

Art. II, section 7 of the Florida Constitution:
The "Right to a Clean Environment" as proposed before the 1997-
1998 Constitution Revision Commission

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I. INTRODUCTION

Florida has always shamelessly promoted its natural attractions as a land of opportunity and promise under the sun. "The Sunshine State" draws tourists and permanent residents alike to sun themselves on Florida's beaches, fish in Florida's rivers, bays and harbors and swim in Florida's springs. But as the population of fifteen million Floridians expands exponentially faster,¹ the increased use of natural resources places will inevitably place additional strain upon Florida's fragile environment. The tourists and new residents who find themselves attracted to Florida's natural beauty unwittingly create greater pressures on natural resources they enjoy.² Throughout the past century, Florida has developed an array of environmental agencies, statutes, rules and regulations to adequately protect its environment.³ Despite the state's efforts to protect its resources through laws, many Florida environmentalists believe that the right to a clean environment is a fundamental right and should be expressly included in the Florida Constitution.⁴

This Article examines the concept of a "Right to a Clean Environment" in the Florida Constitution as proposed during the

¹ United States Census Bureau, Projections of the Total Population of States: 1995 to 2025, available at <http://www.census.gov/population/projections/state/stpjpop.txt>

² AL BURT, AL BURT'S FLORIDA 57 (1997) ("As always in Florida, it was a delicate balancing act: how to grow and prosper without uglification.")

³ Clay Henderson, *The Conservation Amendment*, 52 Fla. L. Rev. 285, 286 fn. 8 (2000)

⁴ David Cox, *State Environmental Stalwarts Campaign for 'Bill of Rights'*, Tampa Tribune, July 24, 1997, available at <http://www.aif.com/CRC/News/199707/z3072497.htm> (last viewed April 21, 2004)

meeting of the 1997-1998 Constitution Revision Commission. The Article briefly discusses the role of the Constitution Revision Commission and its ability to periodically amend the Florida Constitution through the revision process. The Article then examines the citizen-led proposals for a right to a clean environment and briefly discusses the history underlying the principle that environmental protection should rise to a fundamental right. The Article also describes relevant Constitutional examples of a "Right to a Clean Environment" in both foreign and state constitutions.

Finally, this Article examines the proposals to amend Article II, section 7 of the Florida Constitution as debated before the 1997-1998 Constitution Revision Commission. The Article analyzes the initial constitutional proposals and their subsequent amendments to provide a glimpse at the earnest debate and deliberation that surrounded the proposals. In short, this article describes the potential for a "right to a clean environment" and the constitutional infirmities surrounding similar proposals. I argue that the citizens of Florida are not yet prepared to recognize a "right to a clean environment" as a fundamental right to be included in the Florida Constitution.

II. BACKGROUND

A. The Constitutional Revision Commission and the proposed "Environmental Bill of Rights"

For over 150 years, the people of the state of Florida have governed themselves through a state constitution.⁵ Since the birth of statehood in 1845, Florida has been governed by six different state constitutions, with the most recent version considered the "revision" Constitution of 1968.⁶ As only three of the fifty-six "framers" of Florida's first constitution hailed from Florida, the majority of the participants arrived from states where the United States Constitution and state constitutions formed the highest law of the land.⁷ The "Florida Framers" thus likely drew upon their familiarity with the American concept of constitutional conventions to guide the process of drafting Florida's constitution.⁸

Florida's constitutional history largely mirrors the tumultuous historical changes the state has seen since its inception. The Constitution of 1838 served as Florida's first state constitution.⁹ To prepare for entrance into the Union, delegates from the territory of Florida convened in the now-abandoned panhandle town of St. Joseph to craft the state's first constitution.¹⁰ The second Florida Constitution was drafted in

⁵ CONSTITUTION REVISION COMMISSION OF FLORIDA, FLORIDA'S CONSTITUTION REVISION COMMISSION: 1997-1998 MANUAL 51 (Constitution Revision Commission Ed., 1997)

⁶ Id. at 51-56.

⁷ Id. at 51.

⁸ Id.

⁹ Id.

¹⁰ Id. Interestingly, as a precursor to future election debates in Florida, the first Florida Constitution was ratified by a

1861 to form the state's secessionist constitution as a member of the Confederate States of America.¹¹ The third Florida Constitution arose from the ashes of post-Civil War Florida in 1865 and was never ratified, as Congress established military districts in place of recognizing Florida as a sovereign state.¹²

The Florida Constitution of 1868, considered Florida's Reconstruction or "Carpetbagger" Constitution, created Florida's cabinet, emancipated African-Americans and provided a seat in the Florida House and Senate for a Seminole Indian.¹³ The post-Reconstruction Constitution of 1885 included a poll tax for African-Americans and served as Florida's Constitution well into the twentieth century.¹⁴ The Florida Constitution of 1968 became the first twentieth-century constitution for the state.¹⁵ Constitutional scholars consider the Florida Constitution of 1968 as the long-overdue twentieth-century "revision" of the obsolete 1885 Florida Constitution.¹⁶

The Florida Constitution of 1968 ushered in many dramatic and distinct changes to the document representing the supreme law of the state.¹⁷ In keeping with its revisionist purpose, the Florida Constitution of 1968 created the Constitution Revision

margin of 2,070 voters in favor to 1,975 against ("the actual figures may have been even closer").

