fuller, 41 So. 684 (Fla. 1906); Peck v. Spencer, 7 So. 642 (Fla. 1890); Lanier v. Padgett, 18 Fla. 842 (1892). Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 2-3. He also cited the long line of cases in which the court had accorded standing to citizens, residents, and taxpayers who challenged proposed constitutional amendments on the basis that the proposals were unconstitutional in form and content and, therefore, would cause an unlawful expenditure of public funds: Goldner v. Adams, 167 So. 2d 575 (Fla. 1964); Pope v. Gray, 104 So. 2d 841 (Fla. 1958); Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958); Gray v. Golden, 89 So. 2d 785 (Fla. 1956); Gray v. Winthrop, 156 So. 270 (Fla. 1934); Gray v. Moss, 156 So. 262 (Fla. 1934); Crawford v. Gilchrist, 59 So. 963 (Fla. 1912). Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 3-4.

According to Smith, "[n]one of the cases supporting the 'special injury' doctrine overrule or treat the recognized exception made in circumstances where a proposed constitutional amendment is being challenged by a taxpayer alleging that the submission of the proposal to the electorate will result in unlawful expenditure of public funds . . . ." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 6. Furthermore, Smith argued that his case could be distinguished from the rule established by the Supreme Court of Florida in Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972). In Horne, the court held that "where there is an attack upon constitutional grounds based directly upon the legislature's taxing and spending power, there is standing to sue without the Rickman requirement of special injury, which will obtain in other cases." Id. at 663 (emphasis in original). Smith said those "other cases" mentioned in Horne do not include suits such as the one he filed against the Secretary of State. Instead, he contended that the Horne decision was "narrow" and "did not overrule any . . . prior decisions granting such standing in taxpayer suits." Plaintiff's
denied. The legislative sponsors of the resolution intervened on behalf of Smathers. Nonetheless, the circuit court entered summary judgment for Smith.

The circuit court held that the legislative resolution violated article II, section 3 of the Florida Constitution since it was "not express" and would "cause a change in the separation of powers principle." In addition, the circuit court agreed with Smith that the resolution violated article XI, section 1 because it was "so vague and ambiguous" that it was "improperly proposed." The circuit court made no mention of Smith's other arguments. With the general election less than six weeks away, this summary judgment prohibited the Secretary of State from placing the proposed amendment on the ballot. Smathers immediately took a direct appeal to the Supreme Court of Florida in an effort to resolve the constitutional issues at stake.

Memorandum in Opposition to Defendant's Motion to Dismiss at 11. Thus, the Horne court not only reaffirmed the Rickman rule, but also endorsed the exceptions to that rule. The circuit court agreed with this argument and denied the defendant's motion to dismiss. The issue of standing was not raised in the later appeal to the supreme court.


79. Senators Lewis, Ware, Plante, and Gallen and Representatives Hector and Kiser were allowed to intervene on similar grounds to those which Smith used in filing suit: that money would be wasted by leaving the amendment off the ballot and requiring the measure to go back through the legislative process again in the next regular session. Florida Times Union, Sept. 16, 1976, at B–2, col. 4.


82. Id.

83. Smathers pursued the appeal as a ministerial function of his position as Secretary of State and without taking any public stand either for or against the proposed amendment. He did not endorse the proposed constitutional change until after the circuit court decision was reversed by the supreme court. Even then, he did not campaign vigorously for passage of the amendment. "I don't want to put myself in opposition to or argument with any individual,' Smathers said. 'I'm just expressing my own opinion as head of the Department of State.'" Miami Herald, Oct 16, 1976, at B–2, col. 5.

In contrast, Attorney General Robert Shevin eventually expressed strong public opposition to the amendment. As required by law, the Attorney General assisted Smathers in preparing and presenting his case in Smith. However, shortly after the supreme court decision, Shevin denounced the amendment. "The people of Florida are being required by the Legislature to vote on an amendment to their constitution without knowing what the full effects of the amendment would be," the Attorney General said. News Release, Office of the Attorney General, Tallahassee, Florida (Oct. 20, 1976). The proposed amendment, he declared, "envisions a radical and extreme change in our state system of democratic government." Id. It "gives to a select group of legislators and their small staff the authority to void the laws of their state." Id.

In a departure from conventional procedure, the supreme court temporarily relinquished jurisdiction in the case after it arrived on appeal. This was done by Chief
By this time, the administrative procedures amendment had long since emerged from its initial obscurity. Governor Askew continued his denunciations. At one point, he called the proposed amendment "the most insidious proposal that has come before state government since I've been there," for it would put "concentrated, unchecked power . . . in the hands of a few." Following the Governor's lead, many of the major newspapers in the state lined up against the proposed amendment.

Justice Overton on motion by the defendant because, initially, the circuit court judge did not specify his reasons for granting Smith's motion for summary judgment. Smathers v. Smith, No. 50,288 (Fla. Sept. 28, 1976). The Florida Constitution allows direct appeal to the supreme court of decisions by district courts of appeal and orders by trial courts "construing a provision of the state or federal constitution." FLA. CONST. art. V, § 3(b)(1).

That same day, the case was returned briefly to the circuit court, where the Secretary of State moved to amend the summary judgment. He explained that "[u]nless the Court gives reasons for its Final Summary Judgment, construing a provision of the State Constitution, there is a serious question as to whether a direct appeal may be taken to the Florida Supreme Court." Motion to Amend Final Summary Judgment, Smith v. Smathers, No. 76–1931 (Fla. Cir. Ct. Leon County, Sept. 28, 1976). The circuit judge then gave his reasons, which supplied the constitutional construction required for a direct appeal. Order Amending Summary Judgment, No. 76–1931 (Fla. Cir. Ct. Leon County, Sept. 29, 1976).


85. Id. "They can suspend anything we do," Askew said about the increased legislative power which he believed would result from adoption of the amendment. "If they're able to do that, they will break down the whole system of government." Id. On another occasion he said, "You have in this amendment the most insidious attack on our basic government in its two hundred years of existence." Miami Herald, Oct. 18, 1976, at 10-A, col. 1. The Governor criss-crossed the state throughout September and October, focusing much of his attention in the electoral campaign on the administrative procedures amendment. Id.

86. The St. Petersburg Times observed:

We suspect on this one the Court will concur with constitutional lawyer Chesterfield Smith that the amendment is both ambiguous and a violation of the separation of powers doctrine. However, if the court should reverse . . . , it will be up to the voters to reject this legislative power grab and maintain a proper balance between the branches of Florida government.


"While the arguments may be technical and complicated, the effects of the changes are simple enough to understand," said the Miami Herald.

The Legislature would usurp from the Governor and Cabinet and their agencies some of the authority reserved to them by the State Constitution.

. . . .

We do not like the amendment because it does violence to the principle of the separation of powers. Our position, as stated earlier, is that the voters should be given the opportunity to kill the monster themselves, instead of leaving the task to the court. But either way, the proposal needs to be laid to rest.


The Orlando Sentinel Star took yet another approach: "Our reason for opposing the amendment is that it isn't necessary. The legislature already has the power to enact laws that curb executive branch power. Indeed, every session sees a sheaf of
But the legislative leadership remained firmly in favor of the resolution. In a letter mailed to newspaper editors throughout the state, Senator Lewis and the new chairman of the Joint Administrative Procedures Committee, Representative Robert Hector of Miami, described Smith's suit as a "last-minute . . . attempt to prevent Florida voters from having the opportunity to curb the practice of state bureaucrats in the promulgation of rules which have the full force of law, but which have no statutory authority." The legislators compared these supposed practices of the executive agencies to "reports of the tapping of thousands of telephones of innocent citizens by the Federal government without legal authority . . . ." Meanwhile, Secretary of State Smathers advised the supreme court that a prompt ruling was imperative. He said he had to print and distribute the ballots no later than October 11 to be assured that the proposed constitutional amendments would appear before the electorate.

It was in this anxious and politically perilous context that the supreme court considered Smathers' appeal. Briefs were hurriedly submitted by all parties to the controversy. Oral arguments were heard

87. Letter from Senator Lewis and Representative Hector to editors of Florida newspapers (Sept. 21, 1976) (copy on file with author).
88. "Actually, even October 11 was too late," the Director of the Division of Elections in the Department of State, Mary Singleton, said later. "Many people did not get their absentee ballots in time to vote because of the Smith suit and other challenges to the ballot which were then before the court. Some people, in effect, lost their franchise." Interview with Mary Singleton, Director of the Division of Elections, Department of State (Mar. 28, 1977).

When Smith filed his suit, 8,000 posters were being printed with the full text of all proposed amendments. These posters were to be distributed originally in the first week of October to all the polling places in the state. Counties ordinarily prepare their ballots for the printers between the first and second weeks of October in an election year. When the ballots return from the printers, they are placed in the machines, and the machines are then inspected and sealed. It is still possible thereafter to remove an amendment from the ballot, but the expense of such a change runs into thousands of dollars. Id.

90. An amicus curiae brief was submitted by the Florida Audubon Society, which intervened on appeal in support of Smith. The Audubon Society agreed with Smith that the proposed amendment was not an amendment of a single section but rather a revision of several articles. "The basic issue here is fairness," the Society contended. "Are those offering the change giving the public a fair chance to evaluate the proposal and freely approve or disapprove it?" Brief of Florida Audubon Society as Amicus Curiae at 1.

The Audubon Society joined other opponents of the amendment in a statewide campaign to defeat it once the court restored it to the ballot. Environmentalists feared that the amendment would allow land developers to abolish the stringent dredge-and-fill permit rules of the State Department of Environmental Regulation by lobbying the legislators on the Joint Administrative Procedures Committee. Tampa Tribune, October 12, 1976, at 7-A, col. 3. "It is purely and simply a very bad and dangerous amendment..."
Within several days. During oral argument, it appeared the court might affirm the circuit court decision. Pointing to the second sentence of the proposed amendment, Justice Boyd suggested that the court would have to interpret "disapprove" to mean "approve" to make any sense of the amendment. "If we're sitting here having difficulty knowing what it means," he asked, "how can we expect hundreds of thousands of others to know what it means?" Justice England added—in apparent agreement with Smith—that the legislature already had the power it needed to change rules by abolishing an agency's rule-making power or by simply not voting any money for the agency in the state budget. And Chief Justice Overton asked questions which seemed to reveal a concern on his part that the proposed amendment would diminish the constitutional powers of the judiciary—again reflecting Smith's assertions.

Yet, on October 11, a unanimous supreme court reversed the lower court and restored the administrative procedures amendment to the referendum ballot. Justice England wrote the majority opinion, which was joined by Chief Justice Overton and by Justices Roberts, Adkins, Sundberg, and Hatchett. Justice Boyd submitted a concurring opinion. The court dismissed the separation of powers issue and we're going to do everything in our power to make sure it's defeated," said the Society's executive director, Hal Scott. Id.

92. Id.
95. Id.
97. 338 So. 2d at 825.
98. Id. at 832. Justice Boyd concurred with the majority's opinion in the case except for that portion approving of Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), in which the court rejected a proposed initiative petition which sought to establish a unicameral legislature. Justice Boyd noted his dissent in Gunter, adding, "I still feel that the people should have been permitted to vote upon the question of whether to adopt a unicameral Legislature." 338 So. 2d at 832. Applying this reasoning to Smith, he explained:

Recognizing the merit in both positions, it is my opinion that the doubt should be resolved in favor of permitting the people to vote on the matter. Courts should not restrict the people from expressing their views through the ballot, except in those cases in which the questions presented are clearly prohibited by the Constitution.
and most of Smith's other arguments in a brief footnote, describing them as "without merit and not sufficient to warrant discussion in the time we have available." Instead, the majority opinion focused solely on whether the suggested amendment conformed with article XI, section 1 of the Florida Constitution, which specifies the manner in which the legislature may propose constitutional amendments.

"[W]e approach the subject matter of [this] case," the court explained, "mindful of our limited role in reviewing constitutional proposals which have been adopted by the Legislature for direct submission to the people." The court acknowledged that the argument for placing the amendment on the ballot seemed to request a judicial rewriting of article XI, section 1, for it implied that the legislature could "disguise" an article revision or a rewrite of the entire constitution "as a mere section amendment" simply because the legislature was constitutionally authorized to employ all three of those means of proposing constitutional change. The court stressed the necessity for "germanity" in placing amendments in the constitution. The majority agreed that the proposed amendment had only "the barest margin of relevance" to the constitutional section to which it would be added. In fact, the passage of the joint resolution proposing the amendment reached "the outer limits of legislative authority conferred by the people . . . ."

But the court concluded that the proposed amendment was indeed an "amendment" and not a "revision," despite Smith's allegations. And, however bare the margin of relevance, the proposal nevertheless had "some connection, albeit tenuous" to the constitutional section it would have amended. There was "doubt" as to whether the legislature had exceeded its constitutional powers. And, since there was doubt, the court felt "compelled to sustain this legisla-

Id. Justice Boyd conceded that the language of the proposed amendment was "vague and ambiguous" and would "require subsequent judicial interpretation" if adopted. Id. Even so, he concluded, "The inherent right of the people to adopt amendments to the Constitution permit [sic] them to adopt vague and ambiguous amendments, as well as those which are easily understood." Id.

