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Interpreting State Constitutions by Resort to the Record

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INTERPRETING STATE CONSTITUTIONS BY RESORT TO THE RECORD

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The convening of the 1977-78 Florida Constitution Revision Commission was an event of national significance. The commission was the result of a provision in the 1968 Florida Constitution[1] without equivalent in any other state.[2] The appointment of a revision commission is required at regular intervals, starting in 1977[3] and recurring each twentieth year following, for the purpose of examining the entire state constitution and proposing any desired changes to the people at a statewide referendum.

The 1977-78 commission has become noteworthy, not only because of its very existence, but also because of the great amount of time and expense that have been devoted to the preparation and preservation of the record of the commission's proceedings. Although the commission is unique with regard to its activation at regular intervals with an unlimited agenda to propose constitutional changes, the operations of the commission are similar to those of state legislatures and constitutional conventions when such bodies serve as "framers" of proposed constitutional changes. The potential value of the record of the 1977-78 Florida Constitution Revision Commission may be seen in the tradition of Florida and other states which have used the record of the deliberations of the framers as an aid to interpreting constitutional changes.[4]

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1. FLA. CONST. art. XI, § 2.

2. A. STURM, TRENDS IN STATE CONSTITUTION-MAKING: 1966-1972, at 28 (1973); Sturm, *The Procedure of State Constitutional Change—with Special Emphasis on the South and Florida*, 5 FLA. ST. U.L. REV. 569 (1977).

3. The constitution includes conflicting provisions on the date of the first commission to be appointed following adoption of the 1968 constitution. The 1977 date was decided on by the Supreme Court of Florida. *In re* Advisory Opinion of the Governor Request of Nov. 19, 1976 (Constitution Revision Commission), 343 So. 2d 17 (Fla. 1977).

4. The major Florida sources are: *In re* Advisory Opinion of the Governor Request of Nov. 19, 1976 (Constitution Revision Commission), 343 So. 2d 17 (Fla. 1977); *In re* Advisory Opinion to the Governor, 276 So. 2d 25 (Fla. 1973); City of St. Petersburg v. Briley, Wild & Associates, 239 So. 2d 817 (Fla. 1970); Adams v. Gunter, 238 So. 2d 824 (Fla. 1970); Hayek v. Lee County, 231 So. 2d 214 (Fla. 1970); 1978 FLA. OP. ATT'Y GEN. 078-34; 1977 FLA. OP. ATT'Y GEN. 077-65; 6 FLA. JUR. *Constitutional Law* § 13 (1956).

Recent out-of-Florida cases include: Way v. Superior Court, 141 Cal. Rptr. 383 (Cal. 3d Ct. App. 1977); Buckley v. Secretary of the Commonwealth, 355 N.E.2d 806 (Mass. 1976); Keller v. Smith, 553 P.2d 1002 (Mont. 1976); Helms v. Reid, 394 N.Y.S.2d 987 (Sup. Ct. 1977); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976).

Scholarly interest has focused, understandably, on the courts as the most authoritative sources of constitutional interpretation. Mention, however, should also be made of nonjudicial interpreters of constitutional language, including executive and administrative officials, legislators, lobbyists, lawyers, and numerous private citizens. These nonjudicial interpreters make decisions, virtually on a daily basis, about the meaning of their constitutions, subject to relatively infrequent scrutiny by the courts. The techniques and sources of constitutional interpretation are therefore of concern to the nonjudicial as well as the judicial interpreters.

This article deals with the interpretation of state constitutions, not the United States Constitution. Significant differences should be noted. First, the Federal Constitution was adopted through ratification by state legislatures, and the intentions of those legislatures are to a considerable extent preserved by the journals of legislative proceedings—intentions that often conflict from one state to another. State constitutions, on the other hand, are adopted by a direct vote of the people, and the people's intent may be virtually impossible to ascertain, except from circumstantial evidence.

Second, the Federal Constitution is relatively difficult to amend, and this may justify considerable flexibility in the interpretation of the constitutional text. State constitutions are easier to amend and may therefore provide less justification for flexible interpretation. A third and related distinction is that the Federal Constitution was, for the most part, written two centuries ago. Needs have changed, the meaning of certain words in our language has changed, and relatively flexible interpretation may be required. In contrast, many state constitutions are the products of our own times, speaking in our language about our current problems. Less flexibility seems required in interpreting such documents.