¹¹ *Id.* at 53.

¹² *Id.* at 54.

¹³ *Id.* at 54, 55.

¹⁴ *Id.* at 55.

¹⁵ *Id.*

¹⁶ *Id.* at 56.

¹⁷ Robert F. Williams, *Is Constitutional Revision Success Worth its Popular Sovereignty Price?*, 52 Fla. L. Rev. 249, 255 (2000)

Commission to ensure that the Florida Constitution currently reflects the will of the people.¹⁸ Article XI, § 2 of the Florida Constitution of 1968 establishes and outlines the authority of the Constitution Revision Commission.¹⁹ Article XI, § 2 provided for a Constitution Revision Commission of 37 members who would meet periodically to review the Florida Constitution in its entirety and initiate changes through ballot proposals known as "revisions."²⁰ Article XI, § 2 provides that the members of the Commission may suggest revisions to be placed on the ballot in a subsequent general election, but the Commissioners are not granted authority to amend the Florida Constitution themselves.²¹

Article XI, § 2 also provides great specificity in determining the composition of the Constitutional Revision Commission's members.²² Although Commission members are not elected, Article XI, § 2 provides that the legislative, executive and judicial branches will participate in the constitutional revision process through the nomination of Commissioners.²³ Article XI, § 2 provides that the Commission will be composed of the Attorney General,²⁴ fifteen members selected by the Governor,²⁵ nine members selected by the Speaker of the House of

¹⁸ *Id.* at 255, 256; see also FLA. CONST. art. XI, § 2

¹⁹ FLA. CONST. Art. XI, § 2

²⁰ FLA. CONST. Art. XI, § 2; see also FLA. CONST. art. XI, § 2, §§ (a)

²¹ FLA. CONST. Art. XI, § 2

²² FLA. CONST. Art. XI, § 2

²³ FLA. CONST. art. XI, § 2

²⁴ FLA. CONST. Art. XI, § 2, §§ (a), §§§ (1).

²⁵ FLA. CONST. Art. XI, § 2, §§ (a), §§§ (2).

Representatives,²⁶ nine members selected by the Senate President,²⁷ and three members selected by the Chief Justice of the Florida Supreme Court.²⁸ Furthermore, Article XI, § 2 authorizes the Governor to select the chair of the Commission from the thirty-seven participating members.²⁹

Article XI, § 2 also governs the basic revision process of the Constitution Revision Commission.³⁰ After selection of the Commission members is complete, the Commission members must hold public hearings to collect public comments and proposals for constitutional amendments.³¹ After the Commission collects both public comments and constitutional amendment proposals, the Commission convenes and votes on the public proposals to determine if they merit further consideration and debate.³² If 10 out of the 37 Commission members vote for a public proposal, the proposal will be drafted similar to the manner in which bills are drafted in the Florida Legislature.³³ If the proposal is debated before the full Commission, twenty-two of the 37 Commission members must approve the proposal for the proposal to be adopted.³⁴ After the Commission's debate is concluded, the

²⁶ FLA. CONST. Art. XI, § 2, §§ (a), §§§ (3).

²⁷ FLA. CONST. Art. XI, § 2, §§ (a), §§§ (3).

²⁸ FLA. CONST. Art. XI, § 2, §§ (a), §§§ (4).

²⁹ FLA. CONST. Art. XI, § 2, §§ (b).

³⁰ FLA. CONST. Art. XI, § 2, §§ (c).

³¹ FLA. CONST. Art. XI, § 2, §§ (c).

³² CONSTITUTION REVISION COMMISSION OF FLORIDA, *supra* note 7, § E-10, RULE 3.3, RULES OF THE 1997-1998 CONSTITUTION REVISION COMMISSION (1997)

³³ *Id.* at § E-10; see RULE 3.3, RULE 3.35 and RULE 3.4, RULES OF THE 1997-1998 CONSTITUTION REVISION COMMISSION (1997).

³⁴ *Id.* at § E-12; see RULE 5.4, RULES OF THE 1997-1998 CONSTITUTION REVISION COMMISSION (1997).