99. 338 So. 2d at 827 n.2.
100. Id. at 827.
101. Id. at 826.
102. Id. at 828.
103. Id. at 830.
104. Id. at 829.
105. Id.
106. Id.
107. Id.
108. Id. at 827.
tive action" and place the administrative procedures amendment on the November ballot.\textsuperscript{109}

The opinion in \textit{Smathers v. Smith} could almost have been written to affirm the judgment of the circuit court. Despite the absence of any consideration of the separation of powers issue, virtually every paragraph of the opinion alluded to what Justice England described more than once as the "faults" of the defendant's case.\textsuperscript{110} The court appeared to differ with Smith, not in his indictment of the proposed amendment, but only in his conclusion that it should be barred from the ballot. The court discussed in great detail the procedure that the legislature should follow in proposing an amendment to the state constitution. Repeatedly, the justices implied that the legislative enactment of the administrative procedures amendment fell short of the proper procedure. Ultimately, however, the court felt "obliged" to permit a popular vote on the issue.\textsuperscript{111}

IV. THE PRECEDENTS

The decision in \textit{Smathers v. Smith} cannot be understood without an awareness of the pressures of time which weighed on the court. "A decision from this court must be rendered promptly," the majority noted, "or the machinery of government will be seriously impaired."\textsuperscript{112} The decision must also be viewed amid the volatile political pressures which surrounded the case. And surely it cannot be understood without an awareness of the pressures of precedent. Precedent shaped the rhetoric of the \textit{Smith} court. Precedent provided the guidelines for the court's decision.

There is conflicting precedent in Florida where legislative efforts to amend the state constitution are concerned. Competing maxims are at war in the case law. Some of these maxims stress the need for a judicial policy of cautious tolerance toward legislative proposals for constitutional change. Others emphasize the necessity for an assertive and aggressive court which will protect the electorate from legislative excesses in making such proposals. These maxims, of course, reflect competing judicial philosophies. And the past expressions of those philosophies were available to the \textit{Smith} court in the language of previous judicial opinions—for reassurance, for rationalization, for justification, and for window dressing.

One such expression was made by Justice Terrell in 1956 when

\begin{itemize}
  \item \textsuperscript{109} \textit{Id.}
  \item \textsuperscript{110} \textit{Id. at} 828.
  \item \textsuperscript{111} \textit{Id. at} 831.
  \item \textsuperscript{112} \textit{Id. at} 827 n.2.
\end{itemize}
an earlier constitutional amendment was proposed by the legislature and came before the Supreme Court:

[W]e should keep in mind . . . that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.113

Justice England quoted this admonition at the outset in Smith.114 Undoubtedly, he sought to convey the court's awareness of the need for judicial restraint in reviewing the actions of the legislature. This was the framework the court used to justify its decision to limit the discussion in Smith to whether the proposed amendment complied with the procedures set forth in article XI, section 1. And this narrow notion of the judicial role in the amendatory process was mirrored in the Smith decision.

Yet Justice Terrell, who pleaded so eloquently for judicial restraint, also argued on occasion for judicial scrutiny of legislative actions. "The constitution is the people's document," he explained.115 "They may bind the legislature within the confines of democratic polity, but the legislature can limit the people only in the manner authorized by the Constitution."116 Justice Terrell reminded lawmakers that sovereignty resides in the people, not the legislature.117 The legislature must never overlook "its function of preparing something for the

113. Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956). The case involved a legislative proposal to provide home rule for Dade County. The Golden court reversed a trial court decision which would have kept the issue off the referendum ballot. At issue was whether the proposed amendment consisted of "more than one" revised article. Id. at 789. The court held that the amendment had a "single purpose" and did not violate the "one article" rule. Id.
114. 338 So. 2d at 826-27.
115. Rivera-Cruz v. Gray. 104 So. 2d 501, 506 (Fla. 1958) (special concurring opinion). The court held that a legislative proposal to revise the constitution by means of interlocking amendments could not be submitted to the electorate.
116. Id.
117. Id.
people to consider and set itself up as the real constitution maker."\textsuperscript{118} This advice, however, was not repeated by the Smith court.

Where constitutional amendments are at issue, the constitutional restraints on the judiciary have fostered an understandable inclination simply to let the people resolve controversial issues at the polls. Often this is the most expedient choice the court can make in the circumstances. It is a choice which may be defended with the lofty words of earlier courts. As Justice Ellis once said, "The opportunity should be afforded the people, with the least amount of technical departmental obstructions consistent with the letter and spirit of the constitutional provisions on the subject, to express their desire as to a supposedly needed change in the Constitution."\textsuperscript{119}

But equally lofty judicial sentiments can be cited to justify an assertion of the power of the court against the legislature. As Justice Thornal wrote in 1970:

It would be easy to [transfer] to the electorate the burden of making our decisions on an idealistic pronouncement 'to let the people decide.' This, however, is not, in my view, the fulfillment of our judicial responsibility. It is often much more difficult . . . to take a stand and 'do the people's will' when the responsibility is clearly ours under the law.\textsuperscript{120}

To be sure, these prevailing and countervailing maxims reveal relatively little about the decisionmaking process of the court. They offer hardly a clue to why the court would choose one aphorism over another in a given case. In any perusal of a proposed constitutional amendment, the nature of the amendment and the nature of the court will undoubtedly be far more determinative of the eventual outcome than the nuances of previous judicial opinions. All the same, there are some rules which are well settled and on which all the justices would likely agree.

It is generally understood that the court's first duty is to uphold the action of the legislature if there is any rational theory under which it can be done.\textsuperscript{121} This is especially true with proposed constitutional

\textsuperscript{118} Id.

\textsuperscript{119} Collier v. Gray, 157 So. 40, 45 (Fla. 1934). This case involved a citizen's suit to keep the Secretary of State from placing an amendment on the referendum ballot to reapportion and reduce the number of state judicial circuits. The trial court denied the injunction, and the supreme court affirmed.

\textsuperscript{120} Adams v. Gunter, 238 So. 2d 824, 832 (Fla. 1970) (concurring opinion) (emphasis in original).

\textsuperscript{121} Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956).
amendments. The court should not interfere with the right of the people to vote on the proposal unless the constitutional amendment proposed by the legislature is "clearly and conclusively defective." Above all, the court should not consider the substance of the suggested amendment when making its decision. Procedure alone is subject to judicial review. Yet the court must be mindful of its constant responsibility to preserve the integrity of the constitution.

There is precedent to the effect that "[m]ere formal or procedural irregularities in the framing, manner, or form of submission or balloting" should not keep a constitutional amendment proposed by the legislature off the referendum ballot. In *Landis v. Thompson,* the court offered that as an explanation for its holding that an amendment which reapportioned and reduced the number of judicial circuits in the state was constitutionally adopted. But the amendment in

122. *Id.*
123. Goldner v. Adams, 167 So. 2d 575 (Fla. 1964). In *Goldner,* the court noted that "[h]istorically, this Court has declined to interfere with the right of the electorate to act upon a proposed constitutional amendment absent a clear showing that the proposal contravenes existing controlling organic prescriptions." *Id.* Similarly, in *Gray v. Moss,* 156 So. 262, 264 (Fla. 1934), the court held that

124. "It is not for the courts to determine what is a wise proposed amendment or what is an unwise one. With the wisdom of the policy the courts have nothing to do." *Gray v. Childs,* 156 So. 274, 279 (Fla. 1934). "Neither the wisdom of the provision nor the quality of the draftsmanship is a matter for our review." *Weber v. Smathers,* 338 So. 2d 819, 822 (Fla. 1976). "Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual social or economic theories or what they deem to be sound public policy." *Ball v. Branch,* 16 So. 2d 524, 525 (Fla. 1944).
125. "[I]t is the duty of the courts, when called upon so to do, to determine whether or not the procedure attempted to be adopted is that which is required by the terms of the organic law." *Gray v. Childs,* 156 So. 274, 279 (Fla. 1934).
127. 163 So. 270 (Fla. 1935).
128. *Id.* at 276. The *Thompson* court relied on *West v. State,* 39 So. 412, 414-15 (Fla. 1905), in which the court held that

where a proposed amendment to the Constitution receives the affirmative votes of three-fifths of all the members elected to each house, and such proposed amendment is published and submitted to the vote of the people as required, and at the election is approved and adopted by a majority of the votes of the people cast thereon, then it becomes a valid part of the organic law. . . .
Thompson was not subjected to the consideration of the court until after it was approved by the people. Whatever formal defects there may have been in that amendment were cured by its ratification. So Thompson can be distinguished from Smith. Yet even the Thompson court stressed that "[i]t is . . . required by the Constitution that the formal act of agreeing to and submitting to the people each proposed amendment shall be in every respect done in conformity to the requirements . . . of the Constitution . . . ."\(^{129}\)

In Thompson, the court declared that judicial determination of whether the legislature complied with the constitution in proposing an amendment is proper "only before constitutional amendments have been actually advertised, submitted, and voted on . . . ."\(^{130}\) And judicial scrutiny is necessary then "only because of the right of citizens of the state to have the constitutional formalities observed . . . ."\(^{131}\) The Thompson court concluded that "the citizens are entitled to have their constitution remain sacrosanct, unaltered, and untampered with, until such time as the Legislature shall . . . bring about such change in strict conformity to the essential requirements of their organic compact."\(^{132}\)

The holding in Thompson has been followed in subsequent decisions of the court.\(^{133}\) In Pearson v. Taylor,\(^{134}\) for example, the court reiterated in dictum the Thompson rule that procedural defects in proposed constitutional amendments are "cured by the election itself."\(^{135}\) However, the Pearson court also stated that "the constitution places a mandatory duty on the legislature to follow certain procedure as a necessary prerequisite to bringing about an election to amend the constitution . . . ."\(^{136}\) The court declared that the failure

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\(^{129}\) In West, the proposed amendment allegedly was not entered correctly in the legislative journals. West v. State, 39 So. at 415. In Thompson, the petitioner alleged, among other things, that the amendment revised more than one constitutional section, that the substance of the amendment was not placed on the ballot, and that the joint resolution proposing the amendment was passed after the legislative session ended. Thompson v. State, 163 So. at 275.

\(^{130}\) 163 So. at 277.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) See, e.g., Revels v. De Goyler, 33 So. 2d 719 (Fla. 1948) (holding that a slight variation in the wording of the House and Senate versions of the amendment which created the Florida Game and Fresh Water Fish Commission was cured by election; Sylvester v. Tindall, 18 So. 2d 892, 896 (Fla. 1944) (holding that "if there was any irregularity" in an amendment creating the Florida Game and Fresh Water Fish Commission it was cured by adoption at the polls).

\(^{134}\) 32 So. 2d 826 (Fla. 1947).

\(^{135}\) Id. at 827. Pearson involved defects in a local option election on the sale of intoxicating liquors.

\(^{136}\) Id.
to follow prescribed procedures was "fatal if raised before the election." 137

The suit in Smith was brought nearly two months before the election. Yet whatever defects there may have been in the administrative procedures amendment proved far from fatal before the supreme court. The Smith court was apparently tempted to affirm the circuit court judgment and keep the amendment off the ballot. But the court chose instead "to let the people decide." 138 And, however reluctant the majority may have seemed in reaching this conclusion, it was ostensibly founded on a shared belief that the legislature had met at least the minimum requirements of article XI, section 1 of the Florida Constitution in proposing the amendment.

Moreover, the Smith court must have reached its decision after assessing, not only how it would affect article XI, section 1, but also how it would affect all of article XI. For in construing any single constitutional provision, the Supreme Court of Florida must consider the document as a whole to fulfill the overall constitutional purpose. 139 "This fundamental rule of construction," the Smith court stated, "directs that we consider the four methods of modifying the Constitution in a way which will harmonize them rather than distort them." 140

The four methods of constitutional modification are detailed in article XI. 141 First, the people may, by their own initiative, amend any "portion or portions" of the constitution, so long as the amendment confines itself to a single subject. 142 This initiative provision was

137. Id.
138. See text accompanying note 111 supra.
139. Smathers v. Smith, 338 So. 2d at 827. See generally Barrow v. Holland, 125 So. 2d 749 (Fla. 1960); Scarborough v. Webb's Cut Rate Drug Co., 8 So. 2d 913 (Fla. 1942); Wheeler v. Neggs, 78 So. 685 (Fla. 1918).
140. 338 So. 2d at 827. And, where modifications are made in the prescribed manner, there are generally no limits except those presented in the Federal Constitution. Collier v. Gray, 157 So. at 40.
141. See generally Sturm, supra note 3.
142. Fla. Const. art. XI, § 3. This provision was not included in Florida's first five constitutions. It was new to the 1968 document. The provision was broadened by a legislatively initiated amendment in 1972, which removed a locational limit on amendments by popular initiative to "any section" of the constitution. This amendment was inspired by the supreme court's rejection of the initiative petition for a unicameral legislature in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970). Article XI, section 3 now provides:

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. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of
employed successfully for the first time in 1976 when the voters approved the "Sunshine Amendment." Second, the people have approved the intermittent convening of a constitution revision commission to propose a "revision" of the constitution or any part of the constitution for submission to the electorate. This provision is now being used for the first time. Third, the people have reserved the power to call a constitutional convention to consider a revision of the "entire" constitution. This provision has not been used, nor does it seem likely that it will be used in the foreseeable future.

such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

143. See note 40 supra. The "Sunshine Amendment" is now article II, section 8 of the constitution.

144. FLA. CONST. art. XI, § 2. This section provides that a constitution revision commission shall be established "[w]ithin thirty days after the adjournment of the regular session of the legislature convened in the tenth year following that in which the constitution is adopted, and each twentieth year thereafter . . . ." Id.


