Ideas in Action

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Consideration of Some Proposals by the Constitution Revision Commission

By: Arnold L. Greenfield, Florida TaxWatch Senior Research Fellow, member of the Florida Bar and the National Association of Bond Lawyers

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Background

The perspective of this writer has been shaped by involvement in the Constitution revision process and in State Government. In 1968, this experience began with legal support and advice to legislative committees considering the then proposed "new" State Constitution; followed in 1978 by service as a consultant to the Constitution Revision Commission regarding finance and taxation. Before and after the 1969 Constitution took effect, the author served as attorney for State agencies both under the Governor and under the Governor and Cabinet, as well as being the Director of a State agency for several years after the 1969 revision was implemented.

These experiences, as well as working with the State agencies as a consultant and as a managing underwriter of State bond issues from 1976 to 1994, shaped my points of view about this subject.

Factors Considered

In reviewing and commenting upon proposed revisions to the State Constitution, more than one factor or criterion should be taken into consideration. A proposal may be a "good idea" in the opinion of a commentator, but may not necessarily be an appropriate matter to be included in the Constitution. This may be true for more than one reason.

Some matters may be relatively ephemeral. While viewed as popular policies at a certain time, such matters may not be of sufficient long-term significance to be appropriate for inclusion in the organic charter of State Government; and, thereby subject to deletion or further amendment only by subsequent Constitutional Amendment. Matters of this nature are better left for statutory enactment if they are to be enacted into law at all.

The State Constitution should not be "cluttered up" with trivial and relatively meaningless pronouncements designed to appeal to sentiments perceived to be popular with segments of the electorate; or to reinforce feelings of self righteousness among the framers, which are seldom in short supply. In other words, because a proposition

temporarily makes its proponents or some voters "feel good" does not necessarily raise such a proposition to Constitutional dignity.

In fact, proposals of the types discussed above detract from the perceived credibility and seriousness of purpose of the framers. In general, non-elected bodies such as the Constitution Revision Commission should not substitute their judgment for that of elected legislative representatives as to matters within the purview of the Legislature, either because the Legislature has failed to date to enact laws which are favored by a majority of the Commission members or because the Legislature has enacted laws with which the Commission happens to disagree. Any such proposals should an automatic "caution" light for the electorate and almost automatic grounds for rejection. The purpose of Constitutional revision is not to serve as a sort of super-legislative body to reverse the perceived "unwisdom" of elected representatives. This distortion of purpose is decidedly undemocratic, no matter how inconvenient or "unenlightened" current law may be in the collective minds of a given session of the Revision Commission.

A final warning signal to the voters when considering ratification of a proposal should be how it is "packaged." The 1978 Revision Commission contributed to the defeat of their own efforts by "cleverly" bundling proposals thought to have popular appeal with other proposals considered to be less popular in the hope and expectation that the less popular proposals favored by the Commission would be carried to approval by attachment to the more popular proposals.

In the event, exactly the opposite occurred as all the 1978 proposals were defeated by the electorate which proved to be quite capable of seeing through this tactic. (Many of the more meritorious proposals were later adopted as individual amendments, minus the less favored proposals that the voters refused to approve when linked thereto.)

As discussed below, the 1998 Revision Commission does not appear to have derived the rather obvious inference from the 1978 experience. The same tactic has again been adopted, so the same results may very well be obtained.

Review of Proposals

Having set out the factors which this writer believes should be taken into consideration while conducting a review of proposed Constitutional amendments, the reader's attention can now be directed to certain specific proposals (or "packages") approved by the recent session of the Revision Commission for relatively brief applications of these factors to some of the proposals.

Revision 5

The principal purpose of this proposal is to combine and reorganize the present Game and Fresh Water Fish Commission and the present Marine Fisheries Commission. However, a little publicized provision pertaining to revenue bonds is also contained in this proposal.

The effect of the bonding provision would be to permit, pursuant to general law, pledging all or part of a dedicated State tax to finance the "acquisition and improvement of land, water areas, and related property interests and resources for the purposes of conservation, outdoor recreation, water resource development, restoration of natural systems, and historic preservation."

The State has previously authorized and issued bonds and revenue obligations for similar purposes, so there is nothing new or radical about this idea. The legal effect of this proposal is apparently to create an exception to the general prohibition of State revenue bonds payable from State tax revenues (found in Article VII, Section 11(d)).

This was an ill-considered prohibition enacted when State full faith and credit bonds were first authorized in the mistaken belief that revenue bonds payable from tax funds would be replaced by full faith and credit bonds for diverse purposes. In reality, only one issue of full faith and credit bonds has been authorized under Article VII in almost 30 years since the 1969 Constitution took effect. This restriction has impeded the ability of the State to address many capital outlay needs and has required the State to resort to more costly alternatives, such as leasing buildings at taxable commercial rates.