Commission submits Constitutional amendments (i.e. Revisions) for voter approval in the subsequent general election.³⁵

The Constitution Revision Commission has convened on two occasions in Florida history.³⁶ The first Commission was to meet 10 years after the ratification of the 1968 Constitution and every 20 years thereafter.³⁷ The Commission convened for the first time in 1977-1978 and placed several revisions on the ballot for voters to consider.³⁸ The Commission convened for the second time in 1997-1998, and ultimately produced nine revisions for the voters of Florida to consider.³⁹

B. Public proposals gathered by the Constitutional Revision Commission: the Birthplace of the "Environmental Bill of Rights"

Prior to the official convening of Constitution Revision Commission, the Commission held public hearings in 1997 around Florida to gather public proposals for the Constitution amendments.⁴⁰ The Commission gathered hundreds of proposals, ranging from Medical Marijuana to Homestead exemption changes, in an effort to solicit and weigh average Floridians' ideas for constitutional amendments.⁴¹ Many of the ideas proposed by the public concerned Florida environmental issues, and at several

³⁵ Williams, *supra* note 17 at 252.

³⁶ Williams, *supra* note 17 at 269.

³⁷ FLA. CONST. art. XI, § 2 (1968).

³⁸ Williams, *supra* note 17 at 269.

³⁹ *Constitution Revision Commission of Florida: Nine Proposed Revisions For The 1998 Ballot*, 1997-1998 Fla. Const. Revision Comm'n (1998) at <http://www.law.fsu.edu/crc/ballot.html>

⁴⁰ Henderson, *supra* note 3 at 287.

⁴¹ *Id.* at 287.

hearings, members of the public expressed concern about the lack of direct reference to the environment in the Florida Constitution.⁴² During the collection of public proposals, dozens of speakers voiced support for potential Florida Constitution amendments to support land preservation programs, the creation of a unified fish and wildlife service, support for wildlife conservation programs, and a supposedly-innocuous proposal for an "environmental bill of rights."⁴³

While the Commission's conducted public meetings, then-Secretary of the Department of Environmental Protection Virginia Wetherell expressed concern that the Florida Constitution said little about the environment.⁴⁴ Wetherell, along with other Florida environmentalists, proposed an "Environmental Bill of Rights."⁴⁵ In an August 1997 editorial to the Tallahassee Democrat, Wetherell wrote that "...there is in Article II of the Constitution a small but inadequate section about natural resources and scenic beauty. I believe we need to change the Constitution. I believe we need a basic environmental bill of rights."⁴⁶ According to Wetherell's proposal, the "environmental bill of rights" would include several "rights" that were

⁴² Id.

⁴³ Id.

⁴⁴ David Cox, *State Environmental Stalwarts Campaign for 'Bill of Rights,'* Tampa Tribune, July 24, 1997, available at <http://www.aif.com/CRC/News/199707/z3072497.htm> (last viewed April 21, 2004)

⁴⁵ Id.

⁴⁶ Virginia Wetherell, *Bill of Rights Urged to Protect Environment,* Tallahassee Democrat, August 3, 1997 available at <http://www.aif.com/CRC/News/199708/c1080397.htm> (last viewed April 21, 2004)

unrecognized as fundamental rights by the Florida Constitution.⁴⁷ According to Wetherell's editorial, the "environmental bill of rights" should include the right to "live in an environment that is free from the toxic pollution of man-made chemicals;" the right "to protect and preserve our pristine natural communities as God made them;" the right to "ensure the existence of the scarce and fragile plants and animal species that share Florida;" the right to outdoor recreation and the right to "sustained economic success within our natural resources capacity."⁴⁸

During the public proposal process, another proposal gathered support among environmentalists and Commission members: the right to a clean environment.⁴⁹ Commissioner Clay Henderson supported a proposal to provide an adequate "right to a clean environment" under Article II, section 7 of the Florida Constitution.⁵⁰ The proposed amendment to Article II would provide a "right to clean and healthful air and water and to protection of other natural resources."⁵¹ The proposal, as framed by Commissioner Henderson, would revise Article II, section 7 (regarding natural resources and scenic beauty) of the Florida Constitution to state:

SECTION 7. Natural resources and scenic beauty.—

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

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Henderson, *supra* note 3 at 286.

⁵⁰ William Clay Henderson and Deborah Ben-David, *Revision 5: Protecting Natural Resources*, 72 Fla. Bar J. 22 (1998)

⁵¹ Id.