146. FLA. CONST. art. XI, § 4 provides:

(a) The power to call a convention to consider a revision of the entire constitution is reserved to the people. It may be invoked by filing with the secretary of state a petition, containing a declaration that a constitutional convention is desired, signed by a number of electors in each of one-half of the congressional districts of the state, and of the state as a whole, equal to fifteen percent of the vote cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors.

(b) At the next general election held more than ninety days after the filing of such petition there shall be submitted to the electors of the state the question: "Shall a constitutional convention be held?" If a majority voting on the question votes in the affirmative, at the next succeeding general election there shall be elected from each representative district a member of a constitutional convention. On the twenty-first day following that election, the convention shall sit at the capital, elect officers, adopt rules of procedure, judge the election of its membership, and fix a time and place for its future meetings. Not later than ninety days before the next succeeding general election, the convention shall cause to be filed with the secretary of state any revision of this constitution proposed by it.

147. The obstacles to calling a constitutional convention are even more imposing than those for placing a constitutional amendment on the ballot by the initiative. Currently, a convention can be called only by collection of signatures from "a number of electors in each of one-half of the congressional districts of the state, and of the state as a whole, equal to fifteen percent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors." FLA. CONST. art. XI, § 4. See note 146 supra. In the aftermath of his experience with the "Sunshine Amendment" campaign, Governor Askew said he would seek some unspecified modifications in the initiative provision as a part of constitutional revision to make it somewhat easier to place initiatives on the ballot. Miami Herald, July 30, 1976, at 1-A, col. 3. An unsuccessful resolution introduced by Representative George Hieber of St. Petersburg in the 1977 legislative session proposed an amendment to section 3 which would have reduced the number of signatures required for an initiative
Finally, the most significant and the most often used means of constitutional change in Florida is through proposals by the legislature. At issue in *Smith* was article XI, section 1, which provides:

Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

Adopted in 1968, this provision resembles its counterpart in the 1885 constitution. To the extent that the two sections are identical, the judicial constructions of the 1885 provision should apply as well to article XI, section 1. Thus, the constitution clearly contemplates that proposed amendments shall be agreed to by a deliberate, final, and affirmative vote of the required numbers in each house. Like-

to six percent of the votes cast in the state as a whole in the preceding presidential election. Fla. H.R.J. Res. 1628 (1977). However, neither the Governor nor anyone else has suggested easing the even more stringent requirements for summoning a constitutional convention.

148. For example, eight of the nine amendments on the referendum ballot in 1976 were proposed by the legislature. Records in the Division of Elections, Office of the Secretary of State, Tallahassee, Florida. The ninth was the “Sunshine Amendment.” *Id.*

149. Article XVII, section 1 of the 1885 constitution provided:

> Either branch of the Legislature, at any regular session, or at any special or extraordinary session thereof called for such purpose either in the governor’s original call or any amendment thereof, may propose the revision or amendment of any portion or portions of this Constitution. Any such revision or amendment may relate to one subject or any number of subjects, but no amendment shall consist of more than one revised article of the Constitution.

If the proposed revision or amendment is agreed to by three-fifths of the members elected to each house, it shall be entered upon their respective journals with the yeas and nays and published in one newspaper in each county where a newspaper is published for two times, one publication to be made not earlier than ten weeks and the other not later than six weeks, immediately preceding the election at which the same is to be voted upon, and thereupon submitted to the electors of the state for approval or rejection at the next general election, provided, however, that such revision or amendment may be submitted for approval or rejection in a special election under the conditions described in and in the manner provided by Section 3 of Article XVII of this Constitution. If a majority of the electors voting upon the amendment adopt such amendment the same shall become a part of this Constitution.

150. When a provision in the present constitution closely follows those in the previous constitutions, cases interpreting the old constitution remain valid as interpretations of the new document. The theory is that the framers were familiar with the old case law and sought to preserve it. *See*, e.g., Hayek v. Lee County, 231 So. 2d 214 (Fla. 1970); Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959).

151. Crawford v. Gilchrist, 59 So. 963 (Fla. 1912) (holding that a vote in the Senate was duly reconsidered and a proposed amendment was not finally agreed to by the members of the Senate).
wise, procedural rules for acting on such proposals may be adopted and employed by each house if they are not in conflict with the constitution. Furthermore, the legislative power to propose constitutional changes includes the right to reconsider action taken on an amendment when no constitutional provision is violated.

The legislative authority in article XI is not limited in the same ways as the legislative authority in article III. The act of proposing constitutional amendments is not perceived as an ordinary legislative function. Such proposals are not subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments. For instance, "[t]he constitutional requirements that bills shall be read on different days or at different times do not apply." And, while a proposal to change the constitution may have a title, it is not required. Perhaps most important, the Governor's approval is not required.

Before Smith, the only construction by the supreme court of article XI was in Adams v. Gunter. In Gunter, a declaratory judgment was sought by State Senator Bill Gunter to determine the validity of an initiative petition which he planned to circulate proposing a constitutional amendment to create a unicameral legislature. The Orange County Circuit Court upheld the petition, and Secretary of State Tom Adams appealed. The supreme court reversed the lower court and held that the petition was defective because it would have affected several other provisions of the constitution besides article III, section 1, which provides for a bicameral legislature.

The court's decision in Gunter involved the popular initiative provision of article XI, section 3 and not the legislative amendment provision of article XI, section 1, which was construed in Smith. However, the reasoning employed by the Gunter court is pertinent to construction of section 1. The power of the legislature to propose constitutional amendments is restricted by section 1, which states that the legislature may offer either an "amendment" to a "section" of the

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152. Collier v. Gray, 157 So. 40, 45 (Fla. 1934).
154. See FLA. CONST. art. III, §§ 3, 4, 6, 7, and 8.
156. Id.
157. Id.
158. Id. "Whenever a title is used, it is for identification, verification, and convenience and may be considered on interpretation of the amendment." Id.
159. Id. at 45.
160. 238 So. 2d 824 (Fla. 1970).
161. Senator Gunter then abandoned his campaign for a unicameral legislature rather than circulate a series of initiative amendments for signatures. The issue was never placed before the electorate.
constitution or a "revision" of "one or more articles, or the whole."\textsuperscript{162} The distinctions between an "amendment" and a "revision" have been of some importance to the supreme court over the years, and these distinctions were discussed at length by the \textit{Gunter} court. As Justice Drew explained for the majority in \textit{Gunter},

\begin{quote}
[t]he Constitution is divided into twelve Articles and each Article is divided into numbered sections. Throughout Article XI the words "amendment" and "revision" are used to denote entirely different things. The words were carefully and deliberately selected and it is clear from the language of Article XI that the people have reserved the right to bring about an amendment to any \textit{section} of the Constitution by following the provisions set forth therein. The people have also reserved unto themselves the power to bring about a complete revision of the \textit{entire Constitution}. It is equally clear from Article XI that where more than one section of the Constitution is to be amended it is called a revision, and such revision contemplates deliberative action \ldots in order to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies.\textsuperscript{163}
\end{quote}

The \textit{Gunter} court endorsed an observation by the Supreme Court of California that the difference between "amendment" and "revision" is "not merely between two words; more accurately it is between two procedures and between their respective fields of application."\textsuperscript{164} Whether one or the other procedure should be used depends essentially on how much change is envisioned in the constitution. Concurring in \textit{Gunter}, Justice Thornal wrote that the initiative provision had "obviously been so cautiously drawn in order to avoid accomplishing extremely far-reaching changes in the organic law without notice or warning in the proposal which was being acted upon."\textsuperscript{165} The same might be said about article XI, section 1.

Two years after the \textit{Gunter} decision, "the people of Florida made it clear that they no longer wanted their initiative rights confined in the 1968 straight jacket \ldots ."\textsuperscript{166} They removed the locational limit which restricted amendment by popular initiative to "any section" of the constitution. Instead, they adopted the current version of section 3, which allows initiative amendments of "any portion or portions" of

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\textsuperscript{162} \textit{FLA. CONST. art. XI, § 1.}
\textsuperscript{163} 238 So. 2d at 829 (emphasis in original).
\textsuperscript{164} \textit{Id.} at 831, \textit{quoting} McFadden v. Jordan, 196 P. 2d 787, 797 (Cal. 1948).
\textsuperscript{165} 238 So. 2d at 833 (concurring opinion).
\textsuperscript{166} Weber v. Smathers, 338 So. 2d 819, 823 (Fla. 1976).
\end{flushright}
The distinction between “amendment” and “revision” has long been a part of constitutional construction in Florida. The constitution of 1868 provided for separate methods of amending and revising the constitution. A 1948 amendment to the constitution of 1885, the immediate predecessor of the state’s current charter, restricted amendments to a single “article.” There are no cases construing the meaning of the reference to “section” in article XI, section 1. But the Gunter court said that a reference to “section” in the 1968 constitution was “decidedly analogous” to a reference to “article” in the 1885 constitution, which provided in part that “no amendment shall consist of more than one revised article of the Constitution.” Therefore, the “one section” reference in article XI, section 1 of the present constitution would seem to be “decidedly analogous” to the “one article” limitation which was imposed on the 1885 constitution by popular amendment in 1948.

Before the enactment of the 1968 constitution, the Supreme Court of Florida discussed this “one article” rule at some length in Gray v.

167. FLA. CONST. art. XI, § 3; see note 142 supra.
168. FLA. CONST. art. XVII, §§ 1, 2 (1868). Section 1 required that constitutional amendments be proposed by two-thirds of the membership of both houses of the legislature for two consecutive sessions before they could be placed on the ballot. At that time, regular legislative sessions were held once every two years. Section 2 provided for constitutional revision at a convention called at the initiative of the legislature.

The 1868 constitution was the fourth of six constitutions for the State of Florida. The 1861 and 1865 constitutions prohibited amendments except by convention. FLA. CONST. art. XIV, §§ 1, 2 (1861); FLA. CONST. art. XIV, §§ 1–3 (1865). Like the 1868 document, the 1838 constitution required two separate votes. First, the approval of two-thirds of each house of what was then a “general assembly” was required at least six months prior to the election of a new “general assembly.” Then the proposed amendment had to be submitted to the new “general assembly” and, if again approved by two-thirds of the membership of both houses, it was submitted to the people for a vote. FLA. CONST. art. XIV, §§ 1, 2 (1838). See Sturm, supra note 3.

169. FLA. CONST. art. XVII, § 1 (1885). The 1885 constitution was somewhat inconsistent on the amendment process. Article XVII, section 1, as amended in 1948 provided that amendments could be introduced by joint resolution to propose either a revision or an amendment of any portion or portions of the constitution—so long as the amendment did not cover more than one article of the constitution. Before it was amended in 1948, section 1 merely provided for the offering of amendments without indicating whether or not they could relate to more than one section or article.

Article XVII, section 4, as amended in 1964, provided that, as an “additional method” of revising the entire constitution, the legislature could propose either amendments or a revision to the entire document or a revision or amendments of any portion or portions. This was the vehicle actually used to avoid the earlier limitations of section 1 of article XVII and adopt the current constitution in 1968. See 26A FLA. STAT. ANN. 539–40, Comment (1970).

170. FLA. CONST. art XVII, § 1 (1885) (emphasis supplied).
Golden. Speaking for the Golden court, Justice Terrell stated that the applicable test was whether there was a "unity of purpose" in the proposed amendment. He recalled City of Coral Gables v. Gray, in which,

we took pains to relate that even though a proposed amendment may be separable into two or more propositions concerning the value of which diversity of opinion may arise, that alone is not sufficient to condemn it; provided, the propositions may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant purpose. *Unity of purpose* as revealed in the object sought by the amendment is the test; the details leading to it are not material.