Outright repeal of the restriction provided by Article VII, Section 11(d), would be a better proposal, but anyone favoring the combination of the two game and fish agencies will do no harm by also approving this bonding amendment. However, the linkage of these two provisions may not seem appropriate to some voters.

Revision 6

This proposal consists of high sounding rhetoric and would have very little, if any, real legal effect. It states that education is a "fundamental value" and a "paramount duty" of the State. It further provides that the State education system should be "efficient, safe, secure and high quality."

Does anyone really believe that absent this revision the State speaking through the Legislature would prefer an inefficient, dangerous, insecure and low quality education system? This is one of those "feel good" proposals designed to make the Commission members (and the general public) believe that they have accomplished something, while this proposal actually does virtually nothing of substance.

It does no harm, but hardly merits the time spent drafting and debating it. Unfortunately, this is the type of proposal that will be naively promoted to demonstrate the alleged "good work" of the Commission.

No serious voter should be deluded into thinking that ratification of this amendment will really do anything to substantially benefit education in this State. The intention of some of the sponsors may have been to require the Legislature to appropriate a greater

proposition of the State budget for education. If so, the proposal is not likely to be held to legally bind the Legislature in this way.

Revision 7

This proposal would Constitutionally require that almost all costs of the State judicial system be provided for at the State level. Many people are probably unaware that a large part of these costs is now provided for from local property taxes and filing fees. The proposal would continue to allow filing fees to be used for specified court related costs.

Counties would continue to be responsible for facilities, offices and certain services and equipment for the Courts and their offices. There is also a somewhat ambiguous provision, which could become a gaping "loophole", requiring the Counties to pay "salaries, costs, and expenses" of the State Court System "to meet local requirements as determined by general law."

Taken as a whole this part of Revision 7 is a large step in the right direction. The judicial system should be uniform throughout the State and the responsibility of the State.

Unfortunately, the above provision has been combined with a botched attempt to change the method for selecting Circuit Judges and County Judges. This writer strongly agrees that Circuit and County Judges should be selected and retained or rejected by the same method now used for all Appellate Judges in Florida. Some real "horror stories" occurred at the highest level prior to institution of "merit selection" of Appellate Judges, and the manner of conducting elections of Judges in some Circuits and Counties is a disgrace to the legal system and to the State.

Unfortunately, as a political compromise in order to get this proposal approved by the Revision Commission, a local option system was incorporated. Having adjacent Circuits and Counties with different methods of selecting Judges would result in a patchwork system not serving the interests of justice and confusing to citizens. The parts of the State where the worst abuses of the present system have occurred would probably be the most likely to retain the so called "elective" system.

It would, therefore, be better to reject this combined revision and to allow the two distinct subjects to be separated and submitted to the electors with no provision for local options. The proposed cure could be worse than the existing disease and would lock this flawed proposal into the State Constitution for years to come.

Even if more time is required to develop and gain support for a better proposal for selecting Judges at all levels uniformly throughout the State, this would be better than approval of this seriously deficient proposal.

It is regrettable that the Revision Commission saw fit to combine these two proposals, which illustrates the problems inherent in the "log rolling" or "daisy chain" approach

prohibited to the Legislature but used by the Revision Commission in this and other instances.

Revision 8

This proposed "restructuring" of the State Cabinet is a bad idea for more than one reason. It has long been an article of faith among many journalists, academic political scientists, and other self- styled "reformers" that there is something wrong with the Florida Cabinet System (1) because it is unlike most other States (which has nothing to do with the merits of the system), and (2) because it allegedly makes it more difficult to place the responsibility for decision-making in one elected official (as if this would necessarily be a good idea).

Ironically, many of the strongest advocates of "Government in the Sunshine" are also among the most persistent advocates of abolishing or curtailing the so called "Cabinet System". It should be obvious that burying all or a greater amount of executive branch decisions in the confines of any one elected office (and thereby out of public view until after the fact) would hardly contribute to transparency of the decision making process, and would also deprive interested members of the public and the information media of a forum for discussion of the issues being considered.

Having working in the process with both agencies controlled by the Governor alone and agencies controlled by the Governor and Cabinet, this writer can attest from personal experience that the much maligned "Cabinet System" definitely serves as a deterrent to some of the worst abuses of power. It also contributes to a more deliberative and open process, both because of the need to obtain concurrence of a majority of the Cabinet Members and because of the need to take a public vote (and have public discussion) on major policy decisions.

All Governors have found the "Cabinet System" to be frustrating at times during their tenure. Some of our Governors have been outstanding and fair minded public officials. Others have not. Concentration of executive power in one individual of the wrong type (of whom we have had a few during recent history) would hardly produce results pleasing to some of the more idealistic advocates of this proposal. Too often, decisions are made by obscure Gubernatorial aides without the Governor's knowledge and without any public review.