(c) The natural resources of the state are the heritage of present and future generations. The right of each person to clean and healthful air and water and to the protection of the other natural resources of the state shall not be infringed by any person.⁵² (underline added)

The proposal by Commissioner Henderson ultimately became known as Proposal 36 after it received the requisite ten votes needed for full consideration and debate before the Commission.⁵³

While Commissioner Henderson drafted Proposal 36, Commissioner Jon Mills sponsored and drafted Secretary Wetherell's proposal for debate.⁵⁴ The proposal, which also received the necessary votes for debate before the full Commission, would revise Article I of the Florida Constitution to include an additional section to provide:

DECLARATION OF RIGHTS

SECTION 26. Environmental Bill of Rights. -- Every person has a right to live in an environment that is free from the toxic pollution of manufactured chemicals; to protect and preserve pristine natural communities as God made them; to ensure the existence of the scarce and fragile plants and animal species that live in the state; to outdoor recreation; and to sustained economic success within our natural resources capacity.⁵⁵

The proposal by Commissioner Mills, which ultimately became known as Proposal 38, received the requisite ten votes needed for full consideration and debate before the Commission.⁵⁶ After receiving months of citizen input, the Commission would consider two

⁵² Id. at fn. 4.; FLA. CONST. REVISION COMM'N COMMITTEE PROPOSAL NO. 36, CRC17-126-pr (1998).

⁵³ Henderson, *supra* note 3 at 286.

⁵⁴ FLA. CONST. REVISION COMM'N COMMITTEE PROPOSAL NO. 38, CRC24-86-pr (1998).

⁵⁵ Id.; Clay Henderson, *The Conservation Amendment*, 52 Fla. L. Rev. 285, fn. 11 (2000) Proposal 38 was listed by the Commission under Article II, General Provision amendments as II-7-x-1.

⁵⁶ Henderson, *supra* note 3 at 286. Tucker, *supra* note 3 at 286.

proposals advocating a "right to a clean environment" among the 187 proposals ultimately approved for debate.⁵⁷ The question remained, however: where did the idea for a "fundamental right to a clean environment" originate?

C. The International Law Origins of The "Right To A Clean Environment"

The concept of a "right to a clean and healthy environment" originate is derived from general principles of International Environmental Law that have developed since the United Nations Conference on the Human Environment in Stockholm in 1972.⁵⁸ The "right to environmental protection" is viewed by some international constitutional scholars as a post-modern "second generation" human right.⁵⁹ While modern constitutional rights concerned codified public freedoms as a method to limit the State's authority, post-modern public welfare or socio-economic rights often require intervention and defense by the State.⁶⁰ The most commonly-cited origin of the "right to a clean environment" arose from the Declaration of the United Nations Conference on the Human Environment.⁶¹ The non-binding Declaration contained aspirational principles for participating state parties that

⁵⁷ CONSTITUTION REVISION COMMISSION OF FLORIDA, JOURNAL OF THE 1997-1998 FLORIDA CONSTITUTION REVISION COMMISSION 268 (Constitution Revision Commission Ed., 1998)

⁵⁸ NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 275 (Susan Leubusher trans., Oxford University Press, 2002)

⁵⁹ Id. at 275.

⁶⁰ Id.

⁶¹ Id. at 276.

would, in theory, provide guidance for domestic lawmaking.⁶² The first principle stated that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁶³

Over the past thirty years, the "right to a quality environment" as defined in Stockholm's principle has gradually developed into an important principle of international environmental law.⁶⁴ The principle of a "right to a clean environment" is now included in major international environmental agreements, declarations, and conventions, as well as in constitutions and laws of individual countries.⁶⁵ The United Nations Conference on the Environment and Development, known as the Rio Declaration of 1992,⁶⁶ the Convention on Biological Diversity⁶⁷ the World Charter for Nature⁶⁸ and the Ramsar

⁶² Id.

⁶³ Principle 1, U.N. Doc. A/CONF. 48/14 (Stockholm 1972) reprinted in *11 I.L.M. 1416 (1972)*

⁶⁴ John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 Fla. L. Rev. 299, 304-305 (2000)

⁶⁵ Id. at 305.

⁶⁶ Id.; See United Nations Conference on the Environment and Development, Rio Declaration on Environment and Development, principle 3, U.N. Doc. A/CONF.151.5/Rev.1,

⁶⁷ Id.; See United Nations Conference on Environment and Development, Convention on Biological Diversity, (1992), 31 *I.L.M. 818*.

⁶⁸ Id.; See World Charter for Nature, G.A. Res. 7, 36 U.N. GADR Supp. (No. 51) at 17, art. II(b), U.N. Doc. No. 151 (1982), reprinted in *12 Ecology L.Q. 977, 992 (1985)*

Convention on the Conservation of Wetlands⁶⁹ all include some form of recognition of the "right to a clean environment."