The absence of any "unity of purpose" thwarted a legislative effort to revise the 1885 constitution in 1958 by submitting a series of interlocking "daisy chain" amendments to the electorate. In Rivera-Cruz v. Gray, the supreme court removed the amendments from the ballot. The amendments before the Rivera-Cruz court were in the form of fourteen joint legislative resolutions which would have revised

171. 89 So. 2d 785 (Fla. 1956).
172. 19 So. 2d 318 (Fla. 1944).
173. 89 So. 2d at 788. (emphasis supplied). *City of Coral Gables* involved a suit to remove from the ballot an amendment which would have established home rule in Dade and Orange counties. *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944). The trial court granted a motion to dismiss the suit. The supreme court reversed, removing the amendment from the ballot. Speaking for the *City of Coral Gables* court, Justice Sebring said that "if a proposed amendment has but one main purpose and object in view and all else included therein is incidental thereto, . . . it is not susceptible to the charge that it contains more than one amendment." *Id.* at 320. To constitute more than one amendment, the legislative proposal

must not only relate to more than one subject but also have at least two separate and distinct purposes not dependent upon or connected with each other. And even though an amendment embrace more than one subject, said subjects need not be separately submitted to the electors, if they are so connected with or dependent upon the general subject that it might be undesirable that one be adopted and not the other.

*Id.*

Justice Sebring said that an amendment may be acceptable even though "capable of separation into two or more propositions," so long as it has "a single dominant plan or scheme." *Id.* "Unity of object and plan is the universal test," the *City of Coral Gables* court decided, "and it is to be looked for in the ultimate end sought, not in the details or steps leading to the end." *Id.* Consequently,

[i]t is only when, in the light of common sense, several propositions are submitted as one and have to do with different subjects which are so essentially unrelated that their association is purely artificial, that they are not one within the constitutional mandate, for then the unity of object and purpose is not there, no matter in what form the proposal may be framed.

*Id.* (citations omitted).

174. 104 So. 2d 501 (Fla. 1958).
the entire 1885 constitution except for one article. None of the fourteen proposed amendments would have become effective unless all were approved.\(^{175}\) Hence, the term "daisy chain" was used to describe them.

Once again, the issue was whether the proposed changes were merely "amendments" or a full-fledged "revision." The *Rivera-Cruz* court acknowledged the "practicability . . . of linking them together."\(^{176}\) But the court warned that "practicalities cannot, however sound, justify a circumvention of a provision of the Constitution . . . ."\(^{177}\) Moreover, "[i]f the changes attempted are so sweeping that it is necessary to include the provisions interlocking them, then it is plain that the plan would constitute a recasting of the whole Constitution . . . ."\(^{178}\)

The *Rivera-Cruz* court held that the fourteen joint resolutions amounted to a revision of the constitution. And, since the proper revision procedure had not been followed by the legislature,\(^{179}\) the "daisy chain" could not be placed on the ballot. The two methods of changing the constitution, the court declared, "may not be intermingled."\(^{180}\) There are "underlying fundamental principles of amendment and revision" which must be followed.\(^{181}\) And these principles "are so unrelated that they cannot be blended . . . ."\(^{182}\)

According to the *Rivera-Cruz* court, the purpose of the rule limiting amendments to a single constitutional section "is to permit an elector to vote intelligently for the amendments he favors and against the ones he disapproves."\(^{183}\) Or, as Justice Terrell summarized the issue in his concurring opinion, "the word 'revision' relates to the whole instrument."\(^{184}\) Thus, the "underlying fundamental principles of amendment and revision"\(^{185}\) defended in *Rivera-Cruz* are founded on addi--

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175. As the *Rivera-Cruz* court explained:
In each of the resolutions it is provided that the particular amendment embedded in it shall not be effective unless all amendments, of the preamble and all articles except Article V, are approved by a majority of the votes cast. In the briefs and in the decree this arrangement is called the 'daisy chain' system.

176. *Id.*

177. *Id.*

178. *Id.*

179. The proper procedure for revision at the time would have been to call for a constitutional convention as provided in article XVII, section 2 of the 1885 Constitution. *Id.*

180. *Id.* at 502. A fifteenth amendment proposed at the same time as the fourteen amendments condemned in *Rivera-Cruz* was allowed to remain on the ballot because it "was not tied to the other amendments." Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958).

181. 104 So. 2d at 504.

182. *Id.*

183. *Id.* at 505.

184. *Id.*

185. *Id.* at 504.
tional underlying principles of notice. In brief, an amendment must be labeled as an amendment and a revision must be labeled as a revision to assure intelligent and knowledgeable voting at the polls.

This same issue faced the court in a companion case to *Smith, Weber v. Smathers.*\(^\text{186}\) Shortly after Smith filed his suit against the administrative procedures amendment, a former member of the state senate, Charles Weber, challenged the constitutionality of the “Sunshine Amendment.”\(^\text{187}\) A campaign by Governor Askew to place a strong ethics provision in the constitution through use of the popular initiative had generated more than 220,000 signatures from Florida voters.\(^\text{188}\) The Secretary of State certified that these signatures met the test for an initiative proposal which is outlined in article XI, section 3.\(^\text{189}\) However, Weber maintained that the initiative proposal circulated by the Governor embraced “more than one subject” and would “revise several articles other than the one it purportedly amends.”\(^\text{190}\)

Weber’s suit was dismissed with prejudice in circuit court.\(^\text{191}\) The supreme court affirmed this dismissal in *Weber* on the same day that it reversed the circuit court decision in *Smith.*\(^\text{192}\) Chief Justice Overton wrote the majority opinion in *Weber,* and Justice Roberts offered the only dissent.\(^\text{193}\) The majority distinguished the *Weber* suit from both the petition for a unicameral legislature in *Gunter* and the “daisy chain” amendments in *Rivera-Cruz.* The *Weber* court held that, unlike those earlier proposals, the “Sunshine Amendment” was “sufficiently complete within itself, requiring no other amendment to effect its purpose.”\(^\text{194}\) Furthermore, the provisions of the initiative proposal were “sufficiently related to withstand an attack that they embrace more than one subject.”\(^\text{195}\) And, if adopted, the proposed amendment would: “not conflict with other articles and sections of the Constitu-

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186. 338 So. 2d 819 (Fla. 1976).
187. *Id.* at 821. Weber’s suit was filed in Leon County Circuit Court on September 23—two weeks after Smith’s suit was filed. *Id.*
188. Records in the Division of Elections, Office of the Secretary of State, Tallahassee, Florida.
189. See note 142 *supra.*
190. 338 So. 2d at 821.
191. *Id.*
192. *Id.*
193. *Id.* Justice Roberts denounced the “rapid abandonment of former precedents” and said he could not distinguish the situation in *Weber* from that in *Gunter.* *Id.* at 824. “I do not for one moment question the sincerity of the Governor in sponsoring the so-called Sunshine Amendment nor the nobleness of his purpose,” he explained. *Id.* But Justice Roberts felt that it should be “more difficult” for the people to amend the constitution through use of the initiative than for the legislature to propose amendments through joint resolutions. *Id.*
194. *Id.* at 822.
195. *Id.*
Consequently, the *Weber* court held that the "Sunshine Amendment" could not be removed from the ballot.

A concurring opinion by Justice England in *Weber* may afford some insight into his remarks for the majority that same day in *Smith*. Although in *Weber* he addressed the initiative provision of article XI, section 3 and not the legislative amendment provision of section 1, some of what Justice England said in the companion case helps explain the tolerance he displayed toward the legislature in *Smith*. In arguing that the "Sunshine Amendment" should be presented to the electorate, Justice England interpreted the "one subject" limitation in section 3 as a "functional, as opposed to locational, restraint on the range of authorized amendments." He discerned an intention among the framers of the 1968 constitution "to restrain initiative in a manner comparable to restraints on the Legislature."

Justice England offered the novel thesis that the limitation on the people in article XI, section 3 parallels the limitation on the legislature in article III, section 6, which states that laws developed in the legislature "shall embrace but one subject." He saw "no justification for a differentiation" between these similar constitutional sections. Then, noting the "gloss aplenty" that has been attached to article III, section 6 through judicial construction, Justice England implied that he saw no reason why the same broad construction should not be given to article XI, section 3. "On this basis," he concluded, "I have no trouble upholding the amendment's concern with 'ethics in government' as a single subject suitable for initiative."

Entirely apart from the content of the "Sunshine Amendment" and the construction of section 3, what Justice England said in *Weber* sheds some light on what he and the rest of the court did in *Smith*. There is no "one subject" limitation on the constitutional powers of the legislature to propose constitutional changes under section 1. The existing limitations on the authority vested in the legislature by section 1 are primarily the product of judicial construction, such as the "unity of purpose" rule imposed in *City of Coral Gables*. Beyond that, those seeking to limit the discretion of the legislature to suggest constitutional changes must rely on the locational limitations imposed by

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196. *Id.*
197. *Id.* at 823 (concurring opinion).
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. See text accompanying note 173 *supra*. 
section 1 and on the subtle distinctions between an "amendment" and a "revision."

Smith and Weber probably should be considered together. Many of the same actors and many similar issues were involved in both cases. They both involved the overall issue of constitutional change. Without indulging in undue speculation, it can surely be assumed that the attitudes of the justices toward one case may have influenced their thinking about the other. As it was, the court proved willing to allow the people to vote in both instances.

V. THE DECISION

The Rivera-Cruz court reminded a legislature seeking substantial changes in the Florida Constitution that, while "[a]ny process of changing the Constitution is cumbersome," this was done by the people "purposely in order that the organic law may not be easily re-molded [sic] to fit situations and sentiments that are relatively transitory and fleeting." The plaintiff in Smith perceived such fleeting, transitory sentiments in the legislative effort to place the administrative procedures amendment on the referendum ballot. It may not have been a "daisy chain," but the amendment proposed by CS/SJR 619/1398 seemed to Smith to be just as much a "circumvention of a provision of the constitution."

Smith portrayed the amendment on appeal as an agent of "disharmony" and a harbinger of "serious doubts and inconsistencies." He reiterated the allegations he had made in circuit court. He said the administrative procedures amendment was a "revision" and not an "amendment" to the Florida Constitution. And, should it be adopted by the people, Smith believed that no less than six separate and additional amendments would then, by implication, "be required to accomplish the purpose of the proposed amendment."

204. 104 So. 2d at 503.
205. Brief for Appellee at 15.
206. Id. at 10-11.
207. Id.
208. Id. at 16.
209. Id. at 11-14. Smith anticipated two needed amendments to article V which would restrict the historical power of the judiciary. "The all-encompassing statement that the judicial power shall be vested in the courts would no longer be accurate," he claimed. Id. at 11. Also, the constitutional power granted to the judiciary by article V, sections 3(b), 4(b), and 5(b) to review administrative action directly would be limited by the powers which would be conferred on the legislature by the proposed amendment. Id. (Smith did not mention that this type of judicial review is limited to the manner prescribed by law.) In addition, he said article I, section 21 would have to be amended to limit access to the courts for the redress of injury. Id. at 12 (Smith also did not mention the existing limitations on that section).
The appellant foresaw no such difficulties. In his brief, the Secretary of State pointed out that both Gunter and Rivera-Cruz had involved express efforts to amend more than one section of the constitution. There were no such express efforts attached to the administrative procedures amendment, which, according to Smathers, was "singular and complete within itself, and require[d] no further express amendments to become effective."  

The Secretary of State maintained that the implied effects of the administrative procedures amendment on other constitutional provisions were "either minimal or non-existent." Relying on Golden and City of Coral Gables, he also argued that "implied effects upon other portions of the Constitution are irrelevant to the question of whether more than one section is involved as long as those implied effects are germane to the single dominant purpose of the amendment." Therefore, he concluded, the legislative proposal was an "amendment" and not a "revision." In any event, Smathers added, the legislature is granted express authority by article XI, section 1 either to amend or to revise the constitution, as it chooses. Thus, the appellant argued that the distinction between "amendment" and "revision" was irrelevant to the case.  

To all this, Smith replied that the distinction was both relevant and essential. Smathers' efforts to distinguish the administrative procedures amendment from the proposals in Gunter and Rivera-Cruz resulted, Smith claimed, only in "a distinction without a difference." Furthermore, Smith claimed article III, section 1 would have to be changed to reflect the role a legislative committee could play in exercising powers traditionally reserved to the whole legislature. And he envisioned a need to amend article IV, section 1(b) to restrict the power of the Governor to initiate judicial proceedings in the name of the state against any executive or administrative officer to enforce compliance with any duty or restrain any unauthorized act. Finally, he said the provision addressed by the proposed amendment itself, article I, section 18, would have to be further amended, at least in title, to reflect the proposed addition.  

Furthermore, Smith claimed article III, section 1 would have to be changed to reflect the role a legislative committee could play in exercising powers traditionally reserved to the whole legislature. And he envisioned a need to amend article IV, section 1(b) to restrict the power of the Governor to initiate judicial proceedings in the name of the state against any executive or administrative officer to enforce compliance with any duty or restrain any unauthorized act. Finally, he said the provision addressed by the proposed amendment itself, article I, section 18, would have to be further amended, at least in title, to reflect the proposed addition.  