Unfortunately, not all of the advocates of Revision 8 are quite so idealistically motivated. Politicians, aspiring to hold Gubernatorial office regularly fantasize about enjoying less restricted power should they achieve their goal. (This condition afflicts virtually every elected official, starting with many elected Class President in the third grade.)

It would also be easy to infer partisan political motivations behind the present proposal. It may not be a complete coincidence that shortly after Republicans were elected to the offices of Secretary of State, Commissioner of Education and State Comptroller, the

Revision Commission proposed to abolish these three elected offices. Some Republicans went along with this proposal because they expect the current Republican nominee to be elected Governor, but this is a very short-sighted viewpoint for making long lasting Constitutional decisions about the structure of State Government.

It should also be noted that in recent years several formerly "Cabinet" functions have been transferred under the Governor by the Legislature without strenuous objection from the affected Cabinet members (who are now subject to the "Eight is Enough" law and who may also be subject to the fantasy referred to above regarding their own aspirations.)

This proposal also affects the ultra-sensitive and important (but little known) State Board of Administration, which is responsible for almost all State investments and State borrowing through the issuance of bonds. These activities involve responsibility for many billions of dollars of State funds. This Board is a perfect example of the benefits of putting a brake on unlimited power by the Governor or any other State official. The arbitrariness and abuses in other States without such Board control have been almost entirely avoided in Florida.

The Revision Commission did not propose abolishing this Board completely. It did propose to combine offices of State Comptroller and State Treasurer and to add the Attorney General (the only Cabinet Member to also serve on the Revision Commission) to the three member Board, thus giving the Attorney General (who should be an impartial and professional State legal officer) vast new powers in the financial area. This "stealth" reorganization has very serious ramifications and is a very bad idea.

For the reasons explained above, this is perhaps the worst proposal to come from the Revision Commission. It should be rejected by voters who take the time to inform themselves about the issues involved and who are not carried along by the idealistic clichï¿½s and generalities surrounding this subject.

Revision 9

Every once in a while (fortunately not too often) a body will propose a change in the law which is so pointless and so lacking in substance as to subject the entire work product of the body to ridicule and call the value of their total output into question. (If they could deliberate for an extended period of time and pass this, what were they thinking about?)

The proposed Revision 9 is such a fatuous exercise. It is painful to write these words, knowing that the membership of the Revision Commission included some of Florida's most distinguished lawyers (some of whom are also Judges) and many personal friends.

This proposal perfectly illustrates what can happen when normally very rational people get swept along with the tide of "political correctness" (and possible reluctance to be labeled and perceived as non-supporters of "diversity" taken to its most extreme and

mindless lengths). It is worthy of note that some political candidates have already begun the posturing process by declaring their support for Revision 9.

The Florida Constitution in the Declaration of Rights already provides that, "All natural persons are equal before the law and have inalienable rights...". It does not say all men (although this would be interpreted by virtually every Court to include women without expressly so stating). To repeat, it says "All natural persons".

In law, as this humble writer need hardly point out to the distinguished members of the Revision Commission, "natural persons" is a term meaning human beings (regardless of gender); as opposed to "artificial persons", such as corporations or certain other business associations. It most certainly does not refer only to male persons. It is very doubtful that the proponents of this amendment can cite one instance in which any Court or administrative body has ever found or ruled that "natural persons" does not include female human beings.

After informally conducting a survey among my female acquaintances, including some who are also lawyers, not one respondent has yet stated that she does not consider herself to be a "natural person", legally or otherwise.

This proposal amounts to a cloud of "swamp gas", which when released into the atmosphere of the chambers where the Revision Commission convened apparently poisoned and temporarily suspended the reasoning powers of the members.

Presumably, some members voted for Revision 9 feeling that it is probably meaningless but can do no harm; but, this sort of thing can do harm, by bringing the efforts of the Revision Commission into disrepute among large numbers of people who are not adherents of the kind of dogma represented by this proposal and who are not intimidated about expressing their opinions or voting their convictions.

Revision 6, discussed above, is a product of the same school of "thought", but Revision 9 is much worse. It trivializes and detracts from the Constitutional process. It is literally an insult to the intelligence and the understanding of the electorate and deserves to be resoundingly rejected.

Revision 10

This proposal has several things wrong with it, not the least of which is the multiplicity of subjects covered and combined for a single vote. Readers can refer elsewhere in this article to the problems inherent in this "daisy chain" approach.