Because principles of international environmental law are generally aspirational and not legally binding, many nations have incorporated international environmental principles into domestic law.⁷⁰ Constitutions of more than 50 nations now contain environmental provisions, as the majority of environmental provisions have been ratified in the last 20 years.⁷¹ Furthermore, the "right to a clean environment" is now found in twelve national constitutions throughout Latin America and the Caribbean.⁷² The constitutions of Argentina,⁷³ Brazil,⁷⁴ Chile,⁷⁵ Columbia,⁷⁶ Costa Rica,⁷⁷ Ecuador,⁷⁸ Honduras,⁷⁹ Jamaica, Peru and Venezuela provide examples of a "right to a clean environment."⁸⁰ Perhaps the most prominent foreign example of Constitutional right to a clean environment can be found in the Constitution of Costa Rica.⁸¹ Article 50 of the Costa Rican Constitution, which

⁶⁹ Id.; See Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 11 *I.L.M.* 963 (1972)

⁷⁰ Id. at 306.

⁷¹ Id. at 312, see also text accompanying note 73.

⁷² Email from Richard Hamann, Associate Professor, Fredric G. Levin College of Law, University of Florida, to the author (February 13, 2004 8:44 PM EST) (on file with author).

⁷³ Id.; CONST. ARG., art. 41.

⁷⁴ Id.; C.F. ch. VI, art. 225.

⁷⁵ Id.; CONST. OF CHILE, ch. III, art. 19(8).

⁷⁶ Id.; CONST. OF COLUMBIA, art. 79.

⁷⁷ Id.; CONST. OF COSTA RICA, art. 50.

⁷⁸ Id.; CONST. OF ECUADOR, Art. 23.6.

⁷⁹ Id.; CONST. OF HONDURAS, art. 145.

⁸⁰ Id.

⁸¹ Thomas T. Ankersen, *Shared Knowledge, Shared Jurisprudence: Learning To Speak Environmental Law Creole (Criollo)*, 16 *Tul. Env'tl. L.J.* 807, 823 (2003).

was ratified by the Costa Rican electorate in 1994, provides that:

Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.⁸²

The Costa Rican Constitution elevates the "right to a clean environment" to a fundamental right, while providing Costa Rican citizens with standing to bring suits before Costa Rica's Constitutional Court.⁸³ The Costa Rican Constitutional Court has resolved cases based upon the Costa Rican government's failure to protect the rights articulated in Article 50.⁸⁴

D. State Constitution examples of the "Right to a clean environment"

In the United States, the majority of state constitutions today contain at least one environmental provision.⁸⁵ Over 30 states make some mention of environmental policy in their Constitutions, but the constitutional language varies between provisions that provide for explicit environmental protection and provisions considered some scholars consider "aspirational."⁸⁶ Environmental provisions within state constitutions vary along a spectrum from "weak" provisions, which simply grant state legislatures the authority to enact environmental legislation, to "strong" provisions that establish rights and require state

⁸² Id. at 823, 824; CONST. OF COSTA RICA, art. 50.

⁸³ Id. at 823, 824.

⁸⁴ Id. at 824, see also text accompanying note 95.

⁸⁵ Tucker, *supra* note 64 at 307.

⁸⁶ Id. at 307.

action to support those rights.⁸⁷ The state constitutions of New York and Michigan provide examples of “weak” environmental provisions, as both constitutions mandate environmental legislation but create no substantive rights.⁸⁸ The state constitutions of Hawaii, Illinois, Pennsylvania and Montana provide examples of “strong” environmental provisions, as these constitutions confer rights, subject to varying judicial interpretation, upon the citizens of those states.⁸⁹

The relative “strength” or “weakness” of environmental provisions in state constitutions depends largely upon whether citizens may seek judicial enforcement of the constitutional provision.⁹⁰ Most state constitutions do not expressly provide that citizens may enforce environmental provisions through the courts.⁹¹ In fact, only the Hawaii and Illinois constitutions provide that their citizens may enforce the right to a clean environment in court against government or private actors.⁹² Even the Hawaii and Illinois constitutions, whose environmental rights’ provisions expressly provide citizens standing, limit the citizens’ rights based upon laws established by the legislature.⁹³

⁸⁷ Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 *Mont. L. Rev.* 157, 161 (2003)

⁸⁸ MICH. CONST., art. IV, sec. 52; N.Y. CONST., art. XIV, sec. 4, *as cited in Id.* at 161, *fn.* 14.

⁸⁹ HAW. CONST. art. XI, 1, 7, 9; ILL. CONST. art XI, 1-2; MONT. CONST. art. IX, 1-3; PA. CONST. art. I, 27, *as cited in Id.* at 161, *fn.* 16.