Commentators on the interpretation of the Federal Constitution are sharply divided regarding the extent to which the original intent should be taken into account.[5] However, the cases and literature on

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Secondary sources include: T. COOLEY, I CONSTITUTIONAL LIMITATIONS 142-44 (8th ed. 1927); Annot., 70 A.L.R. 5 (1931); 16 AM.JUR.2D *Constitutional Law* § 88 (1964); Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 189 (1975); Sloan, *Lessons in Constitutional Interpretation: Sovereign Immunity in Pennsylvania*, 82 DICK. L. REV. 209 (1978).

5. For a selection of commentaries, see R. BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977); Antieau, *Constitutional Construction: A Guide To The Principles And Their Application*, 51 NOTRE DAME LAW. 358 (1976); Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38 (1971); Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973); Munzer & Nickel, *Does the Constitution Mean*

state constitutional interpretation seem to reflect a strong consensus that original intent must be ascertained and respected.[6] The ultimate success in this endeavor would be achieved if the original intent of the people who adopted the constitutional provision could be ascertained. If the language of the constitutional text is clear on its face, this plain language is deemed to have been understood by the people, and their intent is deemed to coincide with that plain meaning. If, however, the constitutional text does not yield a plain meaning, resort may be had to other sources in order to find the original intent of the people.

On occasion, the people's intent is sought in such materials as newspaper commentaries[7] or summaries appearing on the ballot.[8] More frequently, the intent of the people is sought by examining the intent of the framers.[9] A number of theories could be suggested in favor of this technique. Perhaps the people conveyed their concerns and instructions to the framers, who acted as agents of the people in formulating the proposals for submission back to the people. Or perhaps the framers, having completed their drafting process, reported back to the people, explaining the meaning of the provisions by informal methods of communication, leaving no historical record but nevertheless imparting some level of understanding, so that the people may have understood what the framers were proposing.

Another possible explanation is that the framers shared with the people a general understanding of how language was used, and what types of problems caused concern, so that the intent of the framers would be likely to coincide with the intent of the people, even without any direct communication flowing about specific provisions contained in the proposals. Still another possible explanation for using the intent of the framers to reflect the intent of the people is that the people, in adopting the constitutional language, realized that some of it could be fully understood only by the individuals who had participated in the drafting process. It could be that the people did not demand an explanation at the time of ratification but rather

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What It Always Meant?, 77 COLUM. L. REV. 1029 (1977); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

6. *See* sources cited note 4 *supra*, which all include strong deference to original intent.

7. *In re* Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971).

8. 1978 FLA. OP. ATT'Y GEN. 078-34.

9. The sources cited in note 4 *supra* support the use of the intent of the framers as an indication of the intent of the people. For a contrary view, *see, e.g.*, Alexander v. People *ex rel.* Schofield, 2 P. 894 (Colo. 1884), in which the court stated that the proceedings of a constitutional convention are of no assistance in interpreting the language of a constitution which has been adopted by the people.

committed an act of faith, placing their trust in the undisclosed intent of the framers.

A variation of this theory may be applied where the people are called upon to cast a single vote for or against a document that contains a large number of proposed constitutional provisions. Various individual electors may have sufficient interest to probe the framers' intent underlying some of the provisions that are of special concern, but few electors are likely to take the trouble to acquaint themselves with the framers' intent regarding all provisions, even if this intent could be found if requested. The result is that many electors, in ratifying a package proposal, must have placed considerable trust in the intent of the framers.

A final explanation is that, if the intent of the people cannot be found, the only feasible source of interpretation is the intent of the framers, which is used in place of the intent of the people as the most persuasive substitute available. The framers' intent provides a demonstrable and fixed source of interpretation. It may serve as a protection against some of the instability that could result from a constitutional provision that is unclear on its face and is unaccompanied by any expression of original intent.

If the intent of the framers is to be examined as an aid to interpreting a constitutional provision that is not clear on its face, the next task is to find the most acceptable indicator of the framers' intent. In some states the framers prepare official explanations for distribution to the people in advance of the ratification vote.[10] In most situations, however, the framers are unwilling or unable to prepare an official explanation, and the best available source of their intent is the record of their deliberative proceedings.

The intent of the framers is a useful aid in the interpretation of constitutional provisions that are not clear on their face, but only if the *collective intent* can be established. A vote by the deliberative body during the drafting process may well be sufficient evidence of collective intent. A speech by an individual member is not, by itself, sufficient evidence, but it could be combined with other evidence to help with the demonstration.