210. Brief for Appellant.  
211. Id. at 17.  
212. Id. at 17-18.  
213. Id. at 29.  
214. Id. at 24.  
215. Id. at 28.  
216. Id. at 33 (emphasis in original).  
217. "The Legislature now has full authority to propose amendments and revisions by joint resolution, and thus the distinction is not relevant to the question whether Senate Joint Resolution 619 and 1398 originated in the proper manner." Id.  
218. Brief for Appellee at 15.
is not that the legislature could not have proposed a revision had it put its mind to it, but that it did not bother, and attempted instead to accomplish by amendment that which could have only been accomplished by a revision which directly addressed each affected section, and changed each so as to produce a harmonious whole.\textsuperscript{219}

The Supreme Court of Florida agreed with the Secretary of State. The distinction between an "amendment" and a "revision," the Smith court observed, "shows . . . our great reluctance to write out or blur distinctive constitutional terminology."\textsuperscript{220} However, the court concluded, "[t]he distinction between an 'amendment' and a 'revision' . . . is not critical here."\textsuperscript{221} Yet, having reached this conclusion, the court then went on to discuss that distinction at considerable length.

"The function of a section amendment," the court reasoned, "is to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law."\textsuperscript{222} In contrast, "[t]he function of an article revision is to restructure an entire class of governmental powers or rights, such as legislative powers, taxation powers, or individual rights."\textsuperscript{223} Consequently,

\[\text{w}\text{hen the subject matter being proposed for change goes beyond or is unrelated to the context of the section it purports to change, the proposal cannot be a section amendment. It may be an article revision or a revision of the whole document, but it is not a 'section' amendment.}\textsuperscript{224}

While the supreme court held for Smathers, the justices offered little encouragement for Smathers' efforts to minimize the significance of the distinctions between an "amendment" and a "revision." As Justice England remarked:

\[\text{I}f\text{ an article revision or a rewrite of the whole Constitution could be characterized, equated with or disguised as a mere section amend-}\]

\begin{itemize}
  \item \textsuperscript{219} Id. at 16.
  \item \textsuperscript{220} 338 So. 2d at 828 n.9. The Smith court also explained: "We have consistently held that different words in amendatory articles of the Constitution must be read differently, and each given vitality." \textit{Id.} at 828. This echoed the longstanding general rule: "Our view is that we must give effect to the constitution according to what we deem to be its plain meaning and what the people must have understood it to mean at the time they adopted it." Advisory Opinion to Governor, 22 So. 2d 398, 399 (Fla. 1945).
  \item \textsuperscript{221} 338 So. 2d at 828 n.9.
  \item \textsuperscript{222} \textit{Id.} at 829 (footnote omitted).
  \item \textsuperscript{223} \textit{Id.}
  \item \textsuperscript{224} \textit{Id.}
\end{itemize}
ment, then the people's deliberate choice of terms is wholly without significance. Every proposal could be defended as a revision of the whole Constitution, no matter how narrow its purpose or subject matter. A fault with the state's suggestion, then, is that it seeks total nullification of two or three amendment procedures the people have given to the legislative branch. We, of course, lack judicial authority to rewrite Section 1 of Article XI as the state seems to request.\textsuperscript{225}

The \textit{Smith} decision was not founded on whether the administrative procedures amendment was really an "amendment" to a section or, instead, a "revision" of one or more articles of the Florida Constitution. The court dismissed that issue, just as it dismissed the plaintiff's other contentions. But, curiously, after dismissing the distinctions between "amendment" and "revision" as "not critical" to the case, the court then used those distinctions to explain the test it chose to apply. The distinctions between "amendment" and "revision," the court decided, represent the "minimal requirements for clear expression and locational specificity" which should be fulfilled by the legislature in proposing a constitutional amendment.\textsuperscript{226}

"The serious business of amending a constitution by lawmakers demands that the functional unity of sections and articles be preserved to the fullest extent possible," Justice England wrote for the \textit{Smith} majority.\textsuperscript{227} This is necessary "so that, first, ambiguities and contradictions be avoided and, second, cumulative confusion be prevented."\textsuperscript{228} Justice England said the people of Florida had "recognized the dangers of mis-amendments" and had endeavored to avoid them by mandating a periodic review of their constitution by a revision commission.\textsuperscript{229} This was done, he declared, in order to keep the 1968 constitution from becoming like the much-amended 1885 constitution, which "was fully revised in 1968 principally because a hodgepodge of disharmonious provisions . . . added over the years had made governance complex, expensive and uncertain."\textsuperscript{230}

But the time that elapses between revision commissions in Florida can be measured in decades, and, apart from their power to propose constitutional revisions, such commissions have no authority at all over the legislature. Only the courts can check the exercise of the extensive legislative power to propose constitutional changes. And the courts can do so only when a citizen and taxpayer challenges the

\textsuperscript{225} Id. at 828 (footnote omitted).
\textsuperscript{226} Id. at 829.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at n.14.
legislative prerogative. This rarely happens. Consequently, the principal responsibility for keeping the 1968 constitution from becoming another "hodgepodge" which will make governing "complex, expensive and uncertain" lies with the legislators themselves and, indirectly, with the people who elect them.

So the opportunity presented to the Smith court was indeed an unusual one. And the court responded by applying an unusual "germanity" test to the challenged amendment. Above all, the Smith court seemed concerned with whether the administrative procedures amendment was "germane" to the constitutional section it would have amended. The court divined that a concept of "germanity" was necessary for constitutional amendments and was "clearly essential" to harmonize the various parts of the constitution in a way that would eliminate inconsistencies. "Were this not so," the majority asserted, "or were Article XI, Section 1 so elastic as to sanction the addition of wholly unrelated provisions to guarantees of individual liberty, then the rationality of the entire 1968 constitution would be endangered."

In developing this newly discovered "germanity" test in Smith, Justice England also developed the analogy he drew in Weber between amending the constitution and enacting a statute. According to Justice England, "Inherent in the amendatory process for the Constitution, by necessary implication, is the same notion of 'germaneness' which controls the exercise of amendatory powers for general legislation." He argued in Smith that legislators who are bound by standards of "germanity" when making statutory law should be bound by those same standards when making changes in the state constitution.

In effect, the Smith court maintained that the constitution implies a test for legislatively proposed amendments very similar to the "one subject" rule imposed on the more conventional lawmaking process by article III, section 6. It is well settled regarding Florida statutes that "[w]here all the provisions of an act are germane to the subject and are properly connected with it, the criticism that it violates constitutional provisions restricting each law to one subject is not

231. Eight constitutional amendments were proposed by the legislature and placed on the referendum ballot in 1976. Of the eight, only the administrative procedures amendment was challenged in court.
232. 338 So. 2d at 890.
233. Fla. Const. art. I, § 18 was the section to be amended. See text accompanying note 19 supra for the full text of the proposed amendment.
234. 338 So. 2d at 890.
235. Id.
236. See text accompanying notes 199-202 supra.
237. 338 So. 2d at 890.
well founded." In Smith, the court seemed to be employing the same criteria to evaluate a proposed constitutional amendment.

Undoubtedly, at least part of the court's motivation for using these criteria was to preserve the coherence of the constitution. This was certainly one reason the court recoiled at the Secretary of State's suggestion that, since three distinct alternatives—"amendment of a section or revision of one or more articles, or the whole"—are available to the legislature in proposing constitutional changes, "the legislature can frame by one name whatever would be valid under any one of them." The court apparently feared this would lead to the constitutional confusion it sought to avoid.

In addition, the court was evidently concerned about the internal consistency of the constitution. As Justice England explained:

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

The proposed amendment in Smith passed this innovative "germanity" test only by the slimmest of margins—and only with the assistance of a puzzling judicial determination to decide the case on the narrowest of possible issues. The court contrasted legislative oversight of executive agencies with the "panoply of protections" provided by the Declaration of Rights to which the amendment would have been attached and found that it had only "the barest margin of relevance." "This casual placement of an amendment in the Constitution," the court conceded, "reaches the outer limit of legislative authority as conferred by the people in Article XI, Section 1. Put in

238. Oglesby v. Hand, 119 So. 376 (Fla. 1928).
239. 338 So. 2d at 828.
240. Id. at 830.
241. Id. at 829. The proposed amendment would have been added to article I, which is the constitution's Declaration of Rights. Among the provisions of article I are those barring imprisonment for debt, prohibiting unreasonable searches and seizures, preserving the writ of habeas corpus, guaranteeing a jury trial for capital crimes, prohibiting cruel and unusual punishment, preserving the right to trial by jury, and assuring prompt justice and access to the courts. As the Smith court observed, these fundamental rights do not seem to have much direct relevance to disputes between the legislative and executive branches over nullification of rules promulgated by executive agencies.
242. 338 So. 2d at 829.
other terms, the amendment approaches the borderline of 'germanity' to the provision it amends."243

The Smith court even went so far as to compare the Secretary of State's argument with the long discredited "evil" of statutory "logrolling" which was condemned by the supreme court in 1930.244 "The state's position," the court declared, "would . . . accommodate the placement of random and unrelated provisions without even the appearance of a nexus."245 Moreover, "[u]nder this view of Article XI, Section 1, there would be nothing to bar the Legislature from proposing a single amendment which in one section or article would establish unicameralism, prohibit forced busing of school children, and bar all forms of taxation on corporate entities formed or domesticated in Florida."246 Such an aggregation of appeals to varied interest groups, the court advised, would "exceed legislative power" under the constitution.247

Furthermore, the court concluded, acceptance of the state's assertion would be inconsistent with "notice-giving requirements designed to assure knowledgeable law-giving."248 This statement by the Smith court is reminiscent of a similar concern voiced in Gunter. Justice Thornal counted thirty-three additional constitutional amendments which would have been required by Senator Gunter's petition to create a unicameral legislature.249 "There is nothing in the proposal," he said, "to indicate to the people that it has this extraordinary effect."250 That is, there was insufficient notice to the electorate that their vote in favor of the proposed amendment mandating a unicameral legislature would have had such far-ranging consequences.

The Smith court seemed to be hinting that the same infirmities of

243. Id.
244. Id. at 830 n.21, citing Colonial Inv. Co. v. Nolan, 131 So. 178 (Fla. 1930) (statute requiring the filing of tax returns by owners of real and tangible personal property and also prohibiting the recording of deeds and bills of sale without stating the post office address of the grantee held unconstitutional as encompassing two unrelated subjects). The Nolan court defined "logrolling" as the practice of including "in the same bill incongruous matters having no relation to each other or to the subject specified in the title . . . ." Id. at 179. Such devious legislative devices are prohibited by the Florida Constitution, which requires that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Fla. Const. art. III, § 6.
245. 338 So. 2d at 830 n.21.
246. Id.
247. Id.
248. Id. at 828. The court pointed out in a footnote that, unlike legislation, there is no executive "check" for errors, omissions, or inconsistencies in a proposed constitutional amendment. Id. at 828, n.12. See note 44 supra.
249. 338 So. 2d at 833 (concurring opinion).
250. Id.
insufficient notice infected the administrative procedures amendment. As Justice England expressed it, "The state's suggestion that a proposed section amendment may in reality effect a revision of the entire Constitution completely ignores the . . . compelling notice-giving needs which legislators should have for constitutional amendments."251 He noted that "[t]he deliberative processes of the Legislature are surrounded by guarantees that the duly elected representatives of the people will know what they are doing when they act in their law-making role."252 He specifically mentioned the "one subject" rule and the additional constitutional requirement that each proposed law be accorded "three separate considerations."253

The obvious implication of these allusions, once more, was that the same "guarantees" which "surround" the process of amending statutes should also be employed in amending the constitution. If it is essential that legislators "know what they are doing" when they are changing laws, then it is certainly also essential that they be at least equally informed when proposing changes in the constitution. And it is essential, too, that the people "know what they are doing" when they participate at the polls in the ultimate act of constitutional law-making. The Smith court implied that there were no guarantees that any of these supposed essentials had occurred or would occur with the administrative procedures amendment.

Yet the proposed amendment still passed the crucial "germanity" test. The Smith court placed it squarely, if somewhat uneasily, within the apparently roomy boundaries of article XI, section 1. The "outer limit" of legislative authority clearly was within sight. But the "borderline" was not crossed. To be sure, the amendment had little in common substantively with article I, section 18 of the Florida Constitution. But that did not matter. "The limitation on administrative agency penalties has some connection, albeit tenuous, with the sentence now added to allow the Legislature to protect the citizenry from executive branch over-reaching," the court explained.254 Consequently, "[t]he functional relevance of one to the other (though minimal) being established, our inquiry of necessity is curtailed."255 And, therefore, "[w]e find ourselves obliged to approve the placement of this amendment on the November ballot only because there exists a

251. 338 So. 2d at 828.
252. Id.
253. Id; see FLA. CONST. art. III, §§ 6, 7.
254. 338 So. 2d at 829.
255. Id.
reasonable basis to view the new sentence as germane to the provision it amends." 256

Where constitutional provisions limit the otherwise plenary powers of the legislature in the amendatory process, "the legislature is, by implication, denied the power to take from or to add to the constitutional provisions." 257 As Justice Whitfield explained in 1912:

The people of the state have a right to amend their Constitution, and they also have a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution, which is the fundamental law. *If essential mandatory provisions of the organic law are ignored in amending the Constitution of the state, and vital elements of a valid amendment are omitted, it violates the right of all the people of the state to government regulated by law. It is the duty of the courts in authorized proceedings to give effect to the existing Constitution. The proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation.* 258

The *Smith* court quoted these words approvingly. 259 "We have always required the Legislature to meet the precise limitations which circumscribe legislative amendment powers," the court insisted. 260 But the *Smith* decision contradicted this sweeping claim. If *Smith* is testimony to the "precise limitations" on legislative authority to propose amendments to the Florida Constitution, then those limitations are not very precise at all. In fact, they might as well not exist.