⁹⁰ *Id.* at 163.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Furthermore, the overwhelming majority of state courts have refused to "constitutionalize" environmental provisions that do not contain enforcement language.⁹⁴ State courts have held that when constitutional provisions are silent regarding judicial enforcement, they fail to provide a cause of action.⁹⁵ State courts often dismiss private lawsuits based upon environmental provisions as being "non-self-executing."⁹⁶ State courts are justifiably reluctant to hold that environmental provisions are fundamental rights when the provisions provide only "aspirational" or policy-type language as guidance.⁹⁷

Florida is one of many states that have held that particular constitutional environmental provisions are not self-executing. In Advisory Opinion to the Governor, the Florida Supreme Court held that under Article II, section 7(b) of the Florida Constitution, which required that polluters within the Everglades Agricultural Area be primarily responsible for its cleanup, was not self executing.⁹⁸ In 1997, Governor Lawton Chiles requested an advisory opinion from the Florida Supreme Court to determine if Article II, section 7(b) was self-executing or if the provision required implementing

⁹⁴ Id. at 163, 164.

⁹⁵ Id.

⁹⁶ Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 Fordham Envtl. Law J. 107, 137 (1997)

⁹⁷ Id. at 136.

⁹⁸ Advisory Opinion To The Governor, 706 So. 2d 278 (1997)

legislation.⁹⁹ The Florida Supreme Court held under the test established by Gray v. Bryant, 125 So. 2d 846 (Fla. 1960), a constitutional provision should be considered self-executing if “the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.”¹⁰⁰ Because Article II, section 7(b) did not “lay down a sufficient rule for accomplishing its purpose” and could not be implemented with accompanying legislation, the Court held that Amendment 5 was not self executing.¹⁰¹

The few state constitutions that grant their citizens a “right to a clean environment” differ in their substantive meaning and potential application.¹⁰² Some state constitutions, such as the Hawaii Constitution, create a legislative limitation upon Hawaiians’ “rights” to a clean environment.¹⁰³ Article XI, section 9 of the Hawaii Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.¹⁰⁴ (emphasis added)

According to Article XI, section 9, the Hawaii legislature is authorized to limit the interpretation of the “right” through the

⁹⁹ 706 So. 2d at 279.

¹⁰⁰ Id. at 281.

¹⁰¹ Id.

¹⁰² Thompson, *supra* note 87 at 162.

¹⁰³ Id.

¹⁰⁴ HAWAII CONST., art. XI, § 9 (2003)

adoption of general laws, thus potentially restricting a Hawaii court's application of the provision.¹⁰⁵ The "right" to a clean environment in Hawaii does not rise to the level of a fundamental right.

The Illinois Constitution also provides its citizens a "right to a clean environment," but like Hawaii, the state legislature is authorized to place reasonable limitations upon that "right."¹⁰⁶ Article 11, section 2 of the Illinois Constitution provides:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.¹⁰⁷ (emphasis added)

Much like the Hawaii legislature, Article 11, section 2 of the Illinois Constitution authorizes the Illinois legislature to limit the interpretation of the Illinoisans "right" through general law.¹⁰⁸

In Illinois Pure Water Comm., Inc. v. Director of Pub. Health, the Illinois Supreme Court addressed whether Article XI, sections 1 and 2 of the 1970 Illinois Constitution required that strict scrutiny be applied to the environmental provisions under review.¹⁰⁹ The Illinois Supreme Court rejected arguments that the "right to clean environment" from Article XI, section 1 and 2 is

¹⁰⁵ Thompson, *supra* note 87 at 162.

¹⁰⁶ *Id.* at 162.

¹⁰⁷ ILLINOIS CONST., art. 11, § 2 (2004)

¹⁰⁸ Thompson, *supra* note 87 at 162.

¹⁰⁹ Illinois Pure Water Comm., Inc. v. Director of Pub. Health,

104 Ill. 2d 243 (Ill. 1984)

a fundamental right, holding that because there is no fundamental right involved, the Court's standard of judicial review would be rational basis rather than strict scrutiny.¹¹⁰ The Court held that "(P)laintiffs cite no authority for the proposition that sections 1 and 2 of article XI create a 'fundamental' right to a healthful environment, and do not explain why we should subject statutes affecting the environment to a higher level of scrutiny. In the absence of more persuasive reasoning, we decline to do so."¹¹¹

Today, only the state of Montana can boast a state constitution whose environmental provisions have been held to be self-executing.¹¹² The Montana constitution contains two important provisions relating to the right to a clean environment.¹¹³ Article II, Section 3 of the Montana Constitution provides that "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment."¹¹⁴ Additionally, Article IX, Section 1, subsection 1 provides that "The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."¹¹⁵ The Montana constitution thus appears to grant substantive rights and require commensurate responsibilities of both the state and Montana citizens.

¹¹⁰ Id. at 251, 252.

¹¹¹ Id.

¹¹² Thompson, *supra* note 87 at 162.

¹¹³ Id.