The subject is somewhat complicated, but generally the leasehold interest or other use for private purposes intended to make a profit through operation of a business on public property is not now exempt from taxation. Interests conducting these activities have been

lobbying the Legislature for many years to create such an exemption. Opinions may legitimately vary about the merits of this proposal, but two things are clear:

First, this is an attempt to sidestep or avoid the Legislative or initiative process, after many attempts to obtain this exemption by other legal routes have not succeeded; and

Second, it is overly broad as drafted. Regardless of the merits or demerits of this proposal as to airports and seaports, the proposal would delete the word "exclusively" from the public purpose requirement and would authorize exemption of property "used for airport, seaport, or public purposes...and uses that are incidental thereto". The language would open the door to exemption of virtually anything that could be lobbied through with no Constitutional limitation.

Another part of Revision 10 would authorize exemptions from taxation of "tangible personal property", attached to "mobile home dwellings" or included in single-family and multi-family residential rental facilities with ten or fewer units, without limitation as to value.

The fiscal impact on local governments of the foregoing provisions has not been adequately explained.

Finally, Revision 10 includes an unrelated provision permitting so called "ex parte" communications with local government officials. This term is usually understood to mean, "without the presence of or notice to other interested parties." The apparent purpose is to undo Court rulings to the contrary (proponents would probably say that it "clarifies an ambiguity" or words to that effect).

The potential dangers to "Government in the Sunshine" are obvious. The "backdoor" approach of attaching this to unrelated matters pertaining to taxation is pernicious. Regardless of the merits or demerits of the other parts of Revision 10, this provision is reason enough to reject the combined proposal. This could become a "lobbyist's relief act" embedded in the State Constitution.

Revision 11

Among other things, this proposal would Constitutionally mandate public financing of State- wide political campaigns and funding thereof by the Legislature.

The present Statute covering this subject may be modified or repealed and the Legislature has the discretion to provide appropriations deemed adequate for this purpose, or not to do so. This is a relatively new law that is still subject to debate and modification (although now that politicians have had a taste of public money for their campaigns, they are not likely to repeal it). This is not a proper subject for Constitutional mandate.

This proposal represents another attempt by the Revision Commission to substitute their judgment for that of elected Legislators and should be rejected, even by voters who are favorably disposed to the general concept of public financing.

This writer believes that there is nothing more potentially dangerous to democracy than giving the government on any level control over financing political campaigns, as well as the power to determine who shall receive funding, how much they can spend, and for what purposes. Using a taxpayer's money to support candidates who the taxpayer may oppose is almost as bad as the use of tax money to establish a religion in which the taxpayer does not believe.

This whole idea is either a misguided attempt to rectify perceived excesses of political spending (which it would not accomplish) or an attempt to implement more government control of the electoral process by those who think they know better than the majority of voters and contributors about what is good for society. In other words, they are willing to risk undermining the democratic process (and the freedom of speech as defined by the U.S. Supreme Court) because they are sometimes dissatisfied with election results.

Revision 12

This writer happens to generally favor so called "gun control" at least insofar as safety considerations are concerned. Semi-automatic weapons do not seem to be necessary for hunting game. Reasonable testing requirements do not seem to be unduly burdensome.

Nevertheless, the proposed "local option" authority for the sale of firearms seems to be futile. If a purchaser could avoid more stringent requirement by crossing the County Line, what would be accomplished?

Also, the idea that checking criminal records can prevent the obtaining and use of firearms by criminals seems unlikely at best. Criminals presumably do not hesitate to obtain guns illegally regardless of what laws may be enacted.

This is another "feel good" or "political correctness" proposal that would have little practical effect.

Conclusion

What is the proper course of action to be followed if a voter thinks some points of these proposed Revisions (and others) may be good but is unsure about or opposed to other parts of the same proposal? What if a voter, after attempting to inform himself or herself about the myriad Revisions submitted for ratification, is not firmly convinced that the merits outweigh the demerits (or if the voter just does not have enough information to make a decision of such magnitude or duration)?

For the answer to these questions, this writer is indebted to one of the wisest and most honorable men in Florida public life, former State Senate President and current Regent of the State University system Philip Lewis, who told me a long time ago, "When in doubt, vote no".

About the Author

Arnold Greenfield is a member of the Florida Bar and the National Association of Bond Lawyers. He was the first Director of Bond Finance for the state of Florida, a consultant on finance and taxation to the 1978 Florida Constitution Revision Commission and Managing Director of a major national investment bank until his retirement in 1994. He is now a Visiting Professor at the Askew School of Public Administration and Policy, Florida State University, and a Senior Research Fellow with Florida TaxWatch.

Dr. Neil S. Crispo, Senior Vice President, Research and Operations
Joseph P. Lacher, Chairman; Dominic M. Calabro, President and Publisher
Daniel E. Sprague, Publications Director and Research Analyst

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For more information on this report, please call:
(850) 222-5052
OR
write Florida TaxWatch at:
P.O. Box 10209
Tallahassee, FL 32302