Justice England labored diligently in *Smith* to define the limitations imposed on the legislature by article XI, section 1. No doubt the "germanity" test, which he developed in so much detail in the majority opinion, was meant to be applied by later courts in later cases. Perhaps it will be. And the "germanity" test might have proved useful—had the court held otherwise in *Smith*. But the results of applying the test in *Smith* lead to the inescapable conclusion that virtually anything can be "germane" to virtually anything else in amending the Florida Constitution. The entirety of the court's opinion in *Smith* amounts to a persuasive argument against the court's conclusion.

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256. *Id.* at 831.
260. *Id.*
The *Smith* court indicated what it definitely would not accept from the legislature as a proposed constitutional amendment. But the example the court chose to illustrate what is constitutionally unacceptable is hardly realistic. It is unlikely that any legislature would ever propose a single amendment establishing unicameralism, banning busing, and barring all forms of corporate taxation in Florida. Such disparate concoctions exist only in the realm of the judicial imagination. It is far more likely that a future legislature will propose additional amendments akin to the administrative procedures amendment. They may differ in substance. But, in the aftermath of *Smith*, future legislative proposals will surely resemble the administrative procedures amendment in style—vague, ambiguous, amorphous, and, most of all, only passingly and perfunctorily "germane" to the part of the constitution they would amend. There is nothing in the holding in *Smith* to compel the legislature to draft them otherwise.

Nor is there anything in the holding in *Smith* to persuade the legislature to be more assiduous in providing notice to the people of the actual implications of proposed constitutional amendments. Justice England spoke of "notice-giving needs" which are necessary corollaries to any consideration of a constitutional proposal by the legislature. But those "needs" were disregarded in the decision to restore the administrative procedures amendment to the ballot. If the requirements of notice are "even more compelling" for constitutional changes than for changes in the statutes, as Justice England attested, then those requirements were obviously not compelling enough in *Smith*.

It is interesting, too, that the *Smith* court dismissed without discussion Smith's assertion that the ballot notice provided for the proposed amendment did not meet the statutory requirements. Apart from any consideration of the existence of notice requirements in the constitution, it would seem that a court concerned with the need for notice would at least discuss the statutory aspects of such an issue. The "substance" of the administrative procedures amendment may or may not have been distilled in the ballot notice, as required by statute. Apparently the court was convinced that the statutory requirements had been met. However, the reasons for this judicial conclusion were not offered as part of the opinion in the case. The court merely announced in a rather terse footnote that the allegations of insufficient ballot notice, together with the other issues dismissed by the court,

261. See id. at 830 n.21; text accompanying note 246 *supra*.
262. 338 So. 2d at 828; see text accompanying note 251 *supra*.
263. 338 So. 2d at 828.
264. See notes 19 & 54 *supra*. 
were "without merit and not sufficient to warrant discussion in the

time we have available."265

The issue of notice is intertwined in Smith with the issue of separa-
tion of powers. The plaintiff's contentions concerning the separation
of powers in Florida were also deemed to be "without merit" by the
Smith court.266 Yet the belief that the legislature gave no real notice
to the electorate of the alterations the administrative procedures amend-
ment would have made in the traditional separation of powers in the
state was the linchpin of Smith's suit. All else in the suit revolved
around the plaintiff's conviction that, in voting on the administrative
procedures amendment, the people would be deciding whether to
make drastic and perhaps permanent changes in their form of state
government—without even knowing it.

A separation of powers among "legislative, executive, and judicial
branches" of government is ordained by article II, section 3 of the
Florida Constitution.267 That same section provides that "[n]o person
belonging to one branch shall exercise any powers appertaining to
either of the other branches unless expressly provided herein."268 As
the Supreme Court of Florida has pointed out,

The preservation of the inherent powers of the three branches of
government, free of encroachment or infringement by one upon the
other, is essential to the effective operation of our constitutional
system of government. . . . This doctrine is designed to avoid ex-
cessive concentration of power in the hands of one branch.269

There has always been an express recognition in the Florida
Constitution that the powers of government are to be distributed
among three separate branches.270 What Justice Thornal described in
Gunter as a "triune plan of state sovereignty"271 was first adopted
when Florida was still only a territory of the United States in 1838.272

265. 338 So. 2d at 827 n.2.
266. Id.
267. See note 50 supra.
268. FLA. CONST. art. II, § 3 (emphasis supplied).
269. In re Advisory Opinion to the Governor, 276 So. 2d 25, 30 (Fla. 1973) (citations
omitted). See also State v. Barquet, 262 So. 2d 931 (Fla. 1972); Simmons v. State, 36
So. 2d 207 (Fla. 1948); Sylvester v. Tindale, 18 So. 2d 892 (Fla. 1944).
270. The current provision is substantially the same as its predecessor in the 1885
constitution. FLA. CONST. art. II (1885). A similar provision appeared in all the earlier
constitutions, although the provisions in the constitutions of 1838 and 1861 were more
detailed. FLA. CONST. art. III (1868); FLA. CONST. art. II (1865); FLA. CONST. art. II
(1861); FLA. CONST. art. II (1838). See also Alloway, Constitutional Law, 10 MIAMI L.Q.
143 (1955); Alloway, Constitutional Law, 8 MIAMI L.Q. 158 (1953).
271. 238 So. 2d at 833 (concurring opinion).
272. FLA. CONST. art. II (1838).
This separation of powers has been Florida's blueprint for governing, checking one branch with another and balancing the authority of all branches in order "to protect individuals in their personal and property rights from an abuse of any governmental power or authority."273

The people of Florida may abolish the separation of powers if they wish.274 They may "impose any limitation on the executive, the legislature or the judiciary they see fit."275 This was acknowledged by Smith throughout the course of his suit.276 However, the people also have adopted article II, section 3.277 Smith's conclusion that this constitutional provision necessarily requires that any constitutional shift in the separation of powers be done "expressly" and not merely by implication seems both logical and sound. Yet the separation of powers was not even mentioned in the administrative procedures amendment. Nor was it mentioned in the notice which appeared on the ballot. The only indications the electorate had that the proposal might cause radical changes in Florida government were produced by the publicity surrounding Smith's suit and the campaign by Governor Askew and his allies to defeat the amendment.

The threat that the administrative procedures amendment posed to the separation of powers in Florida was one basis for the circuit court's decision.278 The parties devoted much attention to the issue in their respective briefs.279 The refusal of the Smith court to even consider the issue is difficult to reconcile with some of the qualifying statements made by the court in the wake of that refusal. For instance, the court took pains to point out that "the statute establishing the suspension procedure, which was vetoed by the Governor, is not an issue in these proceedings . . . ."280 Similarly, the court observed that "by recognizing the propriety of this amendment to be on the ballot we neither approve nor disapprove any statutory scheme for suspension."281 In addition, the court pointed out that "the power of a legislative committee to suspend agency rules is likewise a premature

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275. Fraser v. Gay, 28 So. 2d 901, 904 (Fla. 1947).
276. See text accompanying note 219 supra.
277. See notes 50 & 57 supra.
278. See text accompanying note 81 supra.
280. 338 So. 2d at 831 n.24.
281. Id.
issue at this time.”282 And, finally, the court took “note” of the re-
asurances by the state that the amendment would not endanger the
powers of the judiciary.283 The justices then quoted those reassurances
for good measure in a footnote.284

At first glance, all this seems to conflict with the court's professed
conclusion that the separation of powers issue was “without merit.”285
Indeed, these statements seem at least a tacit admission by the court
that the issue had substantial merit. However, the court apparently
believed that the issue either could not or should not be resolved at
that time. Even as it rejected the separation of powers issue on appeal,
the Smith court appeared to be warning the supporters of the pro-
posed amendment that the interferences it threatened with the es-

tablished balance of power in the state government might be con-
strued away in a later suit. “If the amendment should be adopted by
the voters,” the court predicted, “it may then become our responsibility,
in an appropriate case, to harmonize its reach and meaning with other
provisions of the Constitution.”286 But the proposed amendment had
not yet been approved by the electorate. The Smith suit required an
examination by the court of the procedure employed in proposing the
amendment, not an actual construction of the amendment. Conse-

quently, the court concluded that “[t]o attempt at this time an in-
terpretation of the proposal as it relates to other constitutional pro-
visions would be premature.”287

Thus, the Smith court virtually admitted the truth of Smith's
claim that adoption of the administrative procedures amendment
would have had an impact on far more than just the Declaration of
Rights in the Florida Constitution. The court seemed to concede as
well that further amendments, or at least further judicial interpreta-
tion, would be required to determine precisely what the proposed
amendment really meant. This amounted to an indirect admission
of the truth of Smith's assertion that the amendment was so vague and
the ballot notice so inadequate that the voters could not possibly
comprehend it.288 But judicial discussion of these aspects of the con-

troversy was postponed until after the popular vote. The separation
of powers issue was “not sufficient to warrant discussion” by the hurried

282. Id.
283. Id.
284. Id.
285. Id. at 827 n.2.
286. Id. at 831.
287. Id.
288. See note 54 supra.
It was left to be resolved by a later court at a later date—pending approval of the proposed amendment by the people.

The court's aversion to premature construction is understandable. But what the Smith court perceived as premature construction might also be viewed legitimately as an overdue explanation to the people of the meaning and the import of the proposed amendment. If not commendable, the court's decision may nevertheless be defensible. Still, it is surprising that the court would scrutinize a proposed constitutional amendment, declare that it might not "harmonize" with existing constitutional provisions, and then allow it to be submitted to a popular vote. And it is alarming that the court would do so after strongly implying that the legislative proposal did not fulfill the "notice-giving needs" which are supposedly implicit in the constitution. Yet that was the decision of the Smith court.

Faced with a similar choice six years before, the Gunter court roundly denounced the petition for a unicameral legislature as a "constitutional subterfuge" which failed "to give warning to the electorate of its contents." It could be argued that the administrative procedures amendment was no less a "subterfuge" than the petition for a unicameral legislature. This, of course, was Smith's claim. But the Smith court was not persuaded. The notice issue was discussed, but it was not determinative. The outcome of the "germanity" test determined the outcome of the case. And that outcome left the voters with the imposing task of trying to fathom for themselves what the proposed amendment really meant.

VI. Conclusion

Smathers v. Smith reveals the broad scope of the legislative power to propose sweeping changes in the Florida Constitution with but a single amendment. It also discloses how very little legislators are required to tell the people about the probable impact of such proposed amendments. If the holding in Smith is truly indicative of the prevailing sentiment of the supreme court, then the limitations on the legislative prerogative in devising such proposals and dispatching them to the voters are few indeed. Perhaps a measure more contradictory and more confusing than the administrative procedures amendment will someday be spawned by the legislative process in Florida. Perhaps the supreme court will find it in some way abhorrent to the letter

289. 338 So. 2d at 827 n.2.
290. 338 So. 2d at 828.
291. Id.
292. 238 So. 2d at 833 (concurring opinion).
and to the spirit of the constitution. But the acquiescence of the Smith court makes it seem far more likely that the legislature will once again prevail in any renewed confrontation over a suggested amendment to the constitution.

Thus, any additional limitations on the legislature must come from within the constitution itself. The courts are unlikely to impose such limitations on their own. Article XI, section 1 should be amended by the people to place additional and substantial checks on the legislative authority to propose constitutional changes. This much is clear. However, it is not at all clear what amendments should be made. And the record of the court in construing the current provisions in section 1 does not offer much encouragement to would-be reformers.

One conclusion that can certainly be drawn from Smith is that only the most egregious of proposed constitutional amendments will be kept from the voters if the amending article is not changed. From one perspective, the overwhelming defeat of the administrative procedures amendment at the polls might be seen as adequate redemption for the court's decision to let the people vote on the issue. But the supreme court played no role in this redemption. The defeat of the amendment was not by any means the result of the court's decision. Rather, it was the consequence of a concerted campaign by the opponents of the amendment.

The virtual anonymity which characterized the administrative procedures amendment while it remained in the legislature did not prepare its supporters for the attention it later received. If nothing else, Chesterfield Smith's unsuccessful suit undoubtedly contributed to the eventual demise of the amendment by making it the object of statewide debate. This, combined with the campaigning of Governor Askew and the animosity of the media, produced a landslide vote against the proposal.

But prominent lawyers and popular governors may not always be available to attract public attention to questionable legislative acts. Public notice of the administrative procedures amendment was generated primarily by the organized opposition to the amendment, not by the legislature's actions in placing it on the referendum ballot. If the legislature can approve with so little fanfare a measure envisioning a fundamental change in the separation of powers, then how much less fanfare will accompany legislative acts of lesser significance? If one such amendment can make the ballot, then why not another one just as deceptive and just as perplexing next year or the year after?