¹¹⁴ MONT. CONST., art. II, § 3 (2004).

¹¹⁵ MONT. CONST., art. IX, § 1 (2004).

In Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality, the environmental provisions of the Montana constitution were given new significance.¹¹⁶ The plaintiffs argued that Montana statute § 75-5-317(2)(j), MCA (1995), which allowed for discharge of polluted mining well waters without review under the applicable Montana water quality statute, could be challenged as an unconstitutional violation of either Article II, Section 3 or Article IX, Section 1 of the Montana Constitution.¹¹⁷ The Montana Supreme Court held that Article II, Section 3 is a fundamental right in Montana, concluding that

"[T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective."¹¹⁸

As a state, Montana stands alone in holding that the environmental "right to a clean environment" has arisen to a fundamental right.

III. The proposals for a "Right to a Clean Environment" before the 1997-1998 Constitutional Revision Commission

When the Constitution Revision Commission considered proposal 36 and 38, many Commissioners were wary of the unknown

¹¹⁶ Thompson, *supra* note 87 at 168, 169; Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality 988 P.2d 1236 (Mont. 1999)

¹¹⁷ Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality 988 P.2d 1236, 1238 (Mont. 1999)

¹¹⁸ Id. at 1246.

impacts the proposals might pose to existing Florida law.¹¹⁹ First and foremost, would the rights enumerated by proposal 36 and 38 be considered fundamental rights? How would the proposed "Environmental Bill of Rights" affect property rights in Florida? Would the "Right to a clean environment" be self-executing? Despite Commissioner Clay Henderson's argument that that all other fundamental rights derive from a right to clean environment, many Commissioners were unsure of the proposals' potential impacts.¹²⁰

Prior to the introduction of the Environmental Bill of Rights within proposal No. 38, the Committee on General Provisions conducted an analysis to examine the proposal's possible impact and structural ambiguities.¹²¹ The proposed addition of Article I, section 26 began with first phrase, "Every person has a right to live in an environment that is free from the toxic pollution of manufactured chemicals," which recalled the standing private-party litigation allowed by the Hawaii Constitution.¹²² Would proposal 38 allow standing for private party litigation for preservation of the "rights" established by the proposal?¹²³ Furthermore, would the language "free from toxic pollution of manufactured chemicals" mean the prohibition of trace amounts of manufactured chemicals? What happens to existing

¹¹⁹ *Constitution Revision Commission of Florida: Meeting Proceedings for January 27, 1998*, 1997-1998 Fla. Const. Revision Comm'n (1998), at <http://www.law.fsu.edu/crc/minutes/crcminutes012798.html>.

¹²⁰ Id.

¹²¹ FLA. CONST. REVISION COMM'N REP. NO. CRC.GP (1997).

¹²² Id.

¹²³ Id.

approved use standards governing to use of manufactured chemicals?¹²⁴ Additionally, could the right of "sustained economic success within our natural resources capacity" be construed to give each Floridian an expectation of economic success, rather than an expectation of opportunity for success?¹²⁵ As an example, could a business claim that a water management district's denial of a consumptive use water permit violates the right to "sustained economic success?"¹²⁶

Based in part on the numerous deficiencies with the "Environmental Bill of Rights" of proposal 36, the Committee on General Provisions substituted a proposal to combine proposal 36 and 38 into a single proposal.¹²⁷ The Committee placed its substitute onto the calendar for debate on January 27, 1998.¹²⁸ The compromise amendment placed the "right to a healthy environment" under Article II, General Provisions, and provided that:

SECTION 7. Natural resources and scenic beauty.--
(c) The state shall conserve and protect its natural resources including air and water for the benefit, health and welfare of its people and future generations. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise. The people have a right to clean and healthful air and water as provided by general law.
(emphasis added)¹²⁹

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ CONSTITUTION REVISION COMMISSION OF FLORIDA, JOURNAL OF THE 1997-1998 FLORIDA CONSTITUTION REVISION COMMISSION 145 (Constitution Revision Commission Ed., 1998)

¹²⁸ Id.

¹²⁹ FLA. CONST. REVISION COMM'N COMMITTEE SUBSTITUTE FOR PROPOSALS NOS. 36 and 38 (1998).