The search for collective intent therefore requires an examination of the *record as a whole* and a compilation of all parts of the record dealing with the specific point being examined. The record may not contain enough evidence to lead to any conclusion at all; or the record may contain such conflicting evidence that no collective intent emerges; or the record may contain sufficient evidence tending

10. *See* PROPOSED CONSTITUTION OF THE STATE OF TEXAS (1975); PROPOSED 1970 CONSTITUTION FOR THE STATE OF ILLINOIS (1970); WHAT THE PROPOSED NEW MICHIGAN STATE CONSTITUTION MEANS TO YOU (1962).

toward a single meaning so that it can be regarded as an acceptable indicator of the collective intent of the framers.

A litigant who urges a certain interpretation of constitutional language, based on his perception of the intent of the framers, should bear the burden of searching the entire record of the framers' proceedings and of demonstrating that the interpretation being urged is supported by the entire record. The court, with the aid of opposing counsel, should then conduct an independent search of the entire record, in order to verify that the proponent's interpretation is indeed supported by the record.

The process of searching the entire record is greatly facilitated if the record has been suitably compiled, indexed, and made available for public inspection. Preparation of an index by a reliable indexer can permit the parties and the court to focus their attention on those portions of the record that are identified, by the index, as relating to the question at bar. If the compiled record and the index are available to the public before the people's vote, the credibility of the record is enhanced, and a closer identity is established between the intent of the framers, as evidenced by the record, and the intent of the people.

This identity does not depend on any assumption that the average citizen availed himself of the opportunity to peruse the record before casting a vote in the referendum. Rather, the point is that the media, political action groups, and others with special interests may have probed portions of the record, making public comments on selected issues. Moreover, it may be assumed that the compiled and indexed record was offered as a completed product, subject to whatever test might be imposed in the public forum, before the referendum.

In the light of the preceding discussion, the record of the 1977-78 Florida Constitution Revision Commission is remarkably well suited for use in interpreting any of the commission's proposals that are approved at the November, 1978, referendum and that are not clear on their face. The record has been carefully compiled by the commission's staff and consultants to include background research and memoranda of law prepared by the commission staff, summaries of the public hearing testimony, committee minutes and reports, proposals to amend or revise the constitution, transcripts of every meeting of the full commission, journals of the commission proceedings, correspondence, newsclippings, and, of course, such standard items as calendars, amendments, and the vote on all actions considered by the commission.[11]

11. The author visited the office of the Florida Constitution Revision Commission in

The record does not include transcripts of the debates of the committees, a loss that is partially offset by the inclusion of the committee minutes and the transcripts of the debates of the commission on all matters. The record is divided into six sections each numbered consecutively: reference files, public hearing testimony, committee records, commission records, general administrative files, and newspaper clippings. An index has been prepared, by subject matter, by proposals and amendments, and by commissioners. Other finding aids, such as tracing tables, transfer charts, and a bibliography of resource material are also available. The original record and the hard-copy index have been lodged in the state archives as public documents. Microfiche copies of this record will hopefully be available for sale at the cost of copying before the November, 1978 referendum.

It will therefore be quite feasible to rely on the index, and to search all parts of the record identified by the index, on a specific topic to find the interpretation, if any, that is supported by the record as a whole. If the intent of the framers becomes apparent from the search, this intent may be regarded with some confidence as the intent of the people. This conclusion is especially plausible in that suggestions were solicited from the public, many people addressed the commission in response to these solicitations, the responses are preserved in the commission's record, and these responses were the basis of many of the commission's proposals to revise the constitution.[12] This argument will be strengthened if the record becomes available to the people before the referendum.

The record, however, will not solve all questions arising from the need to interpret any constitutional amendments that may be adopted in 1978. As noted above, the record may be inconclusive on some items among the constitutional proposals. The commission has, moreover, used some undefinable terms in its proposals, such as "reasonable notice,"[13] "overriding governmental purposes,"[14] and "privacy interests."[15] The author has not had an opportunity to use the index and search the record for indications of the meaning intended by the framers when these words were drafted. If the record fails to disclose any significant clarification, one could assume that the commission was content to permit the courts—and, subject to

March, 1978, and examined the record, which at that time was necessarily incomplete. Subsequent developments in the compilation and indexing of the record have been described to the author by editors of this Review.