The defeat of the administrative procedures amendment did not

293. See note 86 supra.
end the debate over the separation of powers in Florida. The debate continues unabated outside the court's chambers. The separation of powers is apparently a matter of much concern to the Constitution Revision Commission. Indeed, an effort has been made to revive the administrative procedures amendment in slightly different form as part of the proposed revision.\(^2\) Although this effort seems clearly con-

294. On November 16, 1977, the Constitution Revision Commission voted 25–7 to propose the following language to the people as article III, § 19 of a revised Florida Constitution:

Section 19. Rule-making authority of administration agencies.—The legislature shall maintain continuing oversight of administrative rule-making. The legislature may by concurrent resolution nullify any administrative rule and shall establish a procedure by general law for the temporary suspension of administrative rules.


This proposal was introduced by Commissioner John Ware, a member of the state Senate and one of the early supporters of the administrative procedures amendment. See note 20 supra. Another commissioner, Attorney General Robert Shevin, moved to reconsider the vote in favor of Ware's proposal; but his motion failed, 24–7. Proposal No. 61, supra.

While the Ware proposal differed in some respects from the administrative procedures amendment, it would have had similar and perhaps even more far-reaching affects. If adopted, the proposal would evidently have elevated the Joint Administrative Procedures Committee to constitutional status. This would not have resulted from approval of the administrative procedures amendment. Also, unlike the administrative procedures amendment, the Ware proposal did not specify the grounds on which the legislature could nullify an administrative rule. The administrative procedures amendment limited such suspensions to rules "without or in excess of delegated legislative authority." See text accompanying note 19 supra. There were no such limitations in the Ware proposal.

Moreover, the Ware proposal did not contain the language in the administrative procedures amendment which would have allowed the governor and cabinet to defer legislative suspensions of administrative rules by a majority vote. See text accompanying note 19 supra. This omission would have broadened further the already extensive powers of the Joint Administrative Procedures Committee. And, finally, like the administrative procedures amendment, the Ware proposal provided for nullification by concurrent resolution, thus circumventing the executive veto.

There may be some legitimacy in seeking constitutional recognition of the need for legislative oversight of administrative rule-making. But the Ware proposal would have enhanced considerably the powers of one legislative committee and of the legislature as a whole at the expense of the executive branch. Furthermore, Proposal No. 61 would have resulted in the same usurpation of traditional judicial powers that was a necessary corollary of the administrative procedures amendment. Had the proposal actually become part of the Florida Constitution, the legislature would have been making the laws, and it would also have been interpreting them.

These actions by the Constitution Revision Commission were merely another episode in a continuing endeavor by the supporters of the administrative procedures amendment to overcome their defeat at the polls. Following that defeat, the 1977 legislature expanded the powers of the Joint Administrative Procedures Committee. As passed by the legislature, Senate Bill 558 added language to § 11.60, Florida Statutes, granting the committee standing to seek review of agency rules in court "on behalf of the legislature or the citizens of Florida . . . ." Act of June 30, 1977, ch. 77-458, § 1, 1977 Fla.
Laws 1872. This change was approved by a vote of 115-1 in the House and 34-1 in the Senate on June 2, 1977. FLA. H.R. JOUR. 1074 (1977); FLA. S. JOUR. 797 (1977).

The act provides that judicial review of agency rules cannot be initiated "until the Governor and the agency head . . . have been notified of the committee's proposed action and have been given a reasonable opportunity for consultation with the committee." Act of June 30, 1977, ch. 77-453, § 1, 1977 Fla. Laws 1872. Moreover, review may be sought only of a rule "to which the committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection." Id. This bill was signed into law by Governor Askew on June 30, 1977. Id. at 1183.

Thus, Senate Bill 553 accomplished some of what the legislature sought to accomplish with the administrative procedures amendment but apparently without alienating the executive branch. Whether the new law diminishes the traditional role of the judicial branch in resolving controversies over the proper interpretation of statutes is debatable. Senate Bill 553 expressly recognizes the conventional responsibilities of the judiciary in the separation of powers. It also seems to acknowledge the need for the executive to exercise its longstanding responsibility to see that the laws are executed. However, the wisdom of this legislation in the light of the continuing debate over separation of powers in Florida may be questioned. See Sheldon, 1977 Revisions in the Administrative Procedure Act, 6 FLA. ST. U.L. REV. (1978); Tallahassee Democrat, Jan. 23, 1978, at 28, col. 1; Florida Times-Union, Jan. 23, 1978, at B-2, col. 1.

Although Governor Askew signed Senate Bill 553, he was not at all receptive to Proposal No. 61. Soon after the favorable vote on the Ware proposal by the Constitution Revision Commission, Askew denounced the measure in no uncertain terms:

"Most disappointing of all to me in the revision process thus far has been the needless revival of the administrative procedures amendment—a dangerous and deceptive proposal that was rejected by a landslide margin of nearly a half million votes in the general election just one year ago. The latest proposal is not identical in all respects to the defeated amendment. But it may have even more far-reaching results."


In announcing his opposition to the Ware proposal, Askew recalled his reasons for opposing the original amendment. Id. In addition, he stressed the augmented power that adoption of the Ware proposal would have given to the Joint Administrative Procedures Committee. "The proposal would allow the legislature to empower a single legislative committee to suspend rules promulgated by agencies of the executive branch," he said, "without even requiring the committee to state the grounds for such a suspension." Id. The Governor argued that "a solitary legislative committee would be able to frustrate the efforts of the entire executive branch in executing the laws." Id. "It is my hope," he concluded, "that the Constitution Revision Commission will reconsider its vote on this proposal." Id. See Tallahassee Democrat, Dec. 8, 1977, at 17, col. 1; Florida Times-Union, Dec. 8, 1977, at A-13, col. 1.

Several additional proposals were made to the Constitution Revision Commission following the initial approval of the Ware proposal. No doubt they were inspired at least in part by the continued adamancy of the Governor, who appointed 15 of the 37 commissioners.

Proposal No. 103 by Commissioner Jon Moyle would have replaced Proposal No. 61 with the following language as article III, § 19 of a revised constitution:

"It shall be the public policy of this state that administrative rule-making shall not exceed constitutional or statutory authority and the legislature shall establish by general law a procedure for the temporary suspension of administrative rules by the judiciary."

Proposal No. 103, Constitution Revision Commission of Florida. Proposal No. 131 by Commissioner Moyle and others would have supplemented Proposal No. 61 by adding the following language to article V, § 3(b)(2) of a new constitution:
Shall hear appeals from legislative decisions pursuant to Article III, Section 19 to nullify or suspend an administrative rule. The decision on such appeals shall be rendered within 20 days of filing. Failure of the court to render a decision in 20 days shall automatically reinstate the rule.

Proposal No. 131, Constitution Revision Commission of Florida.

But neither of these proposals was considered by the commission. Instead, the commissioners adopted Proposal No. 161, which would have replaced Proposal No. 61 by adding the following language as article III, § 19:

Section 19. Legislative review.—
(a) The legislature shall maintain continuing over-sight of administrative rule-making. Any rule may be nullified by law. Procedures may be established by law for the suspension of rules between regular legislative sessions. Rules shall only be suspended on the ground that delegated authority was exceeded. A suspension shall not become effective for thirty (30) days, during which time any party may appeal such suspension to the appropriate district court of appeal. Any other right of judicial review shall not be affected as a result of any suspension.
(b) The appropriate district court of appeal shall hear appeals pursuant to this section as provided by law and shall render a decision as to the validity of the legislative action on suspension within twenty (20) days of filing of the appeal.

Proposal No. 161, Constitution Revision Commission of Florida.

This generally moderate proposal was approved by a margin of 31–3 on January 9, 1978, with Commissioners Edward Annis, Lew Brantley, and Thomas Barkdull casting the only dissenting votes. Id. See St. Petersburg Times, Jan. 10, 1978, at B–12, col. 1. Surprisingly, in the light of this vote, a second move to reconsider Proposal No. 61 failed on January 11. The vote against reconsideration of the initial proposal was 19 to 15. However, in view of the approval of Proposal No. 161, Commission Chairman Talbot D'Alemberte ruled that Proposal No. 61 had been superseded.

Two days later, yet another proposal was offered, this time by Commissioners Barkdull and Bill Birchfield. Both Barkdull and Birchfield had supported the original Ware proposal. As submitted, Proposal No. 211 would have created the following version of article III, § 19:

Section 19. Review of rules.—
(a) The legislature shall maintain continuing oversight of rules promulgated by agencies of the executive branch of government. Any rule may be repealed by law.
(b) The legislature may establish a joint legislative committee to continuously review the rules adopted by agencies of the executive branch, and the committee may suspend the operation of any rule until the sine die adjournment of the next regular session of the legislature.

Proposal No. 211, Constitution Revision Commission of Florida.

This proposal by Barkdull and Birchfield eliminated altogether any mention of judicial review. For all practical purposes, it would have revived the original proposal by Commissioner Ware. However, when debate began on the measure on January 26, Commissioner and Chief Justice Ben Overton moved immediately to strike the language following “branch” in subsection (b) and add:

After reasonable notice to the agency, the joint committee may seek judicial review of the validity of an administrative rule exceeding agency authority. The review shall be before the supreme court or such court as the supreme court may designate in an expedited proceeding. The court may suspend the rule pending judicial determination of its validity.

Proposal No. 211, Amendment No. 1, Constitution Revision Commission of Florida.

Commissioner Birchfield offered an amendment to the Overton amendment, changing “may” to “shall” in the final sentence and thus compelling at least temporary judicial suspension of any challenged rule. Proposal No. 211, Substitute Amendment No. 1 to Amendment No. 1, Constitution Revision Commission of Florida. Commissioner Dempsey Barron then suggested that “agency” be changed to “delegated” in the first
trary to the will of the electorate as expressed in the 1976 referendum, it may nevertheless succeed. The people of Florida may well be asked to make important decisions about the separation of powers once again when they vote on the proposed constitutional revision in 1978. Eventually, the supreme court could be confronted with the issue once again. And, should that happen, it will probably merit much more than a mere footnote.

Undoubtedly, the court also will be faced once again with the unwelcome task of determining how much notice must be provided for the people when the legislature proposes a constitutional amendment. "[L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them," the Smith court reasoned, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." It is difficult to believe that the people were given a "fair notification" of the potential impact of the administrative procedures amendment on their state government. And it is more difficult still to understand why the Supreme

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sentence of the Overton amendment. Proposal No. 211, Substitute Amendment No. 2 to Amendment No. 1, Constitution Revision Commission of Florida.

Thus amended, Proposal No. 211 was adopted by the commission 34-0 as follows:
Section 19. Review of rules.—
(a) The legislature shall maintain continuing oversight of rules promulgated by agencies of the executive branch of government. Any rule may be repealed by law.
(b) The legislature may establish a joint legislative committee to continuously review the rules adopted by agencies of the executive branch. After reasonable notice to the agency, the joint committee may seek judicial review of the validity of an administrative rule exceeding delegated authority. The review shall be before the supreme court or such court as the supreme court may designate in an expedited proceeding. The court shall suspend the rule pending judicial determination of its validity.

Proposed No. 211, First Engrossed Version, Constitution Revision Commission of Florida.

With some stylistic changes, this compromise proposal will likely be presented to the voters in November. It preserves the principle of judicial review. But it also allows a single legislative committee to cause the suspension of a duly promulgated rule pending the outcome of that review. And, in contrast to Proposal No. 161, Proposal No. 211 does not require a judicial decision within a specified time. Presumably, the courts would act quickly in an "expedited proceeding." But judicial haste is not required.

Proposal 211 undoubtedly would cause less harm than the administrative procedures amendment. But it too would be destructive of the historical separation of powers in Florida. While the principle favoring interpretation of the laws by the judicial branch of government would be protected, albeit in novel form, the equally important principle favoring execution of the laws by the executive branch would not. For the effective execution of the laws by administrative agencies would be subject to delay and diminution at every turn by the Joint Administrative Procedures Committee.

295. 338 So. 2d at 829.
Court of Florida would place such emphasis on "fair notification" and, at the same time, effectively deny it to the electorate.

As it is, the constitution places little emphasis on notice in its provisions for constitutional amendments in article XI. Aside from the brief instruction to place the "full text of the joint resolution and the vote of each member voting" in the journal of each house, there is nothing even remotely resembling a notice requirement in section 1. As the Smith court adroitly demonstrated, whatever notice requirements there may be in the technical distinctions between "amendments" and "revisions" are subject to the whimsy of judicial discretion. The issue of notice is addressed almost as briefly in article XI, section 5. And the scant notice requirements of that section are virtually meaningless. Section 5 provides for notice in the form of newspaper publication of the proposed amendment "in each county in which a newspaper is circulated" in the sixth week and in the tenth week before the referendum vote. It is hardly necessary to document the conclusion that a constitution which relies exclusively on legislative journals and legal advertisements to publicize proposed constitutional amendments guarantees little in the way of actual notice to a vast majority of the electorate.