During the Commission debate on January 27, however, Commissioner Mills and Henderson offered an amendment to the Committee substitute that removed ambiguous language of specific "rights" to a clean environment, opting instead for language requiring legislative oversight:

SECTION 7. Natural resources and scenic beauty.--

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources for future generations.¹³⁰

During the subsequent debate, Commissioner Mills argued that the committee substitute both removed the statement on absolute rights and would provide no additional standing for plaintiffs to challenge environmental laws.¹³¹ Commissioner Mills argued that

What this has done by removing the statement on absolute rights is, in my judgment and I think others, that there is no additional standing created by this. It is simply a policy statement for the Legislature and others to consider and it states that we have a concern for future generations.¹³²

Despite the removal of language referring to a "right to a clean environment," many Commissioners were uneasy about language requiring the legislature to conserve and protect natural resources for future generations.¹³³ Although the amendment to the proposal called only authorized the legislature to create laws for a conservation purpose, Commissioner Thomas Barkdull

¹³⁰ FLA. CONST. REVISION COMM'N COMMITTEE SUBSTITUTE FOR PROPOSALS NOS. 36 and 38, SECOND ENGROSSED (1998).

¹³¹ *Constitution Revision Commission of Florida: Meeting Proceedings for January 27, 1998*, 1997-1998 Fla. Const. Revision Comm'n (1998) (statement of Commissioner Jon Mills) at <http://www.law.fsu.edu/crc/minutes/crcminutes012798.html>.

¹³² Id.

¹³³ Id.

moved to strike the language referring to "future generations."¹³⁴

During the debate with Commissioner Mills, Commissioner Barkdull expressed concern that the provision might create standing, or

[A] private standing to bring a lawsuit. I don't know the answer to it and it concerns me. If it doesn't do anything, which as I understood some of the comments, then we don't need it. If it's going to do something, I want to know what it does. And what I'm afraid it does is create a private right.¹³⁵

Following the debate, the Commission temporarily deferred further consideration of the Committee substitute.¹³⁶

After the debate on January 27, the Committee on Style and Drafting recommended to strike the language referring to future generations' "right to a clean environment."¹³⁷ After introducing the amendment to strike the language referring to "future rights," Commissioner Mills stated that the proposal in its final form would protect the environment of present and future generations.¹³⁸ Additionally, Mills argued that the proposal as amended

[I]s not self-executing, this does not generate litigation, it is not enforceable judicially, it is a political directive. It is a political directive to the Legislature to enact

¹³⁴ *Constitution Revision Commission of Florida: Meeting Proceedings for January 27, 1998*, 1997-1998 Fla. Const. Revision Comm'n (1998) (statement of Commissioner Thomas Barkdull) at <http://www.law.fsu.edu/crc/minutes/crcminutes012798.html>.

¹³⁵ Id.

¹³⁶ CONSTITUTION REVISION COMMISSION OF FLORIDA, JOURNAL OF THE 1997-1998 FLORIDA CONSTITUTION REVISION COMMISSION 155 (Constitution Revision Commission Ed., 1998)

¹³⁷ *Constitution Revision Commission of Florida: Meeting Proceedings for March 17, 1998*, 1997-1998 Fla. Const. Revision Comm'n (1998) at <http://www.law.fsu.edu/crc/minutes/crcminutes031798.html>.

¹³⁸ Id.

conservation and preservation measures in any form they see fit.¹³⁹

After a final vote of twenty-three yeas and twelve nays,¹⁴⁰ the Commission passed the proposal to amend Article II, section 7 as follows:

SECTION 7. Natural resources and scenic beauty.--

(a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.¹⁴¹ (emphasis added)

CONCLUSION

By the time the 1997-1998 Constitutional Revision Commission gathered its final votes, neither the "Environmental Bill of Rights" of proposal 38 nor the "Right to a Clean Environment" of proposal 36 would be placed before the Florida electorate as constitutional amendments. The resulting series of compromises and discussions surrounding both proposals clearly illustrated the Commission's valuable work in scrutinizing potential amendments with clarity and focus, thus forging sensible compromises through the rigor of the proposal consideration process. The Commission eventually bundled the amendment to Article II, section 7 with an environmental revision known

¹³⁹ Id.

¹⁴⁰ CONSTITUTION REVISION COMMISSION OF FLORIDA, JOURNAL OF THE 1997-1998 FLORIDA CONSTITUTION REVISION COMMISSION 211 (Constitution Revision Commission Ed., 1998)

¹⁴¹ *Constitution Revision Commission of Florida: Revision 5*, 1997-1998 Fla. Const. Revision Comm'n (1998) at <http://www.law.fsu.edu/crc/ballot.html>

simply as Revision 5.¹⁴² Revision 5 also created Fish and Wildlife Conservation Commission, extended bond repayments for state conservation land-purchase programs and created stricter standards for conveyance of state-owned conservation land.¹⁴³ Revision 5 was ultimately ratified by 72% of the Florida voters in 1998.¹⁴⁴ Although Florida elected not to follow the constitutional model adopted by Hawaii, Illinois and Montana, the natural resources clause of the Florida Constitution provides a better-defined constitutional authority for Florida's growing and complex body of environmental and growth management laws.

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¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Henderson, *supra* note 3 at 287.