12. Uhlfelder, *The Machinery of Revision, infra* this issue.
13. Fla. C.R.C., Rev. Fla. Const. art. III, § 19(b) (May 11, 1978).
14. *Id.* art. I, §§ 24-25; *id.* art. V, §§ 1, 11(c).
15. *Id.*

judicial review, other organs of government—to develop the meanings of these terms as social needs arise, deriving some background from past judicial and governmental practice, but not necessarily limited by these traditions. If the people approve constitutional proposals containing such language, without adequate clarification in the record, the people may be deemed to have expressed their faith in the framers' faith that the courts and other governmental organs will apply these terms with sound judgment as future needs arise.

Finally, it could be argued that the record of the 1977-78 Constitution Revision Commission may be used as an indicator of the meaning of those portions of the Florida Constitution that the commission decided not to change. This argument would note that the commission had an unlimited agenda to examine the entire constitution and to propose changes in all or any part of it, and the commission did indeed examine the entire document.

The commission will submit its proposals to the electors in eight ballot items—each accompanied by a short descriptive explanation of the change.[16] The actual text of the constitution, showing proposed deletions from the existing constitution in struck-through type with proposed additions in underlined type, will be published in newspapers throughout the state in the tenth and the sixth weeks preceding the election.[17] Thus, it could be asserted that the commission has proposed, in effect, the readoption of those portions of the existing constitution that remain unchanged in the ballot packages. This is especially true for the "omnibus provision," ballot item number one, which includes every change which has not been severed from the basic document for a separate vote.[18] The people, if they vote favorably on any of the ballot choices, will thereby readopt those portions of the existing constitution included within that

16. The existing constitution requires the commission to file its proposal, if any, for a *revision* of the constitution. FLA. CONST. art. XI, § 2(c). Case law has recognized that a "revision" is a major change, by contrast to an "amendment," which makes relatively minor changes. Adams v. Gunter, 238 So. 2d 824 (Fla. 1970). The commission proposal is drafted in the format of a series of revisions. 33 Fla. C.R.C. Jour. 586-90 (May 5, 1978). If all are adopted at the November, 1978, referendum, these eight revisions will be the new Florida Constitution, entirely replacing the existing constitution. Portions of the proposals are worded identically to the corresponding provisions of the existing constitution.

17. FLA. CONST. art. XI, § 5(b). The publication of a voter pamphlet was approved by the 1978 Florida Legislature (HB 720). The Governor, however, vetoed the bill because provisions requiring a brief statement explaining the proposal in layman's terms, as well as arguments in favor and in opposition, were deleted from the final version. The pamphlet would have cost $750,000 for distribution, and the Governor questioned the expenditure. Letter from R. Askew to B. Smathers, Sec'y of State (June 23, 1978) (veto message).

18. 33 Fla. C.R.C. Jour. 586 (May 5, 1978).

package, together with the changes proposed by the commission. Therefore, any materials in the commission records tending to explain the commission's understanding of those portions of the existing constitution which the commissioners did not seek to change may be an acceptable indicator of the 1978 meaning of pre-1978 constitutional language.

This argument must be considered in the light of the traditional rule of interpretation that when the framers repeat the language of an old constitution in a new one, they are deemed to have been familiar with the established meaning of the old constitution, as construed in case law, and to have intended to preserve that established meaning.[19] The corollary is that if the framers wish to change the meaning, their only method of doing so is to propose a change in the language. If this traditional interpretation is followed, neither the framers nor the people themselves have the capacity to change the meaning of the existing constitution, unless they change the language of the document itself. This rule could have harsh consequences in a state where the process of constitutional change is difficult. It appears less harsh in Florida, where constitutional change can be proposed either through initiative, by the legislature, by the calling of a convention, or by the Constitution Revision Commission.[20]

The traditional rule, however, could be viewed as merely a presumption that the old meaning should be retained, subject to rebuttal upon a demonstration that the framers—and perhaps the people—had formulated an intent that the old language should be preserved, but with a new meaning. Not having searched the record, the author is unaware whether any portions of the record express the commissioners' collective intent to reinterpret the existing language of the constitution without changing the constitutional text, in a sufficiently persuasive manner to rebut the presumption—if rebuttal is allowed—that the old meaning is locked into the old language.

In summary, the record of the proceedings of the framers—such as the Florida Constitution Revision Commission—may be of considerable help in interpreting constitutional changes and arguably could aid in construing parts of the constitution left unchanged by the framers. The record is significant for such purposes, however, only if a particular interpretation is supported by the collective intent of the framers as revealed by the record as a whole.

19. Hayek v. Lee County, 231 So. 2d 214 (Fla. 1970).

20. FLA. CONST. art. XI, §§ 1 (proposal by legislature), 3 (initiative), 4 (convention).