A search for more effective methods of notice might not yield much beyond the legislative journals and the legal advertisements. No doubt modern means of communication such as radio and television might be employed to provide some additional notice. Conceivably, a statement to that effect might even be included in the constitution. And surely there should be some constitutional requirement that the substance of a proposed amendment must appear on the ballot. The need for this can readily be seen in the cavalier dismissal by the Smith court of the statute requiring such a ballot notice. A constitutional requirement would not be so easily dismissed.

One option would be to adopt that part of the Model State Constitution which provides that "[e]ach proposed constitutional amendment shall be submitted to the voters by a ballot title which shall be descriptive but not argumentative or prejudicial, and which shall be prepared by the legal department of the state, subject to review by the courts." Preparation of the ballot notice by the Attorney General might help insulate the amendatory process from the temptations of partisan politics. Judicial review of such preparation might also serve the ends of fairness and objectivity.

However, more realistic notice to the people about legislative efforts to change the constitution would be much better assured by

imposing more visible restraints on the amendatory process. Various alternatives are available. Some have been tried in other states. For example, in seventeen states a two-thirds majority of the membership of each house of the legislature is necessary to propose a constitutional amendment instead of the three-fifths vote mandated in Florida and in eight other states. Yet this would probably not impose much of an added restraint on a legislature which passed a measure such as the administrative procedures amendment with only a few dissenting votes.

Another alternative would be to limit the number of constitutional amendments the legislature could propose at any single election, as three states have previously done. This would be more helpful, for it would focus public attention on just a few proposed amendments rather than on the increasing number of proposals that crowd, and thus cloud, the referendum. Such limitations, though, should not be used to restrain the right of the people to place proposed constitutional amendments on the ballot by means of the initiative.

Recalling his unsuccessful suit and reflecting on the reluctance of the court to remove legislatively proposed amendments from the referendum ballot, Chesterfield Smith urged the Constitution Revision Commission at its opening session to recommend further restrictions on the authority of the legislature to propose constitutional changes. "I personally have become convinced quite recently that constitution revision should be restricted to bodies set up for that sole purpose," he said in an obvious allusion to his unsuccessful suit. Accordingly, I hope this commission will consider restricting the legislature in the future to constitutional proposals relating to a single subject in a single section."

This suggestion has considerable appeal. Unfortunately, it might not overcome all the obstacles to rational constitutional change which were posed by the Smith decision. After all, the Smith court never admitted that the administrative procedures amendment was not an amendment to a single section of the constitution, despite the plaintiff's protestations. Certainly there were abundant implications in the court's opinion. But the Smith court did not rule that the proposed amendment was really a revision, as Smith claimed. While the court came

297. See Sturm, supra note 3.
298. See note 21 supra.
299. Kentucky allows the legislature to propose only two constitutional amendments at each election. Arkansas allows three. Kansas permits five. Sturm, supra note 3.
301. Id.
very close to confessing the truth of some of Smith's assertions, it never actually admitted any of them. And this should give pause to those who might hope that the court would reach a different conclusion in similar circumstances in the future.

Thus, there is no assurance that adoption of Smith's suggestion to limit the legislature to proposing only section amendments would keep schemes such as the administrative procedures amendment off future ballots. A proliferation of such proposals could result despite the limitation, with the legislature offering constitutional revisions concealed in the guise of mere amendments. And, so long as such proposals were able to meet the undemanding dictates of the "germanity" test, they would not be kept from the electorate by the supreme court. This much is obvious from Smith.

All the same, Smith's proposal deserves serious study by those hopeful of reform. Given the current constitutional guarantee that revision commissions will be convened every twenty years from now on, and given the constitutional changes by means of the initiative, there is no longer any justification for the legislative power to propose constitutional revisions. Legislative amendments are probably needed. But legislative revisions are superfluous. If Florida's unique experiment with a constitutionally mandated revision commission is to be successful, then the power to propose revisions at regular intervals should be restricted to the commission appointed specifically for that purpose. And the right to make any needed revisions in the interim between revision commissions should be reserved to the people themselves, through the initiative or through the constitutional convention, rather than to their surrogates in the legislature.

Yet another alternative in amending article XI would be to incorporate the implications of Justice England's analogies in Weber and Smith in the constitution. The same restrictions could be applied to the legislature when proposing constitutional amendments as are currently applied to the lawmakers under article III when proposing statutory amendments. Most noticeably, this would mean the imposition of the "one subject" rule on the amendatory process. Conceivably, such a change could make the final product of that process more understandable to the voters. But importation of the "one subject" rule from article III would be of little benefit if the rule were given the same broad construction and the same gloss that the courts have given it in recent years when construing legislation. And this would be the

303. See, e.g., Demko's Gold Coast Trailer Park v. Palm Beach County, 218 So. 2d 745 (Fla. 1969).
probable consequence of such a change before a court enamored of the loose strictures of the "germanity" test—a test which is, to a great extent, simply a judicial restatement of the "one subject" rule.

However, still another potential alternative for amending article XI is available in article III. A visible and effective check could be placed on the legislature in the amendatory process in the form of an executive veto. This would be without precedent. No other state allows the governor any sizeable constitutional role in proposing constitutional amendments to the people, much less in keeping such proposals from the people. Proposing constitutional amendments has always been a legislative power, with the checks on that power deriving exclusively from the courts and from the people. The governor's role in the amendatory process has been one principally of suasion, as typified by Governor Askew's efforts in Florida on behalf of the "Sunshine Amendment" and in opposition to the administrative procedures amendment.

Yet the arguments against allowing an executive veto of a proposed constitutional amendment depend more on tradition than on reason. Those arguments are based primarily on the historical role of the legislature as a representative body and on the presumed communion between the legislature and the electorate. The unspoken assumption is that only the legislature can discern the deepest desires of the people in such matters. The governor, however, is also a representative of the people. He too speaks with the sanction of the sovereign populace. And, unlike individual legislators, the governor is responsible to a statewide constituency. It would not seem illogical to balance the predilections of these two independent constitutional authorities—the legislature and the governor—in an effort to arrive at some positive accommodation in proposing constitutional change.

As an example, the constitution could be amended to allow both a gubernatorial veto of a proposed constitutional amendment and an override of such a veto by a three-fourths vote of the members of each house. This proposal is not really as radical as it may seem. Such a change in the constitution would probably prove less significant as an additional executive check on the legislature than as an additional and a quite practical means of providing more effective notice to the people about proposed constitutional amendments. A required three-fourths vote for a veto override would undoubtedly not have deterred the legislature from placing the administrative procedures amendment on the referendum ballot since the measure had virtually no opposition within the legislature.\textsuperscript{304} However, a gubernatorial veto of the pro-

\textsuperscript{304} See notes 21 & 38 supra. A two-thirds vote is required to override gubernatorial
posed amendment would have attracted public attention to the proposal and provided additional public notice of its possible consequences—in much the same way as Smith's suit.

A final alternative, and perhaps the most feasible alternative, would be to amend article IX, section 1 to require a majority vote by two consecutive regular sessions of the legislature as a prerequisite to placing a proposed constitutional amendment on the referendum ballot. In contrast to the suggestion of allowing an executive veto, there is ample precedent for this proposal. Separate votes by successive legislatures were required by slightly different provisions in the Florida Constitutions of 1838 and 1868.\textsuperscript{305} And, while this procedure was abandoned in Florida with the adoption of the Constitution of 1885, it is still employed with some variations in twelve states.\textsuperscript{306}

Had two votes in two sessions been required when the administrative procedures amendment was first proposed, Chesterfield Smith's suit might never have happened. The administrative procedures amendment might have been defeated on the second vote. The battleground over the legislative proposal would have been in the legislature and not in the courts. The legislature would probably have voted as it did in the 1976 regular session. Governor Askew would doubtless have voiced his displeasure, as he did, following that session. And, most likely, the competing parties in the controversy would have converged in political combat over the necessary second vote of approval in the 1977 regular session.

In the meantime, a year would have passed. The legislators would have been better prepared to weigh the possible consequences of the proposed amendment before casting their second votes. And the people too would have been better prepared to cast their votes if it proved necessary. Given the circumstances, surely the second vote would not have been as hurried or as unpublicized as the first.\textsuperscript{307} And, whatever the outcome of that second vote, the people would have been given substantial additional notice of the possible effects of the administrative procedures amendment.

As Justice Drew explained in Gunter, the overall aim of the 1968 revision was to offer the people of Florida a constitution they could

\textsuperscript{305} See note 168 supra.


\textsuperscript{307} See text accompanying notes 14 and 15 supra.
read and understand and live by. The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968," he said, "was to eliminate inconsistencies and conflicts and to give the state a workable, accordant, homogeneous and up-to-date document.

No doubt the Supreme Court sought to further this abiding ambition in Smith. The "germanity" test was surely intended to eliminate the "inconsistencies and conflicts" in article XI, section 1. But the court's decision only added to the "inconsistencies and conflicts" which surround legislative efforts to amend the Florida Constitution.

If anything should be clear in a constitution, it is how that constitution may be changed. Yet article XI, section 1 of the Florida Constitution is anything but clear. Making fine distinctions between such words as "amendment" and "revision" may seem trivial. Yet these words have different connotations, not only to lawyers and legislators, but to many other people as well. It may be difficult, too, to define a concept as elusive as "fair notification." But there can be little real justification for allowing the people to vote on an issue when the people are not really told what they are deciding.

The legislators who sponsored the "daisy chain" amendments that were rejected in Rivera-Cruz were at least candid in acknowledging that those amendments would have changed virtually the entire state

308. 238 So. 2d at 892.
309. Id.
310. The distinctions between an "amendment" and a "revision" may seem less trivial if the Constitution Revision Commission decides to submit its proposed changes to the people in 1978 as a series of separate proposals rather than as a single proposal. Commission Chairman Talbot D'Alemberte has suggested that this might happen. Tallahassee Democrat, July 17, 1977, B-1, col. 4. It seems likely because of the apparent decision by the commission to propose major changes in the document.

This plan, however, might be subject to constitutional challenge. Article XI, section 2 provides that the commission shall file "its proposal, if any, of a revision of this constitution or any part of it" with the Secretary of State not later than 180 days prior to the general election (emphasis supplied). It is uncertain whether this language will allow the individual amendments envisioned by D'Alemberte. It is also uncertain whether the legislature is precluded from exercising its authority under article XI, section 1 to submit separate proposals for constitutional revision to the people at the same time the vote is held on the proposal of the revision commission.

Commissioner and Senate President Lew Brantley, unhappy over the commission's proposal to abolish the elected cabinet system, has threatened to push conflicting proposals through the legislature in time for a November vote. Tallahassee Democrat, Jan. 19, 1978, at D-1, col. 2. Perhaps in response to this threat, the Constitution Revision Commission approved by voice vote on March 6, 1978, adding language to article XI, section 5 which would give the supreme court the authority to resolve questions about conflicting amendments in revisions in expedited proceedings. If adopted, this proposal would apply to conflicting amendments and revisions adopted simultaneously at the 1978 general election. Proposal No. 258, Constitution Revision Commission of Florida.
constitution. The state senator who suggested the initiative petition that was rejected in Gunter was at least straightforward in saying that his petition would have created a unicameral legislature—in addition to whatever other changes it might have caused. But the sponsors of the administrative procedures amendment were neither candid nor straightforward in what they told the people about their proposal. Whatever that proposal may or may not have been, it was certainly not what it appeared to be. The administrative procedures amendment may well have been intended to dispel a “phantom government.” But it might also have created a very different form of government for Florida. And the people of Florida were told nothing by the legislature of this possible result of their referendum vote.

It is easy to say, in the democratic spirit, that the people can comprehend even the most complex of issues. No doubt they can—if they are given the chance. But why should issues be made any more complex than necessary? Why should the people not be properly and adequately informed when they vote? The “notice-giving requirements” to which Justice England alluded in Smith should not be implied. They should be explicit. The Supreme Court of Florida should not be left to search for notice requirements between the lines of the state constitution.

At the very least, one brief sentence should be added to article XI, section 1:

The people shall be given fair and adequate notice of the contents and the consequences of any amendment or revision proposed by joint resolution of the legislature.

This alone might help avoid future dilemmas such as Smathers v. Smith. It would certainly add credibility and coherence to legislative efforts to amend the Florida Constitution.

JAMES BACCHUS

311. One possible indication that the people did not fully understand the administrative procedures amendment might be the fact that, of the referendum proposals on the November ballot, fewer votes were cast on the administrative procedures amendment than on any other proposal. Only 1,939,401 voters expressed an opinion on the administrative procedures amendment. In contrast, 2,227,566 voted either for or against the Sunshine Amendment. A total of 3,150,631 Floridians voted in the presidential election which was on the same ballot. Florida Secretary of State, Tabulation of Official Votes, Florida General Election, Nov. 2, 1976.

312. 338 So. 2d at 828.